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

5.2
7
'7
1



NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1987 to December 31, 1987

VOLUME 1

PAGES 1-890

Saul Cooperman
Commissioner of Education

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

If you don't have the *New Jersey Administrative Reports, Second Edition...* You're not up on the latest in New Jersey Law.

The daily decisions of New Jersey's administrative agencies apply the state's laws and regulations to real life situations setting the precedents every attorney needs to know. If you have a business or law practice that is affected by state regulations, you need the *NJAR 2d*. You can order the complete set or ***only those segments that interest you.*** Barclays makes it easy to get just the reports you need.

Barclays is the Official Publisher of the *New Jersey Administrative Reports, Second Edition*. This latest edition contains 15 times more decisions than the prior edition. A concise summary precedes each decision so you get to the facts in seconds!

The New Jersey Administrative Reports Second Edition (NJAR 2d) brings you the decisions of New Jersey administrative agencies in timely monthly releases. You can subscribe to the *NJAR 2d* as a complete set or buy any of the 44 agency-specific units.

Call (800) 888-3600 for more information.



INFORMATION ON POINT

BARCLAYS™

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



NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1987 to December 31, 1987

VOLUME 1

PAGES 1-890

RECEIVED
NOV 2 4 1992

NJ DEPOSITORY
SAVITZ LIBRARY
ROWAN COLLEGE OF NJ
GLASSBORO NJ 08028-1701

Publisher's Name



BARCLAYS

Barclays Law Publisher • P.O. Box 3066 • South San Francisco, CA 94080 • Customer Service (800) 888-3600

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

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

1987 NEW JERSEY SCHOOL LAW DECISIONS

Florence Amos v. Board of Education of the Borough of Red Bank, Monmouth County..... 690

Board of Education of the City of Asbury Park v. Mayor and City Council of the City of Asbury Park, Monmouth County..... 2226

In the Matter of the Special School Election Held in the School District of the City of Asbury Park, Monmouth County..... 679

B.B., on behalf of her son, L.C. v. Board of Education of the Union County Regional High School District No. 1 and Donald Merachnik, Superintendent of Schools, Union County..... 323

B.W., a minor child by his parents, J.W. and B. W. v. Board of Education of the City of Brigantine, Atlantic County, and Safety Bus Service, A Corporation of the State of New Jersey..... 921

Nancy Balczun v. Board of Education of the Borough of Medford Lakes, Burlington County..... 1578

In the Matter of Annual School Election Held in the School District of the Borough of Bellmawr, Camden County..... 1270

Bergen County Vocational-Technical Education Association v. Board of Education of the Bergen County Vocational Schools, Bergen County (Decision on Remand)..... 1497

In the Matter of the Tenure Hearing of William Breece, School District of the Township of North Brunswick, Middlesex County..... 2212

Robert Brunnquell v. Board of Education of the Scotch Plains Fanwood Regional School District, Union County and Donald E. Sheldon (Decision on Motion)..... 729

William L. Cade, Jr. v. Board of Education of the Township of Ewing, Mercer County..... 1523

Donald Cain v. Board of Education of the Township of Lakewood, Ocean County..... 351

Caldwell-West Caldwell Education Association v. Board of Education of the Caldwell-West Caldwell School District, Essex County..... 1943

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

In the Matter of the Tenure Hearing of James Camisa, School District of the Bergen County Vocational School District, Bergen County..... 304

Cape May County Vocational-Technical Education Association et al. v. Board of Education of the Cape May County Vocational Technical School District and Donald P. Echevarria v. Board of Education of the Cape May County Vocational-Technical School District, Cape May County (Decision on Remand)..... 1171

Joseph A. Capizola v. Board of Education of the Buena Regional School District, Atlantic County..... 1566

Patrick Caporaso v. Board of Education of the Township of Belleville, Essex County (Decision on Remand)..... 1005

In the Matter of the Tenure Hearing of Patrick Caporaso, School District of the Township of Belleville, Essex County..... 1664

Raymond Carrato v. Board of Education of the Borough of Milltown, Middlesex County..... 796

Marianne Carver et al. v. Board of Education of the Township of Pennsauken, Camden County..... 2281

Elmer Corda and Martha Gunning v. Board of Education of the Township of Willingboro and Individual Board Members et al., Burlington County..... 337

Stella Cosmas et al. v. Board of Education of the Borough of Mount Arlington, Morris County..... 370

Harry J. Cotyk v. Board of Education of the Essex County Vocational Schools, Essex County..... 628

Barbara Creed et al. v. Board of Education of the City of Long Branch, Monmouth County (Decision on Remand)..... 523

D.S. v. New Jersey State Interscholastic Athletic Association and Board of Education of the Borough of Rutherford, Bergen County..... 211

Frank D'Alonzo v. Board of Education of the Township of West Orange, Essex County..... 2175

Thomas A. Daly v. Board of Education of the Township of River Vale, Bergen County..... 757

Thomas DeGise v. Board of Education of the City of Jersey City, Hudson County..... 1057

Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, Gloucester County..... 966

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

Deron School of New Jersey, Inc. et al. v. State of New Jersey, Department of Education and the Commissioner of Education..... 2036

In the Matter of the Tenure Hearing of Thomas DiCerbo, School District of Manchester Regional High School, Passaic City and Thomas DiCerbo v. Board of Education of the Manchester Regional High School District, Passaic County and In the Matter of the Manchester Regional High School Board of Education and the Manchester Regional High School Education Association..... 412

John Dowling v. Board of Education of the Township of Middletown, Monmouth County..... 1431

In the Matter of the Suspension of the Teaching Certificate of David T. Drake, School District of the Borough of Dunellen, Middlesex County..... 2016

Michael Dreher v. Board of Education of the City of Jersey City, Hudson County (Decision on Remand)..... 1706

E.P. Reid, Inc. v. Board of Education of the City of Jersey City, Hudson County and Rexxon, Inc..... 738

Board of Education of the City of East Orange v. the City Council of the City of East Orange, Essex County..... 2420

In the Matter of the Tenure Hearing of John Eberly, School District of the Township of Ewing, Mercer County (Decision on Motion)..... 553

In the Matter of the Tenure Hearing of John Eberly, School District of the Township of Ewing, Mercer County (Decision on Remand)..... 594

In the Matter of the Tenure Hearing of John Eberly, School District of the Township of Ewing, Mercer County (Decision on Motion)..... 601

Wilber Edwards v. Board of Education of the Village of Ridgewood, Bergen County..... 641

In the Matter of the Annual School Election Held in the School District of the Borough of Emerson, Bergen County.. 1225

Charles England v. Board of Education of the Lenape Valley Regional High School District, Sussex County..... 1842

Board of Education of the Borough of Farmingdale v. Borough Council of the Borough of Farmingdale, Monmouth County.... 2233

Barbara Faycik v. Board of Education of the City of Englewood, Bergen County..... 1343

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

Board of Education of the Township of Florence, Burlington County v. Elizabeth Pelle..... 1911

Harvey Fried v. Board of Education of the Township of Teaneck, Bergen County..... 785

G.B.C., on behalf of J.T.C., a minor v. Board of Education of the Borough of Haddonfield, Camden County..... 45

G.B.C., on behalf of J.T.C., a minor v. Board of Education of the Borough of Haddonfield, Camden County (Decision on Remand) 54

G.L.H., by his guardians ad litem, G.H.H. and G.R.H. v. Board of Education of the Hopewell Valley Regional School District et al., Mercer County (Decision on Motion)..... 891

Barbara Garrison v. Board of Education of the Borough of Mountain Lakes, Morris County..... 833

Augustus C. and Colette Gerding v. Board of Education of the Matawan-Aberdeen Regional School District, Monmouth County..... 2363

In the Matter of the Annual School Election Held in the Borough of Gibbsboro, Camden County..... 1290

Haydee Gonzalez v. Board of Education of the City of Newark et al., Essex County..... 2003

In the Matter of the Issuance of a Teaching Certificate of Paula Griskey..... 1803

Marion Hagerty v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County (Decision on Remand)..... 399

In the Matter of the Tenure Hearing of Joseph Harris, School District of New Brunswick, Middlesex County..... 719

In the Matter of the Tenure Hearing of Joseph Harris, School District of the City of New Brunswick, Middlesex County (Decision on Remand)..... 725

Board of Education of Harrison Township, Gloucester County v. C.W. by his parents, J.R.W. and K.T.W..... 1064

Mary Hart v. Board of Education of the Borough of Ridgefield, Bergen County..... 1788

Ross R. Hughes v. Board of Education of the Township of West Orange, Essex County..... 2338

Board of Education of the Township of Irvington v. Mayor and Council of the Township of Irvington, Essex County.... 2127

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

In the Matter of the Tenure Hearing of Mary Jackson, School District of the City of Newark, Essex County..... 218

Dam Jin Koh and Hong Jun Kim v. New Jersey State Interscholastic Athletic Association..... 259

In the Matter of the Tenure Hearing of Linda Lane, School District of the City of Newark, Essex County..... 1073

Bernard Laufgas v. Board of Education of the Township of Barnegat, Ocean County..... 2023

Bernard Laufgas v. Board of Education of the Township of Barnegat, Ocean County..... 2442

Linda Ledwitz v. Board of Education of Manalapan Englishtown Regional School District, Monmouth County..... 1963

Board of Education of the Township of Livingston, Essex County v. Kenneth A. Riker (Declaratory Judgment)..... 908

Thomas J. Lombardi v. Board of Education of the Borough of Rumson, Monmouth County..... 204

In the Matter of the Annual School Election Held in the School District of the Lower Camden County Regional High School District No. 1, Camden County..... 1282

M.A.H., on behalf of L.H. v. Board of Education of the Borough of Rutherford, Bergen County..... 2075

Richard L. Mann v. Board of Education of the Township of Cherry Hill, Camden County..... 1506

Ann Maresca v. Board of Education of the Hudson County Area Vocational-Technical School District, Hudson County..... 379

In the Matter of the Tenure Hearing of Jude Martin, School District of the Township of Union Beach, Monmouth County (Decision on Remand)..... 1929

In the Matter of the Annual School Election Held in the School District of Matawan-Aberdeen Regional, Monmouth County..... 1140

Matawan Regional Teachers Association and Marie Panos v. Board of Education of Matawan-Aberdeen Regional School District, Monmouth County..... 1826

George McClelland v. Board of Education of the School District of the Township of Washington, Mercer County..... 539

Peter Melillo v. Board of Education of the Essex County Vocational School District, Essex County..... 1481

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

Thomas Metzler v. Board of Education of the Township of Bloomfield, Essex County..... 2304

Anastasia Michals v. Board of Education of the Hudson County Area Vocational-Technical Schools, Hudson County... 1361

Board of Education of the Borough of Middlesex v. Borough Council of the Borough of Middlesex, Middlesex County..... 2039

Middletown Township Education Association et al. v. Middletown Township Board of Education, Monmouth County... 1548

Helga Milan-Vera et al. v. Board of Education of the Union City, Hudson County..... 1324

Paul Miller v. Board of Education of the Borough of New Providence, Union County..... 23

Elma Milwit v. Board of Education of the City of Jersey City, Hudson County, Jersey City Learning Center and William A. Beebe..... 87

Theodore R. Murnick v. Board of Education of the City of Asbury Park, Monmouth County and W. Frank Johnson, Department of Education, Bureau of Facility Planning Services..... 2098

Violet Nealy v. Board of Education of the Borough of Roselle, Department of Education of the State of New Jersey and the Union County Superintendent of Schools, Union County..... 1598

Board of Education of the Township of Neptune v. Mayor and Council of the Township of Neptune, Monmouth County... 2351

Neptune Township Education Association v. Board of Education of the Township of Neptune, Monmouth County..... 1757

Joan R. Nolan v. New Jersey State Board of Examiners..... 79

Rose Northey and Iris Williams v. Board of Education of the City of Trenton, Mercer County..... 2273

North Plainfield Education Association v. Board of Education of the Borough of North Plainfield, Somerset County..... 1045

Board of Education of the Township of Old Bridge v. Mayor and Council of the Townshp of Old Bridge, Middlesex County..... 308

In the Matter of the Tenure Hearing of Richard Onorevole, School District of the Township of Weehawken, Hudson County..... 96

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

In the Matter of the Tenure Hearing of Richard Onorevole, School District of the Township of Weehawken, Hudson County (Order)..... 165

In the Matter of the Tenure Hearing of Richard Onorevole, School District of the Township of Weehawken, Hudson County (Decision on Remand) 172

Board of Education of the City of Orange, Essex County v. New Jersey State Department of Education, Division of Finance, Vincent Calabrese, Assistant Commissioner..... 2217

Arthur L. Page v. Board of Education of the City of Trenton, Mercer County..... 1105

Theresa Pallarino v. Board of Education of the Township of Livingston, Essex County..... 1367

In the Matter of the Tenure Hearing of Ruth Parker, School District of North Bergen, Hudson County..... 2010

Kathy Partus v. Board of Education of the Township of Belleville, Essex County..... 1883

Board of Education of the Pascack Valley Regional High School District, Bergen County v. New Jersey State Interscholastic Athletic Association..... 1848

In the Matter of the Annual School Election Held in the School District of the City of Passaic, Passaic County.... 1259

Board of Education of the City of Paterson v. City Council of the City of Paterson, Passaic County..... 2379

Paterson Education Association v. Board of Education of the City of Paterson, Passaic County..... 2319

Board of Education of Penns Grove-Carneys Point Regional School District v. Board of Education of the Township of Oldmans and the Borough of Woodstown, Salem County and Ann C. Chevreuil et al. v. Boards of Education of the Township of Oldmans and the School District of Penns Grove-Carneys Point Regional, Salem County..... 2189

Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County..... 2262

Joseph Pezzullo v. Board of Education of the Township of Willingboro, Burlington County 183

Joseph Pezzullo v. Board of Education of the Township of Willingboro, Burlington County..... 2156

Dr. Wayne Phillips v. Board of Education of the North Hunterdon Regional School District, Hunterdon County..... 1184

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

Wayne E. Pickering v. Board of Education of the Borough of North Plainfield, Somerset County..... 1393

In the Matter of the Annual School Election Held in the School District of the Borough of Point Pleasant, Ocean County..... 1218

Board of Education of the Borough of Point Pleasant v. Mayor and Council of the Borough of Point Pleasant, Ocean County..... 2474

Thomas Puryear v. Board of Education of the City of East Orange, Essex County and Dr. T. Josiah Haig, Superintendent of Schools (Declaratory Judgment)..... 2412

R.A.S., on behalf of his minor child, R.S. v. New Jersey State Interscholastic Athletic Association..... 1698

Alexander Reaves v. Board of Education of the City of East Orange, Essex County..... 497

Ruth Rendell v. Board of Education of the Union County Regional High School District No. 1, Union County..... 391

In the Matter of the Tenure Hearing of Ronald Roemmelt, School District of the Borough of Washington, Warren County..... 861

Marilyn Roman v. Board of Education of the City of Jersey City, Hudson County..... 821

Joseph Rosania v. Board of Education of the Borough of Middlesex, Middlesex County..... 1855

Rumson-Fair Haven School Employees Association v. Board of Education of the Rumson-Fair Haven Regional High School District, Monmouth County..... 1652

Board of Education of the Borough of Rutherford, Bergen County v. Stephanie Karabaic..... 1989

Board of Education of the Borough of Saddle River, Bergen County v. Robert Iomazzo and Mary Ann Iomazzo..... 2288

Melvin Sanders v. Board of Education of the City of East Orange, Essex County..... 1029

Board of Education of the Scotch Plains-Fanwood School District, Union County v. Royce M. Pride..... 300

Board of Education of the Scotch Plains-Fanwood Regional School District, Union County v. L.C. and S.R..... 1835

Dennis Siefring v. New Jersey State Board of Examiners.... 1208

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

Charles Smith v. Board of Education of the City of Jersey City, Hudson County..... 269

In the Matter of the Annual School Election Held in the School District of the Borough of Somerville, Somerset County..... 1309

Bonnie Sontupe and Upper Freehold Regional Education Association v. Dr. Saul Cooperman, Commissioner of New Jersey Department of Education and Board of Education of the Township of Upper Freehold Regional School District, Monmouth County..... 706

Arlene P. Spizzirri v. Board of Education of the City of Salem, Salem County..... 1633

Rose S. Stahnten v. Board of Education of the Township of Hillside, Union County, consolidated with Barbara A. Washington v. Board of Education of the Township of Hillside, Union County..... 1078

Charles R. Stockton v. Board of Education of the City of Trenton, Mercer County (Decision on Remand)..... 512

Keith H. Struble Air Conditioning, Inc. v. Board of Education of the Township of South Brunswick, Middlesex County..... 1238

Lawrence Tave v. Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County..... 1147

Arthur Tote v. Board of Education of the Mercer County Vocational-Technical School District, Mercer County..... 11

In the Matter of the Tenure Hearing of Julio Triana, School District of the City of East Orange, Essex County..... 1683

In the Matter of the Tenure Hearing of Lynn Jenisch Tyler, School District of Sussex-Wantage Regional, Sussex County. 1895

V.J.H. v. Board of Education of the City of Orange Township et al., Essex County..... 1669

Shirley Vanderhoof v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County..... 848

Felix Villarin v. Board of Education of the Essex County Vocational Technical High Schools..... 1

Vogel Bus Company, Inc. et al. v. Board of Education of the Union County Regional School District No. 1 et al., Union County..... 2243

In the Matter of the Tenure Hearing of Lynn P. Ware, School District of the Woodstown-Pilesgrove Regional School District, Salem County..... 265

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

In the Matter of the Tenure Hearing of Willie White,
School District of the City of Trenton, Mercer County..... 1023

Timothy White-Stevens v. Board of Education of the Rumson-
Fair Haven Regional High School District, Monmouth County... 62

Eugene J. Williams v. Board of Education of the City
of Orange Township, Essex County..... 977

Eugene J. Williams v. Board of Education of the City
of Orange Township, Essex County (Decision on Remand)..... 991

Gerard P. Williams v. Board of Education of the City
of Englewood, Bergen County..... 1412

In the Matter of the Annual School Election Held in
the School District of Willingboro, Burlington County..... 1200
In the Matter of the Tenure Hearing of Richard Wolf,
School District of the Borough of National Park,
Gloucester County..... 1447

Board of Education of the Township of Woodbridge v.
Municipal Council of the Township of Woodbridge,
Middlesex County..... 1953

In the Matter of the Tenure Hearing of Helen Yorke,
School District of the Township of Piscataway,
Middlesex County..... 1764

Noble Young v. Board of Education of the City of
West Orange, Essex County..... 776

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

In the Matter of the Teaching Certificate of
Patricia Acken, School District of the Township
of East Amwell, Hunterdon County..... 2513

In the Matter of the Special School Election Held
in the School District of the City of Asbury Park,
Monmouth County..... 688

Evelyn Ball et al. v. Board of Education of the
Township of Teaneck, Bergen County..... 2514

Irene Bartz v. Board of Education of the Township of Green
Brook, Somerset County and Marilyn Burke v. Board of
Education of the Township of Green Brook, Somerset County.... 2520

Linda Bassett v. Board of Education of the Borough
of Oakland, Bergen County (Decision on Motion)..... 2528

Linda Bassett v. Board of Education of the Borough
of Oakland, Bergen County..... 2533

Richard Francis Bickings v. Board of Education of the
Camden County Vocational-Technical Schools, Camden County.... 2535

In the Matter of the Tenure Hearing of Edna Booth, School
District of the Township of West Orange, Essex County..... 2541

In the Matter of the Annual School Election Held in
the Bridgewater-Raritan Regional School District,
Somerset County..... 2549

Robert Brunnquell v. Board of Education of the Scotch
Plains-Fanwood Regional School District and Donald E.
Sheldon, Union County..... 736

Edward Buzinky v. Board of Education of the City of
Clifton, Passaic County..... 2550

Cape May County Vocational-Technical Education Association
et al. v.Board of Education of the Cape May County
Vocational Technical School District, Cape May County
and Donald P. Echevarria v. Board of Education of the
Cape May County Vocational-Technical School District,
Cape May County..... 1183

In the Matter of the Tenure Hearing of Patrick Caporaso,
School District of the Township of Belleville, Essex County.. 1668

Joyce Capra v. Board of Education of the Borough of
Eatontown, Monmouth County..... 2551

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

William F. Carroll Jr. v. Board of Education of the Sussex-Wantage Regional School District, Sussex County..... 2557

Erica A. Cohen v. Board of Education of the Borough of Emerson, Bergen County and Suzanne Carter..... 2562

Mary C. Comstock et al. v. Board of Education of the City of Summit, Union County..... 2576

Board of Education of the Township of Cranbury, Middlesex County v. Board of Education of the Township of Lawrence, Mercer County..... 2580

Thomas DeGise v. Board of Education of the City of Jersey City, Hudson County..... 1063

Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, Gloucester County.... 974

Kenneth Deveney v. Board of Education of the Borough of South Plainfield, Middlesex County..... 2595

In the Matter of the Tenure Hearing of Thomas DiCerbo, School District of Manchester Regional High School, Passaic County and Thomas DiCerbo v. Board of Education of the Manchester Regional High School District, Passaic County and In the Matter of the Manchester Regional High School Board of Education and the Manchester Regional High School Education Association..... 487

In the Matter of the Tenure Hearing of Robert Doyle, School District of the Township of Pemberton, Burlington County..... 2596

Robert P. Durkin v. Board of Education of the City of Newark, Essex County..... 2597

In the Matter of the Tenure Hearing of John Eberly, School District of the Township of Ewing, Mercer County..... 599

Wilber Edwards v. Board of Education of the Village of Ridgewood, Bergen County..... 678

In the Matter of the Annual School Election Held in the School District of the Borough of Emerson, Bergen County..... 1237

Fair Lawn Education Association, Katherine Solomon, Arlene Albalah, Elaine Pavon and Phyllis Stolar v. Board of Education of the Borough of Fair Lawn, Bergen County..... 2600

In the Matter of the Tenure Hearing of Robert Ferenz, Borough of Paulsboro, Gloucester County..... 2602

Dr. Jennifer Figurelli v. Board of Education of the City of Jersey City, Hudson County..... 2607

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

Peter Fischbach et al. v. Board of Education of the Township of North Bergen, Hudson County..... 2608

Harvey Fried v. Board of Education of the Township of Teaneck, Bergen County..... 795

G.L.H., by his guardians ad litem, G.H.H. and G.R.H. v. Board of Education of the Hopewell Valley Regional School District et al., Mercer County..... 906

In the Matter of the Tenure Hearing of Mary Jackson, School District of the City of Newark, Essex County..... 258

Jersey City Education Association et al. v. Board of Education of the City of Jersey City, Hudson County..... 2609

Constance Johnson v. Board of Education of the City of Englewood, Bergen County..... 2613

Joseph Koslick v. Board of Education of the Township of Edison, Middlesex County..... 2623

Board of Education of the Borough of Lawnside v. Board of Education of the Borough of Haddon Heights, Camden County.... 2626

Thomas J. Lombardi v. Board of Education of the Borough of Rumson, Monmouth County..... 210

In the Matter of the Tenure Hearing of Joyce Malley, School District of the Township of Pequannock, Morris County and Joyce Malley v. Board of Education of the Township of Pequannock, Morris County..... 2627

Richard L. Mann v. Board of Education of the Township of Cherry Hill, Camden County..... 1522

In the Matter of the Tenure Hearing of Patricia Marsden, School District of Toms River Regional, Ocean County..... 2628

In the Matter of the Annual School Election Held in Matawan Aberdeen Regional School District, Monmouth County..... 1146

Thomas C. McHugh v. Board of Education of the Town of Westfield, Union County..... 2636

Peter Melillo v. Board of Education of the Essex County Vocational School District, Essex County..... 1496

Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, Middlesex County..... 2642

In the Matter of the Tenure Hearing of Thomas Molineux, School District of the Township of Medford, Burlington County..... 2658

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

Shirley Odenwald et al. v. Board of Education of the Borough of Oakland, Bergen County..... 2659

Old Bridge Education Association et al., and Marilyn Jaclin et al. v. Board of Education of the Township of Old Bridge, Middlesex County..... 2663

In the Matter of the Tenure Hearing of Dr. Richard E. Onorevole, School District of the Township of Weehawken, Hudson County..... 170

Arthur Page, Jeanne Pearson and Clifford Zdanowicz v. Board of Education of the City of Trenton, Mercer County..... 1139

Piscataway Township Education Association v. Board of Education of the Township of Piscataway, Middlesex County.... 2664

Jeanne Prior v. Boards of Education of Bergenfield, Dumont, Tenafly, Oradell, River Edge, New Milford, Rochelle Park and River Dell Regional, Bergen County..... 2672

Henry R. Przystup v. Board of Education of the City of Jersey City, Hudson County..... 2674

Rahway Education Association, and Nancy Lazur v. Board of Education of the City of Rahway, Union County..... 2677

Alexander Reaves v. Board of Education of the City of East Orange, Essex County..... 511

Marilyn Roman v. Board of Education of the City of Jersey City, Hudson County..... 832

Peter J. Romanoli v. Board of Education of the Township of Willingboro, Burlington County..... 2678

Rumson-Fair Haven Education Association and New Jersey Education Association v. Board of Education of the Rumson-Fair Haven Regional School District, Monmouth County..... 2682

S.T., on behalf of her minor child, N.T. v. Board of Education of the City of Millville, Cumberland County..... 2689

Melvin Sanders v. Board of Education of the City of East Orange, Essex County..... 1044

Scotch Plains-Fanwood Education Association et al. v. Board of Education of Scotch Plains-Fanwood, Union County.... 2690

Marilyn R. Sheehan v. Board of Education of the City of Newark, Essex County..... 2701

Brian J. Small v. Board of Education of the Borough of Westwood Regional, Bergen County and Linda Schadt..... 2706

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

Charles Smith v. Board of Education of Jersey City..... 296

Roger Smith v. Board of Education of the Lower Camden County Regional School District No. 1, Camden County..... 2713

Bonnie Sontupe and Upper Freehold Regional Education Association v. Dr. Saul Cooperman, Commissioner of New Jersey Department of Education, and Board of Education of the Upper Freehold Regional School District, Monmouth County 717

South River Education Association et al. v. Board of Education of the Borough of South River, Middlesex County.... 2724

Barbara Spooner v. Board of Education of the Borough of Palisades Park, Bergen County..... 2730

Rose S. Stahnten and Barbara A. Washington v. Board of Education of the Township of Hillside, Union County..... 1104

Elizabeth Szpiech v. Board of Education of the Borough of Hopatcong, Sussex County..... 2731

Margaret D. Tahnenbaum v. Board of Education of the Borough of Glassboro, Gloucester County..... 2738

Lawrence Tave v. Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County..... 1170

Sharon Tompkins v. Board of Education of the Township of Hamilton, Mercer County..... 2742

Felix Villarin v. Board of Education of the Essex County Vocational Schools, Essex County..... 10

Zalotta Walter et al. v. Board of Education of the Township of Teaneck, Bergen County..... 2748

West Orange Education Association et al. v. Board of Education of the Township of West Orange, Essex County..... 2753

West Orange Supplemental Instructors Association v. Board of Education of the Township of West Orange, Essex County.... 2758

Gerard P. Williams v. Board of Education of the City of Englewood, Bergen County..... 1430

In the Matter of the Tenure Hearing of Richard Wolf, Borough of National Park School District, Gloucester County..... 1480

In the Matter of the Tenure Hearing of Helen Yorke, School District of the Township of Piscataway, Middlesex County..... 1787

Noble Young v. Board of Education of the City of West Orange, Essex County..... 784

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

1987 COURT CASE CITATIONS

A.A. on Behalf of A.A. v. Cooperman.
218 N.J. Super. 32

Bednar v. Westwood Board of Education.
221 N.J. Super. 239
cert. denied 110 N.J. 512 (1988)

Capodilupo v. W. Orange Township Education Board.
218 N.J. Super. 510
cert. denied 109 N.J. 514 (1987)

Maxfield v. Board of Education of Ridgewood Township.
217 N.J. Super. 267 (1986)
reviewed 106 N.J. 538 (1987)

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 0150-86
AGENCY DKT. NO. #424-12/85

FELIX VILLARIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL TECHNICAL HIGH SCHOOLS,
Respondent.

Linda Kaufmann, Esq., for petitioner
(Oxfeld, Cohen & Blunda, attorneys)

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

Record Closed: October 7, 1986 Decided: November 21, 1986

BEFORE **ELINOR R. REINER**, ALJ:

On or about December 18, 1985, petitioner, Felix Villarin, appealed to the Commissoner of Education alleging that respondent violated petitioner's tenure and seniority rights by failing to appoint him to a vice-principal position effective November 1, 1985. Respondent filed an answer on January 3, 1986 requesting the Commissioner of Education to dismiss the appeal. On January 7, 1986, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

New Jersey Is An Equal Opportunity Employer

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

A prehearing conference was held on February 26, 1986 at which time the following issues were isolated:

1. Did respondent violate petitioner's tenure and seniority rights by failing to appoint him to a vice-principal position effective November 1, 1985?

2. If so, did respondent have the right to consider any other factors in determining not to appoint petitioner to the position of vice-principal?

3. If so, were the factors considered by respondent sufficient to warrant its determination not to appoint petitioner to a vice-principal position?

4. If petitioner is successful, to what relief is he entitled?

The parties agreed to stipulate as to certain pertinent facts and contemplated motions for summary decision. A hearing was scheduled for June 16, 17 and 18, 1986. The hearing was adjourned due to this judge's illness.

By letter dated June 20, 1986, the parties filed a stipulation of facts and, on or about June 25, 1986, petitioner moved for summary decision. By conference call of July 28, 1986 (subsequent to this judge's return to work after an illness), it was determined that respondent would answer petitioner's motion for summary decision and petitioner's reply would be forthcoming. The hearing was rescheduled for October 7 and 8, 1986. On the day of the hearing, it was determined that there were no facts at issue and that this matter was ripe for determination.

The stipulation of facts, as well as the affidavit of Dr. William Harvey, Superintendent of Schools, relied on by respondent in support of its contentions, are

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

incorporated by reference herein and constitute this tribunal's findings of fact. The essential facts necessary for a determination may be summarized as follows.

Petitioner has been employed by respondent since September 1960. He holds tenure in both the position of teacher and the position of vice-principal with the Essex County Vocational Technical High Schools. Effective August 31, 1981, respondent abolished all vice-principal positions. Thus, as of September 1, 1981, petitioner, who had been serving as a vice-principal, returned to a teaching position. For the next several years, respondent did not employ any vice-principals.

Effective September 1, 1984, respondent created two vice-principal positions. Both individuals appointed to those positions had greater seniority than petitioner. For the 1985-86 school year, respondent re-created the positions of vice-principal at the West Caldwell Center, Irvington Center and Technical Career Center/Sussex Avenue. On November 1, 1985, the following vice-principal appointments were made: Irvington Center - Robert Fiorini; West Caldwell Center - John Pizzi; Technical Career Center/Sussex Avenue - George Howland; North Thirteenth Street Center - Deborah Alexander; Bloomfield - Edmond Riccardi. Neither Deborah Alexander nor John Pizzi had prior service with respondent district in the postion of vice-principal, nor were they on the preferred eligible list for the position of vice-principal. Robert Fiorini, having been apppointed to the position of vice-principal effective April 1, 1977 and holding this position until it was abolished on August 31, 1981, had less seniority than petitioner, who was appointed to the position of vice-principal effective July 1, 1976 and held the position until it was abolished on August 31, 1981.

Based upon these essentially uncontroverted facts, the issue is whether respondent violated petitioner's tenure and seniority rights by failing to appoint him to the vice-principal position effective November 1, 1985. In support of its motion for summary decision, petitioner points out that boards of education are required to recognize the tenure rights of teaching staff members. Having acquired tenure status, a teaching staff member may be removed from a position for good cause shown or upon a reduction in

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

force. N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-9. When a reduction in force has occurred, the teaching staff member must be accorded the right to automatic reemployment in accordance with his calculated seniority in the one or more teaching staff categories in which he had previously served. Petitioner notes that seniority is based on the number of years of employment in specific categories.

According to petitioner, his seniority rights in the category of vice-principal were fixed upon the abolishment of the position of vice-principal in the vocational school on August 31, 1981. When he was transferred from the position of vice-principal to math teacher after his position was abolished, reemployment rights were vested in him in accordance with the number of academic or calendar years of employment in the categories in which he previously served. Petitioner explained that N.J.A.C. 6:3-1.10(i) provides that whenever a person is moved from a category, he or she shall be placed and remain upon the preferred eligible list of the category from which he or she was removed until a vacancy shall occur in such category to which he or she is entitled by seniority.

In the instant case, petitioner contends that he was vested with five years seniority in the category of vice-principal when his position was abolished on August 31, 1981. During that time, he remained on the eligibility list. On September 23, 1985, respondent appointed three employees to the position of vice-principal effective November 1, 1985, despite the fact that all three of these employees had less seniority in the category of vice-principal than petitioner. More particularly, petitioner notes that he had more seniority than Mr. Fiorini, who also had served as a vice-principal, and Mr. Pizzi and Ms. Alexander, who never acquired tenure in the position and have no seniority rights to it. Petitioner thus argues that respondent violated N.J.A.C. 6:3-1.10(i) when it failed to appoint petitioner to the position of vice-principal in 1985. In further argument, petitioner alleges that there is no support for respondent's position that petitioner is not entitled to the vice-principalship because of absenteeism or poor leadership. Absent some showing that the parties have equal seniority, which is not the case here, respondent's argument has no basis in statutory, regulatory or case law.

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

Respondent does not agree. It contends that upon a subsequent reorganization or creation of a position, seniority should not be the sole criteria for determining entitlement to a position. Respondent contends that competence and administrative discretion should also be valid considerations for recall when the individual involved has not been truly "dismissed" from employment with the district. Respondent asserts that petitioner cannot point to a statute, regulation or case which specifically precludes the action taken by respondent. Respondent argues that it is not seeking petitioner's dismissal from all employment, it is merely seeking a declaration of his ineligibility for the prime management position of vice-principal. In sum, respondent opines that a hearing on the factual background and rationale underlying the denial to petitioner of the newly created vice-principal position is warranted and that factors other than seniority may validly be considered in the recall.

I have considered the arguments espoused by the parties and must agree with the conclusion reached by petitioner.

> Seniority. . . provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies. Lichtman v. Ridgewood Board of Education, 93 N.J. 362, 368 (1983).

When a reduction in force has occurred, the individual removed from his position has a right to automatic reemployment in accordance with his calculated seniority in the one or more teaching staff categories in which he previously served. As stated in N.J.A.C. 6:3-1.10(i), whenever a person is moved from a category, he or she shall be placed and remain upon the preferred eligible list of the categories from which he or she was removed until a vacancy shall occur in such category to which he or she is entitled by seniority. Further, entitlement to a position is not determined, as respondent contends, based on whether an individual with seniority rights is qualified for the position. There are statutory avenues open to respondent to remedy petitioner's alleged failing as a vice-principal should same be warranted.

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

Here, petitioner was vested with five years seniority in the category of vice-principal when his position was abolished on August 31, 1981. When respondent re-created vice-principal positions and appointed three employees who had less seniority than petitioner in the category of vice-principal (Fiorini, Alexander and Pizzi), respondent ignored petitioner's seniority rights. Clearly, petitioner's seniority entitles him to one of those appointments. In failing to honor petitioner's seniority, respondent violated N.J.A.C. 6:3-1.10(i). Respondent cannot use the instant situation, in which the only issue is petitioner's seniority, to deny petitioner his earned position as vice-principal.

Based upon the above discussion, **I CONCLUDE** that respondent acted improperly and in violation of petitioner's seniority rights by appointing three individuals to vice-principal positions on November 1, 1985 in lieu of petitioner.

It is hereby **ORDERED** that petitioner's motion for summary decision is **GRANTED**. It is **FURTHER ORDERED** that respondent reinstate petitioner to the position of vice-principal of the Essex County Vocational Technical High Schools effective November 1, 1985, in accordance with his seniority rights. Petitioner is to be reimbursed for all lost salary and other emoluments of employment.

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

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

OAL DKT. NO. EDU 0150-86

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

November 21, 1986
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Aeknowledged:

DEC - 1 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 2 1986
DATE

Ronald L. Parker, JS
FOR OFFICE OF ADMINISTRATIVE LAW

e/jrp

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

FELIX VILLARIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Board excepts to the recommended decision of the Office of Administrative Law for the reasons previously advanced before and considered by the ALJ.

Upon review of the record in this matter, the Commissioner is in emphatic agreements with the ALJ's analysis and conclusion and therefore adopts the recommended decision as his own. He finds not a scintilla of information in the Board's arguments and/or exceptions to persuade him that the ALJ in any way erred in this matter either with respect to the issue of summary judgment being warranted or the substantive issues involved.

Contrary to the Board's contentions otherwise, N.J.A.C. 6:3-1.10 is strictly controlling in this matter. At the time petitioner's vice-principal position was abolished in 1981, his seniority rights vested in the category of high school vice-principal and his placement on the preferred eligibility list controlled his reemployment entitlement to any position becoming available in the future in that category. N.J.A.C 6:3-1.10 Thus, in 1985 the Board was strictly required by law and regulation to reemploy petitioner based on his seniority entitlement when a position became available in the vice-principal category for which he was on a preferred eligibility list. N.J.S.A. 18A:28-11 and N.J.A.C. 6:3; Fallis v. Board of Education of South Plainfield, decided March 4, 1985, aff'd State Board September 4, 1985; Walldov et al. v. Board of Education of East Brunswick, decided May 10, 1985, aff'd State Board November 6, 1985

Moreover, despite contentions to the contrary, the ALJ is correct in concluding that the Board cannot use the instant situation to deny petitioner that which he has entitlement to by virtue of tenure and seniority. If the Board deems petitioner lacking in skills and abilities as vice-principal, it must invoke those statutory avenues available to it for achieving removal from a tenured

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

position. It cannot unilaterally determine to "pass over" him or disregard that to which statute and code entitle him.

Accordingly, the Commissioner adopts the initial decision granting summary judgment to petitioner. The Board is ordered to reinstate petitioner to the position of vice-principal effective November 1, 1985 pursuant to his seniority rights and to reimburse him all salary and other emoluments, less mitigation, denied him by the Board's illegal action.

COMMISSIONER OF EDUCATION

January 6, 1987

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

FELIX VILLARIN,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL TECHNICAL HIGH SCHOOLS, ESSEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 6, 1987

For the Petitioner-Respondent, Klausner, Hunter and Oxfeld, (Nancy I. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Schwartz, Pisano, Simon and Edelstein (Nathanya G. Simon, Esq., of Counsel)

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

June 3, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3754-86
AGENCY DKT. NO. 170-5/86

ARTHUR TOTE,
Petitioner,
v.
BOARD OF EDUCATION OF MERCER COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT,
Respondent.

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

David Carroll, Esq., for respondent

Record Closed: October 10, 1986 Decided: November 24, 1986

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

Arthur Tote (petitioner) who was employed since January 1973 as a teacher of Automotive Mechanics by the Board of Education of Mercer County Vocational Technical Schools (Board) was subject to a reduction in force as of June 30, 1986 following the abolishment of his position due to declining enrollment. Petitioner does not challenge the reasons for the abolishment of his position; he does claim superior seniority to the teaching position Automotive Services presently occupied by Robert Wagner. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted September 19, 1986 at the Office of Administrative Law, Mercerville. The record closed October 10, 1986 upon receipt of simultaneous briefs of the parties.

New Jersey Is An Equal Opportunity Employer

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

ISSUE

The ultimate issue in the case and as stated in the Prehearing Order of July 21, 1986 is whether petitioner has an enforceable seniority claim to the Board's teaching position for the course known as "service station attendant" or to some other position of employment to be identified by him. Petitioner identified no other teaching position to which he could make a reasonable seniority claim; consequently, the focus is on Wagner's position of teacher of service station attendant.

BACKGROUND FACTS

At the commencement of hearing the parties submitted a written stipulation of fact which is reproduced here in full:

1. Petitioner Arthur Tote is a teaching staff member under tenure with Respondent. Petitioner Arthur Tote began employment with Respondent on or about January 1, 1973.

2. Petitioner Arthur Tote holds standard certification as a "Teacher of Skilled Trades - Auto Mechanics," [J-1] which was issued in May 1974 * * * Prior to issuance of standard certification in May 1974, Petitioner Arthur Tote held emergency certification under the same title. All of Petitioner Arthur Tote's service has been under such certificates.

3. Petitioner Arthur Tote also holds certification as a coordinator of cooperative industrial education. However, the parties stipulate that the seniority claim in this matter does not involve such certification.

4. Petitioner Arthur Tote is a veteran of the United States Air Force, having served in excess of four years prior to beginning his employment with respondent.

5. Petitioner Arthur Tote's service has been under a job description entitled Instructor - Full Time. [J-2] This same job description is used for all classroom teaching positions in the District * * *

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

6. All of his employment in the Respondent school district, Petitioner Arthur Tote taught a course entitled Automotive Mechanics (I and II). [J-3] * * *

7. On April 29, 1986, the Board of Education abolished the position then held by petitioner, Teacher of Auto Mechanics at the Sypek Center, for reasons of declining enrollment. The abolishment of the position was made effective June 30, 1986. The legality of the abolishment of his prior position is not challenged in this proceeding.

8. Petitioner was notified of the Board's action and the termination of his employment as of June 30, 1986, by letter [J-4] dated April 30, 1986. * * *

9. The Board continues to operate an Auto Mechanics program identical to that taught by petitioner at the Assunpink Center. The full-time incumbent in that position, Al Parker, also holds certification as "teacher of skilled trades - Auto Mechanics" and has been employed in that position since the 1968-69 school year. It is stipulated that petitioner is less senior than Parker, and that petitioner has been placed on a preferred eligibility list for such position.

10. Robert Wagner, who holds the position Petitioner Arthur Tote seeks, commenced employment in the Respondent school district on September 1, 1977.

11. Robert Wagner, during all of his employment, served under the same job description [J-2] that Petitioner Arthur Tote served under.

12. Robert Wagner is tenured in the Respondent school district, but has been given no seniority credit for military service. The parties agree that Robert Wagner is entitled to no such credit.

13. During all of his employment in the Respondent district, Robert Wagner served under certification as a "Teacher of Production, Service Occupation - Service Station Attendant." [J-5] * * *

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

14. During all of his employment in the Respondent school district, Robert Wagner taught a course entitled Automotive Services. [J-6] * * *

15. For the 1986-87 school year, Robert Wagner is teaching the same course as listed above.

16. The above facts are stipulated by both parties. * * *

In addition to these stipulated facts, other facts as established by a preponderance of credible evidence of record and other which is there is no dispute between the parties are these. Petitioner's qualifications and assignments with the Board shall be addressed first, followed by Wagner's qualifications and assignments including his present assignment to which petitioner claims legal entitlement.

Prior to petitioner's initial employment with the Board in 1973, he spent four years as a mechanic on fighter aircraft in the United States Air Force. Upon his discharge from the Air Force, petitioner worked part time in an automobile service station where he pumped gas, did minor repairs such as engine tune-ups and brake work, he took meter readings from the gasoline pumps, and he opened and closed the station. In or about 1965, petitioner opened his own service station. Petitioner was in complete charge of the operation of the service station, including maintaining an appropriate inventory of parts, gasoline and oil and he directly supervised two employees in the performance of minor repairs and some major repairs to automobiles. In or about 1968, petitioner opened a different service station at which he had six employees. Petitioner began doing major engine repairs, including air conditioning. He allocated the work among the six employees including pumping gasoline, lubrication and mechanical work. In or about 1970, petitioner ceased the operation of his own service station and began employment as an auto mechanic in another service station where he did minor repairs and some major repairs. During the time petitioner operated his own service stations, the supplying oil companies trained him in operating a service station, including recordkeeping, inventory, employees and minor repairs.

At about the same time petitioner was initially employed by the Board in January 1973, he was enrolled at Trenton State College from which he was graduated in 1975 with a baccalaureate degree. Prior to graduation, petitioner was issued by the State Board of Examiners an instructional certificate with an endorsement as a Teacher of Auto

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

Mechanics. Auto Mechanics is recognized as a skilled trade, then N.J.A.C. 6:11-6.3(c)(1)(ii), now N.J.A.C. 6:11-6.2(a)28(iv), and as such the endorsement may be issued upon work experience in lieu of a baccalaureate degree. N.J.A.C. 6:11-6.3(c)1(ii). The Board initially assigned petitioner to teach at its Assunpink Center until 1977 or 1978 when he was transferred to its Sypek Center. At both centers, petitioner taught automotive mechanics for which at the time no formal curriculum existed. Nevertheless, his testimony shows that during that time period the course consisted of instruction in major and minor automotive repairs, accessory repairs, suspension, brakes, engine overhaul, and rear differential overhaul. Petitioner pointed out that the Assunpink Center has gasoline pumps on the premises which were used by him to train pupils to be service station attendants. He also testified that between 1973 through 1977 he trained students how to balance cash received from the sale of gasoline at those pumps to staff and faculty, how to read gasoline pump meters and how to maintain proper inventory.

Petitioner prepared in 1976 a written course of study (J-3) for automotive mechanics. While there is no evidence of record that the Board adopted this curriculum as its curriculum, it is fair to say that the curriculum prepared by petitioner in 1976 sets forth the content of what is taught by him in automotive mechanics. The curriculum details the general objectives and goals of the course, together with a matrix of task performances necessary to be acquired by pupils in various occupational careers directly related to " * * * preventive maintenance and repairs to gasoline engines, component parts, and accessories." (J-3, at p. 1). Pupils in auto mechanics are introduced to the repair of the transmission, ignition, front end system, brake system, the air conditioning and radiator systems. Depending upon the pupil's choice of an occupational career which may include lubrication specialist, service station attendant, front end specialist, or a radiator or ignition specialist, each selected career has task performances common to the task performances assigned pupils studying and training to be an apprentice mechanic, a service mechanic, or chief mechanic. As examples, pupils studying towards being one of the three classes of mechanic need to know lubrication guides, the operation of hydraulic lifts and use of automotive jacks as do those studying to be lubrication specialists or service station attendants. A service station attendant, according to the curriculum, needs to know as do all pupils studying to be a mechanic how to remove and replace wheel assemblies, repack wheel bearings, rotate tires, repair tires and tubes, use tire changing equipment, balance wheels and tires, remove and replace exhaust system components, remove and service the heat control valve, identify brake system parts, and adjust and service brake system. In similar fashion the service station attendant needs to

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

know, as do mechanics, how to service hydraulic brake systems, power brake and disc brake systems. Nevertheless, pupils studying to be one of the three classes of mechanics learn skills and perform tasks not learned nor performed by service station attendants. These tasks include testing engine performance, power steering units, manual transmissions, the clutch and flywheel assemblies, and removing and replacing rear axle assemblies among others.

Petitioner testified that the ultimate goal of the automotive mechanics course is for pupils to secure and retain employment and be self-sufficient in auto mechanics. Petitioner relies on two text books for his course, one of which is entitled the "Fundamental of Auto Mechanics" while the other is entitled "Auto Mechanics Service and Repair".

Petitioner claims that based on the instructional certificate endorsement of Teacher of Auto Mechanics he possesses together with his teaching assignment under that endorsement during his employment with the Board creates for him an enforceable superior seniority claim to the position held by Robert Wagner, teacher of service station attendant.

Robert Wagner, who has tenure, began employment with the Board as a teacher in September 1977. Between that time through February 1981, Wagner possessed emergency certification as a Teacher of Production, Personal, or Service Occupations - Service Station Attendant. During February 1981, Wagner was issued regular certification in that subject area, then N.J.A.C. 6:11-6.3(c)(1)(iii), now N.J.A.C. 6:11-6.2(2)(27)(xviii). At the time of his initial employment, the course Automotive Services was known as simply gas station attendant instructor. It appears that in 1985 when Wagner prepared a written curriculum (J-6) for the course, the course title became automotive services, of which service station attendant study is but one facet.

Automotive services is a course part of the Board's Education Orientation Program designed exclusively for educationally handicapped pupils. The individual education plan for these pupils is prepared by their home sending districts. According to the vice principal in charge of special needs at the Sypek Center, the Educational Orientation Program has 15 teachers assigned to food service, building maintenance, office practice, homemaking, automotive services, including service station attendant, construction, marketing, and one or two other subject areas. Each of the teachers possess

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

Production, Personal, or Service occupation endorsements on their instructional certificates with the exception of marketing and office skills teacher. These teachers are certified in distributive education because there is no endorsement in Production, Personal, or Service Occupation certificate for marketing or office skills. It is noted that the superintendent explained the requirement for a production, personal, or service occupation endorsement on an instructional certificate is not a written Board policy requirement of teachers in the Employment Orientation Program. Rather, he explained that historically that is the endorsement that has been required since he has been superintendent from 1977 and he inherited that requirement from his predecessor.

The educational opportunity program is designed to provide pupils, all of whom are classified under N.J.S.A. 18A:46-8, an overview of the world of work and to train the pupils to acquire positive habits for work in the service industry. In addition to subject matter taught, teachers in the Education Opportunity Program work with the pupils to develop their social skills by way of cooperation with coworkers, attention to prompt attendance at work, organization of their assigned work and to follow schedules. These goals of the Employment Orientation Program are formally set down in writing. (R-1).

The written curriculum prepared by Wagner of the automotive service program is designed to train pupils for entry level positions in automotive services. These entry level positions are identified as automobile service station attendant, lubrication servicer, tire repairer, used car lot porter, industrial garage servicer, muffler installer and automobile mechanic helper. The areas of gasoline sales, car care, tire repair, auto maintenance and minor repair are stressed. This course, according to the matrix of occupations and task performances for each occupation, does not cross over into automobile service mechanic, automobile mechanic apprentice, or chief automobile mechanic. Rather, the tasks are limited to the entry level position above. No one of the tasks in this course address mounting engines, removing and replacing intake manifolds, measuring a brake drum, testing engine performance, or other like major tasks generally associated with the tasks of a mechanic.

This concludes a recitation of the relevant facts of the matter.

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

LAW

It is well established that as a prerequisite a legally enforceable seniority claim follows upon the acquisition of tenure. Tenure is acquired by the person meeting the precise conditions articulated in the statute for the acquisition of such a status. In this regard, N.J.S.A. 18A:28-5 provides in part "* * * The services of all teaching staff members including all teachers * * * in positions which require them to hold appropriate certificates issued by the board of examiners * * * shall be under tenure during good behavior and efficiency * * *". Nevertheless, tenure does not prohibit a board of education from abolishing positions for reasons of economy or because of a reduction in the number of pupils. Dismissals of teachers with tenure following a reduction in force are governed by seniority standards established by the Commissioner of Education.

Administrative standards for determining seniority are set forth at N.J.A.C. 6:3-1.10. Specifically, seniority is determined according to the number of academic or calendar years of employment in the school district in specific categories. Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. Categories are set forth at N.J.A.C. 6:3-1.10(1), one of which is "Secondary". Petitioner anchors his claim to Wagner's job on this category which, at N.J.A.C. 6:3-1.10(1)(15)(i) provides:

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

In instances where one endorsement authorizes a teacher to teach several subject areas that person acquires seniority in all such subject areas despite the fact they may have only taught in one of the authorized areas. Camilli v. Bd. of Ed. of Northern Highlands, 1985 S.L.D. — (Jan. 3, 1985), aff'd St. Bd. of Ed., 1985 S.L.D. — (May 1, 1985). However, where a teacher possesses a specific endorsement authorizing the teaching of one subject area that teacher has no valid seniority claim to other subject matter areas for which a separate endorsement exists. Hudson County Vo-Tech Ed. Asso. v. Hudson County Vo-Tech Bd. of Ed., 1986 S.L.D. — (Jan. 27, 1986).

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

FINDINGS AND CONCLUSION

The essential finding is made that automobile services is a course qualitatively different than automotive mechanics. Automotive mechanics, while addressing in some measure certain tasks to be performed by service station attendants, has as its focus the higher skilled level of the internal parts of a combustion engine. Students learn the assembly and disassembly of major component parts of the automobile. Service station attendants within automotive services address those kinds of tasks assigned the lesser skilled employee such as pumping gasoline, checking oil, washing automobile windows, changing tires, as so on. These latter kinds of tasks require a teacher who, by the issuance of a teaching endorsement in service occupations, acquired the necessary sophisticated background to impart those kinds of lesser skills, work habits, and attitudes to their students. The automotive mechanic skilled trades endorsement represents acknowledgement that the possessor has the intellectual capacity and practical know-how of gasoline engines to train pupils in that discipline.

Because the Board has not formally adopted the production, personal, occupations - service station attendant as the endorsement for the teacher of automotive services to possess, it does not follow that petitioner, through his skilled trade automotive mechanics endorsement, is authorized to teach the course automotive services. The State Board of Examiners recognizes skilled trades - auto mechanics to be a separate endorsement than the endorsement production, personal, or service occupation - service station attendant. Given the nature of the service station attendant course within automotive services as set forth in the written curriculum (J-6) it is unlikely that any other endorsement would be the appropriate endorsement for a teacher to possess to be authorized to teach service station attendant. This is not a case where the Board imposes a greater requirement upon its teacher of service station attendant than the State Board of Examiners as was the case in Ellis v. Middlesex County Vo-Tech School District, 1984 S.L.D. — (St. Bd. of Ed. May 2, 1984). Consequently, so long as this Board requires the endorsement for its automotive service course, service station attendant, to be taught by one who possesses the endorsement required by the State Board of Examiners there is no need for the Board to first have adopted a written policy requiring the possession of such an endorsement by the incumbent Wagner.

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

The issue in this case it must be remembered is petitioner's claim that by virtue of his skilled trade - auto mechanics endorsement on his instructional certificate, coupled with his approximately 17 years seniority in the Board's employ as a teacher of auto mechanics, he has a claim to teach service station attendant held by Wagner, who admittedly has only nine years seniority teaching service station attendant with the Board. The fact that the service station attendant course, part of automotive services, is different than automotive mechanics and in light of the fact the State Board of Examiners requires separate endorsements for the teaching of each subject area leads to the conclusion that petitioner has no seniority claim to the position of teacher of service station attendant in the automotive services course by virtue of either (1) his endorsement on his instructional certificate or (2) by his prior assignment with the Board.

In sum, I **FIND** the subject courses herein controverted to be different from each other. I **FIND** separate endorsements upon instructional certificates are necessary to be possessed by the teacher of each subject area. I **CONCLUDE** petitioner, Arthur Tote, has failed in his ultimate burden of persuasion to demonstrate a superior seniority claim to the teaching position presently held by Robert Wagner. The petition of appeal is **DISMISSED.**

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

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

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

November 24, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

NOV 24 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 1 1986
DATE

Ronald L. Parker /s
OFFICE OF ADMINISTRATIVE LAW

sc

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

ARTHUR TOTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL-TECHNICAL SCHOOL, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner urges reversal of the recommended decision and relies on the arguments set forth in his brief filed with the ALJ as his exceptions and objections. Moreover, he reiterates that all the subject matter taught in Mr. Wagner's course is within the scope of his endorsement and that the course merely is a lower level of possible skills included within the subject area level.

Upon review of the record in this matter, the Commissioner concurs with the findings and conclusions reached by the ALJ. He therefore adopts the recommended decision as the final decision in this matter for the reasons expressed therein. The matter is hereby dismissed.

COMMISSIONER OF EDUCATION

January 6, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3127-86
AGENCY DKT. NO. 107-4/86

PAUL MILLER,
Petitioner,
v.
NEW PROVIDENCE BOARD OF EDUCATION,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Martin R. Pachman, Esq., for respondent (Pachman & Glickman, attorneys)

Record Closed: October 10, 1986 Decided: November 24, 1986

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

Paul Miller, petitioner, alleges and the New Providence Board of Education (Board), respondent, denies that the Board violated the petitioner's tenure and seniority rights when the Board failed to assign the petitioner to the newly-created position of Vice Principal/Supervisor of Physical Education after it had abolished his position of Supervisor of Physical Education and Health/Athletic Director on January 24, 1985 (J-5), effective June 30, 1985.

The present petition was filed with the Commissioner of Education on April 23, 1986 and timely answered by the Board on May 5, 1986. The Commissioner determined the matter to be a contested case and transmitted it to the Office of Administrative Law on May 8, 1986, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

New Jersey Is An Equal Opportunity Employer

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

The petition sets forth the following main allegations:

1. The petitioner is a tenured teacher in the employ of the New Providence Board of Education and, prior to July 1, 1985, was the tenured Supervisor of Physical Education and Health/Athletic Director, for which he remains on a preferred eligible list. The Board admits this allegation.

2. On or about January 4, 1985, the Board abolished the position of Supervisor of Physical Education and Health/Athletic Director. The Board admits this allegation.

3. At the same time, the Board added the duties formerly performed by the Supervisor of Physical Education and Health/Athletic Director to the duties of the Vice Principal, effective September 1, 1985, and entitled the new position, Supervisor of Physical Education/Vice Principal. The Board admits this allegation.

4. Subsequently, the Board established the position of Administrative Intern at New Providence High School, effective September 1, 1985. The Board admits this allegation.

5. The petitioner alleges, and the Board denies, that over the course of the 1985-86 school year, the duties of the Administrative Intern have evolved to be those previously performed by the Vice Principal, while the current, untenured Vice Principal performed the same duties the petitioner had performed as Supervisor of Physical Education and Health/Athletic Director.

6. The petitioner alleges, and the Board denies, that on or about March 1, 1986, it became apparent to him that the Vice Principal was performing substantially the same duties the petitioner performed in his prior position.

7. The petitioner alleges, and the Board denies, that the Board attempted to coherse him to resign during the 1983-84 school year; that when he refused, the Board created a false reorganization - the petition uses the word

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

"charade" - of a high school administration, and that his tenure and seniority rights have been circumvented thereby.

This matter was heard on September 23 and 24, 1986, at the Office of Administrative Law, Newark. The petitioner testified in his own behalf and called four other witnesses on his case in chief. He gave testimony which tended to show that he was assigned to an elementary school, not the high school, in 1985-86; when his position was abolished and the new position created, he saw the duties (J-3) for the new position, believed that the person selected would be responsible for all of those duties and he did not apply for the position; he performed 59 of the 74 separate duties listed for the Supervisor of Physical Education, Athletics and Vice Principal and assisted, at least on occasion, with five others; during February or March 1986, he determined the duties of the Vice Principal-Supervisor were what he had done and the Administrative Intern was doing the Vice Principal's job.

He came to this determination on the basis of information given to him orally by other coaches and teachers and from copies of memorandums circulated to high school staff by the administrative intern (J-14 through J-35). He asked for and received appointments to see the superintendent and the Board president. Both seemed satisfied with the high school organization "as it worked out."

The petitioner also testified in the 1984-85 school year, the high school had assigned a principal, a vice principal and 11 supervisors, including himself. In January 1985, the superintendent met with the administrative staff and informed them the Board was going to change the organization. It did (J-5). Eleven separate positions were abolished. The petitioner has no evidence that the Board ordered the reorganization to eliminate the 11 incumbents. When he began service at the high school in 1979, the enrollment was approximately 1,000 pupils. In 1985-86, the number was approximately 640 and a continued decline in enrollments is projected.

The Board moved to dismiss this matter on the grounds that the complaint is untimely under N.J.A.C. 6:24-1.2(b) - commonly called the 90-day rule - and that the petitioner had failed to carry the burden of persuasion.

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

On the first point, the Board argues that the only relevant testimony shows the petitioner made a subjective decision about who was doing what jobs at the high school in December 1985. However, on May 2, 1985, he wrote a letter (J-10) to the Superintendent-Board Secretary, Board president and Board members concerning the new position, stating, among other things:

> I decline to apply for the job due to the scope of the work. If, however, the position evolves so that the duties and responsibilities are diminished and do not represent those defined in the job description, I will exercise my legal right to that position based on my seniority and tenure.

In December, the petitioner met with a guidance counselor and formed a belief the new vice principal was doing his old job.

On the second point, there is no showing that anyone other than the present vice principal is doing the tasks that the former vice principal stated makes up 50-75% of the job: attendance and discipline. Therefore, the present vice principal's position is not the mirror image of the petitioner's former job. The many memorandums from the administrative intern pointed to by the petitioner are in the areas of fire drills, assemblies and extracurricular activities. The latter has been shown to merely a calendar clearing function and all have been shown to be a minor part of the vice principal's duties. No relationship has been established between the present vice principal position and the petitioner's former position.

The petitioner survived the motion to dismiss. The ruling from the bench was thus follows:

> Gentlemen, I have considered the arguments on the motion to dismiss this matter as untimely and for failure to carry the burden of persuasion.
>
> In dealing with a motion to dismiss, it is required that all favorable inferences be construed in favor of the party not the maker of the motion. As long as there is more than a mere scintilla of evidence in support of the plea, petition or complaint, a tribunal - whether civil or administrative - may not properly enter a dismissal.

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

> In the present case, I perceive that enough has been put forward by the petitioner that the record could, if unrebutted, support certain inferences in his favor.
>
> In order for a full adjudication on the merits of the case to be had, a defense is required of the Board. The motion to dismiss is denied at this time.

A former vice principal at the high school testified. He served in that capacity in 1974-1985. His title was Vice Principal for Student Personnel, Guidance, Special Services. He was also responsible for discipline and attendance in the period 1974-1979. He was housed in the main office of the school as was the athletic director. Exhibit J-5 is the high school vice principal job description he served under from 1979-1985. Exhibit J-9 is a memorandum he wrote to the principal, at her request, listing his duties in the 1984-85 school year. Exhibit J-2 is a much more general document than is J-9. J-9 details major responsibilities such as attendance, discipline, building maintenace, extracurricular activities, pupil deportment, fire drills, building inspection, curriculum coordination, field trip scheduling, supervision of the Student Service Organization, assemblies, staff evaluation and attendance. Pupil discipline and attendance occupied 50-75 percent of his time. He was also responsible for the building if the principal were out of the building.

Although the witness had not previously seen exhibits J-14 through J-35 because they were produced in the year following his departure, he did produce a number of similar memorandums when he was vice principal. He stated that the subjects of exhibits J-14 through J-35 were all his responsibilities while he served at the high school. The witness was aware in 1984-85 that a reorganization at the high school was coming.

The former vice principal reviewed exhibit J-3, the job description for the present supervisor position. Comparing this document to his duties in 1984-85, he found the areas of program, staff, interviewing, student handbook and operations to have been performed by him, and the balance to have been performed by the petitioner.

Although he spent 50-75% of his time on discipline and attendance, the time devoted to these duties fluctuated tremendously.

The witness testified that the two vice principal positions, Attendance and Discipline and Pupil Personnel Services were merged in June 1979. The primary change

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

was in title. The student personnel services title was eliminated. The Supervisor of Pupil Personnel Services took some of his responsibilities which, in turn, allowed him to concentrate on attendance and discipline as well as the other responsbilities enumerated above.

The superintendent of schools also testified. He began service in the district in 1961 as assistant superintendent and board secretary. He later was designated deputy superintendent and in 1977 was named superintendent and board secretary.

The superintendent participated in the reorganization of the high school. The reorganization began with a reduction of supervisors when the pupil population began to drop. The most recent reduction at the high school, as described above, was made on the basis of his recommendation to the Board after the Board had directed him to study the question. The superintendent has met with supervisors and principals over the last several years keeping them aware of changes in the district.

The superintendent met with the petitioner in 1983-84. The superintendent initiated the meeting because he was dissatisfied with the leadership style and attitude displayed by the petitioner. The principal and assistant superintendent were present for the first part of the meeting and then left. The superintendent and the petitioner had a private conversation. The superintendent had recommended the petitioner for the athletic director job and had known him for more than 20 years. During their private meeting, he made known to the petitioner his concerns about an inadequate baseball coach, soccer coach salary questions, a walk-out of pupils over a pep rally and other concerns.

The petitioner did not see the concerns as being as important as did the superintendent. The petitioner indicated he would step down but also indicated he wanted time to think about it. Subsequently, he said he would not resign.

The superintendent assured the petitioner that the superintendent would not recommend withholding of his salary or tenure charges against the petitioner, but that the superintendent certainly was not happy with the petitioner's performance. The superintendent gave the petitioner opportunities to attend conferences and institutes related to his position. However, the superintendent saw no improvement.

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

As part of reorganization discussions, the Board rejected the idea of keeping 12 supervisors at the high school but reducing their administrative time. Thereafter, decisions were made to merge several administrative positions. Athletic duties were merged with vice principal duties, English and Social Studies duties were combined as were Mathematics and Science duties.

Before making this recommendation, the superintendent had studied other districts, including Mountain Lakes and Glen Rock, which each had a combination vice principal and athletic director position. Because much athletic director business occurs during the school day, if the athletic director were a teacher, instructional time would be interrupted. Conversely, if the athletic director were an administrator, she or he would have greater flexibility in handling the required duties.

In January 1985, the Board held, not for the first time, a public discussion of reorganization. The Booster Association and other groups came to meetings and expressed concerns about the vice principal - athletic director combination. The Board decided, to appease the public, to appoint for a period of time an administrative assistant or intern to assure that all athletic duties were performed. The Board voted the changes at its January meeting. After the January meeting, the Board decided to appoint an adminstrative intern at the high school. In February they appointed a person to that position.

The combination supervisor positions were posted on January 25, 1985, applications to close on June 30, 1985 (J-6). Exhibit J-7 is the posting for administrative intern with applications due by February 13, 1985. The administrative intern position had existed for many years in the district although this was the first use of an intern at the high school. The petitioner applied for none of these positions.

All positions except the vice principal - athletic director position were filled at the February meeting. There was only one application for the vice principal - athletic director position and the Board directed the superintendent to advertise outside the district. In May, the superintendent made a recommendation to the Board.

The superintendent stated that one candidate told the superintendent that coaches from New Providence called him and told him "not to touch the job." Miller

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

would challenge the appointment and the candidate would wind up in court. The candidate withdrew.

Exhibit J-10 is a memorandum from the petitioner to the superintendent, Board president and members of the Board under date of May 2, 1985. The letter reads:

> I am writing in reference to the abolish of the petition of Supervisor of Physical Education and Health/Athletic Director and the creation of a new position combining the above with the Vice Principal position.
>
> A job description was given to me listing the duties and responsibilities of the combined positions, i.e. Vice Principal/Supervisor of Physical Education and Health/Athletic Director. I declined to apply for the job due to the scope of the work. If, however, the position evolves so that the duties and responsibilities are diminished and do not represent those defined in the job description, I will exercise my legal right to that position based on my seniority and tenure.

The petitioner did not say he wanted the job. The intern, by that time, had been appointed at the high school. When the outside candidate withdrew, the superintendent advertised the position again. Two staff and several outside persons applied. A selection was made and appointed in June. Once again, the petitioner did not apply.

The superintendent also testified that the petitioner advised in the spring of 1985 that he would be leaving the district. However, the job he thought he would be taking did not materialize.

The superintendent stated that the administrative intern served in the 1985-86 school year at the high school. The position was not filled for 1986-87, the present school year. The high school has a principal and one vice principal who also serves as athletic director.

Referring to exhibit J-3 again, the superintendent said he fully expected one person could perform all the duties of supervising physical education and athletics as well as certain vice principal duties because of falling numbers of pupils in the school. Some sports, however, actually have been added to the schools offerings.

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

The superintendent also traced the history of vice principal positions at the high school as population of the school grew and then diminished. The superintendent also pointed out that when the petitioner returned to teaching, there was no reduction in his salary. While he may have lost salary expectation, he suffered no actual dollar loss when his position was abolished. Those selected to be supervisors under the new titles did receive a salary increase for 1985-86.

The high school principal testified. She has served in the district for 20 years, the last five as high school principal. She stated the vice principal is the disciplinary and attendance person. She or he has responsibility for cafeteria supervision as well. These three functions form the bulk of the job. There are other duties, very much at the principal's discretion and direction. In every case in every year, the vice principal did not perform all tasks in the job description. The principal has total authority to structure the duties of and emphases by the vice principal.

At the beginning of the year, some accommodations were made for the incoming vice principal because he was from outside the district and did not know the routines of the school. The principal, in fact, assumed some of the former vice principal's duties. The intern was expected to cycle through all administrative responsibilities and he did so. The principal and intern helped the new vice principal with cafeteria duty at first, but by the end of the year the responsibility was completely his.

The intern was quite active in cocurricular activities but gave little if any help to the vice principal in the area of athletics. Discipline and attendance remained the responsibilities of the vice principal and he became more involved in these as the year went on and problems grew.

The principal testified concerning the memorandums designated J-14 through J-35. Exhibit J-14 having to do with supervisory duties at extracurricular activities would generally be a vice principal's job. This, however, is not a major task. Exhibit J-15 deals with fire drills. The Fire Marshal became more involved than in prior years. She assigned the intern to create a new evacuation plan. Exhibit J-16 deals with upgrading of curriculum and is an area she had specifically assigned to the intern. Now that the intern is gone, these duties would fall on the vice principal or herself. Exhibit J-17 deals with nursing coverage. Although the memo went out under the administrative intern's name,

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

she made up the schedule and had the intern reproduce and distribute it. Exhibit J-18 deals with field trips and is strictly routine. Actually, a secretary sets up transportation, not a vice principal. Exhibit J-19 concerns assemblies. The intern was assigned responsibility for lighting, but entry to, control of and exit from the assembly was the vice principal's job. Exhibit J-20 deals with supervisory duties and is a routine clerical job that she delegated to the intern. Exhibit J-21 deals with assembly supervision and she assigned some duties in this area to the intern. The same is true of exhibits J-22 and J-23. Exhibit J-24 deals with chaperoning at special events. It was done at her direction. Exhibit J-25 again deals with assemblies and illustrates an innovation of the intern's. Exhibit J-26 deals with an extracurricular council that the intern had originated. Exhibit J-27 concerns a pep rally. In prior years, this would have been a vice principal and athletic director joint responsibility. The intern was involved here to give him experience in the area. However, he worked with the vice principal and not alone. Exhibit J-28 again deals with the extracurricular council. Exhibit J-29 is merely an assembly information flier. Exhibit J-30 deals with expected behavior at a holiday concert. Exhibit J-31 deals with a pep rally and again, the intern worked with the vice principal. Exhibit J-32 is a report of the intern to staff concerning fire drills. Exhibit J-33 is simply an assembly announcement. Exhibit J-34 concerns search volunteers in the case of bomb threats. All school administrators were involved. The vice principal and intern jointly issued the memorandum. Exhibit J-35 simply announces a fire drill.

None of these show the intern doing any of the major functions of the vice principal. The principal deliberately did not give such responsibilities to the intern for two reasons. She knew she would only have the intern for a year and the superintendent did not want the intern to become indispensable.

The principal emphasized that the intern never observed staff as the vice principal had. The intern never supplanted the vice principal. He served as an intern to her and to the vice principal. The vice principal's responsibilities increased as the year went on.

The reorganization was not undertaken to "get" Miller or anyone else. As a result of the reorganization, at least three other supervisors were returned to classroom teaching duties.

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

In the present school year, the principal has looked at her needs and at teachers' schedules. She is, in effect, using some teachers as helpers on specific tasks. The vice principal has full responsibility for fire drills. The principal herself is doing the safety audit. The principal had requested continuation of the intern position but has been told that the position will not be continued. In September and October of the 1985-86 school year, she directed the new vice principal to concentrate on athletics. As the year went on, he spent less time on athletics and more on the other duties the principal described in her testimony.

PETITIONER'S ARGUMENTS

The petitioner argues that he is not time barred from bringing this action. The new vice principal and athletic director commenced employment on or about September 1, 1985. The petitioner did not have actual or constructive notice until late February or early March 1986 that the vice principal was performing substantially the duties previously performed by him. He filed his petition on April 23, 1986 and complied with the 90-day rule. Because he was assigned as a teacher at another school, the petitioner did not have the advantage of observing the day-to-day duties being performed by the new vice principal.

The petitioner was informed in late December 1985 or January 1986 that he should look into what duties were being performed by the new vice principal. When he ascertained in late February or early March 1986 that the new vice principal had substantially assumed his former position, the petitioner immediately contacted the superintendent and arranged a meeting. The petitioner testified that the meeting occurred in late March 1986. When the superintendent refused to recommend reinstatement, petitioner contacted the president of the Board. When this conversation proved unproductive, the petitioner filed this action on April 23, 1986, well within 90 days of the time he first had knowledge that his tenured position was being occupied by another.

The petitioner also asserts that he does not need to apply for a position to which he has tenure entitlement. The Board seems to argue that because the petitioner did not apply for the position of Supervisor of Physical Education, Health and Athletics/Vice Principal, he has waived his right to the position. In Camilli v. Northern Highlands Reg'l

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

Bd. of Ed., OAL DKT. EDU 5752-84 (Nov. 14, 1984), mod. Comm'r of Ed. (Jan. 3, 1985), aff'd St. Bd. (May 1, 1985), the issue was addressed. The Commissioner stated:

> The Board is in error when it argues petitioner waived his seniority rights to the physics position because he failed to apply for the position in March 1984. A tenured staff member who is subjected to a reduction in force is under no obligation to apply for a position to which he or she has entitlement by virtue of seniority. It is the responsibility of the Board to review its eligible staff to assure that no tenured employee has entitlement to a position prior to determining a vacancy exists that a non-tenured individual may fill. Slip opinion at 9.

The petitioner claims the Board has committed the same error here. The petitioner is entitled to the position of Supervisor of Physical Education, Health and Athletics/Vice Principal. He performed the duties from September 1, 1979 - June 30, 1985. The Board should not have filled the vacancy with a non-tenured person without first offering the position to the petitioner.

The petitioner is entitled by tenure to the position. It is uncontroverted that he was tenured as the Supervisor of Physical Education, Health and Athletics. The issue is whether the Board abused its authority granted by N.J.S.A. 18A:28-9 by removing the petition from his tenured position and assigning his position to a non-tenured person.

The State Board of Education has addressed this issue. In Capodilupo v. W. Orange Bd. of Ed., OAL DKT. EDU 3814-84 (Mar. 19, 1985), rev'd Comm'r of Ed. (May 3, 1985), mod. St. Bd. (Sep. 3, 1986), the State Board determined:

> We first emphasize that although boards of education have great discretion when acting pursuant to N.J.S.A. 18A:28-9, that discretion is not without limits. The tenure provisions of the school laws are important expressions of legislative policy and the rights they confer are accorded vigerous [sic] protection. Viemeister v. Prospect Park Board of Education, 5 N.J. [Super.] 215 (App. Div. 1979). Because reductions in force often necessarily implicate tenure rights, the decision-making process and its consequences are closely scrutinized whenever an allegation is made that tenure rights have been impermissibly compromised by board action taken pursuant to N.J.S.A. 18A:28-9. Vogel v. Board of Education of the Borough of Ridgefield, decided by the State Board, June 5, 1985. Slip opinion at 14.

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

. . .

In Valinski v. Board of Education of the Borough of Garwood, we again were called upon to balance the policies reflected in two statutes [N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-9]. Valinski v. Board of Education of the Brough of Garwood, decided by Commissioner, March 11, 1985, rev'd by the State Board, November 8, 1985, appeal dismissed, Docket #A-0738-85T1 (App. Div. March 6, 1985). In that case, the board reduced two physical education teaching positions at the elementary level from full-time to four-fifths time. One position was held by Ms. Valinski, a tenured teacher, the other by a non-tenured teacher. Ms. Valinski asserted that her tenure rights were improperly abridged by the board's in reducing her position while retaining a non-tenured teacher to teach classes that she was qualified to teach and to which she could have been assigned without any adjustment in pupils schedules.

In considering this case, the State Board concluded that, because of the measure of security afforded to tenured teachers by the tenure statute, a board of education has an obligation to attempt to acknowledge an affected teacher's tenure rights when it exercises is [sic] discretionary authority under N.J.S.A. 18A:28-9. Such obligation encompasses the duty to attempt to assign the affected teacher to courses assigned to non-tenured teachers before reducing his position from full-time. We found that this resolution permits boards to achieve their desired result without impairing the underlying purposes of the tenure law in cases where the board does not have an educational policy for retaining the non-tenured teacher and full-time assignment of the tenure teacher would not affect pupil schedules. Since the record demonstrated that the board in Valinsky could have retained Ms. Valinsky full-time without any disruption to pupils schedules, and since the board failed to put forth any justification for reducing her position while retaining a non-tenure teacher, we held that the board had failed to fulfill its obligation to attempt to acknoweledge Ms. Valinsky's tenure rights. Slip opinion at 17-18.

On page 20, the State Board set forth the test to be used:

We recognize that N.J.S.A. 18A:28-5 was intended to confer some measure of security on tenured staff members. However, the requirement that district boards attempt to acknowledge the tenure rights of affected teachers when effectuating a reduction in force does not infringe upon the board's ability to make determinations that are in the best educational interests of the students. We therefore reaffirm our conclusion that where a board validly determines that a reduction in force is necessary, it has an obligation to attempt to recognize the tenure rights of the teacher affected by the reduction. This

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

> obligation does include consideration of the reassignment of the affected teacher to assignments filled by non-tenure teachers for which he is qualified, but which are in categories in which he has no seniority.
>
> We, however, hold that the board has fullfilled this obligation where it provides sound educationally based reasons for its decision to retain a non-tenured teacher, and we will uphold the propriety of the board's decision unless the petitioning teacher has shown that the board's reasons were pretextual. We find that this standard properly recognizes the discretion of local boards when acting pursuant to N.J.S.A. 18A:29-9 while properly accommodating the tenure rights of affected teachers by ensuring that tenure status is properly considered.

The petitioner argues that applying this test to the present matter shows that he is entitled to the controverted position. He was tenured Supervisor of Physical Education Health and Athletics; the Board created a position of Supervisor of Physical Education, Health and Athletics/Vice Principal which was the petitioner's old position combined with some additional duties; the petitioner is fully certified for the new position, and the Board hired a non-tenured person for the position. Furthermore, it was not necessary under Camilli, above, for the petitioner to apply for the position. In the absence of any sound educational reasons for placing a non-tenured person in the position, the petitioner being tenured and certified should have been so placed.

BOARD'S ARGUMENTS

The Board acknowledges that the petitioner was tenured as Supervisor of Health Athletics and Physical Education. That was one of 13 adminstrative positions, including principal and vice principal, at the high school.

Declining enrollment within the New Providence High School, which had fallen from a high of 4,000 pupils to an anticipated 1985-86 level of approximately 1,600, spurred the Board in its January and February 1985 meetings to reduce its high school administrative staff from 13 to six. Among the new positions was the Supervisor of Physical Education, Athletics and Vice Principal, which combined the position formerly held by the petitioner with the vice principal position held by another incumbent. Several other posts were combined.

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

The position was posted in January and reposted in the early spring of 1985. On May 2, 1985, the petitioner wrote to the Board indicating that he had reviewed the job description for the new position and declined to apply for it. He went on to state that if the duties diminished, "I will exercise my legal right to that position based upon my seniority and tenure." On April 23, 1986, some 11 months later, the present petition was filed.

First, the Board renews its argument that the petition is untimely. Even assuming arguendo that the "notice of the final order, ruling or other action by the district board of education" pursuant to N.J.A.C. 6:24-1.2(b) dates not from the January 24, 1985 meeting at which the reorganization was approved, but at some later date, the Board submits that on May 2, 1985, the petitioner knew what the job description of the new position was, and, further, was aware of the placement in the high school of the administrative intern. Even further assuming that the May 2, 1985 date was somehow insufficient, the petitioner by his own testmony admitted that in the fall of 1985 he had a meeting with another teacher in which he was told that Mr. Van Eyk was doing his duties and that the intern was functioning as vice principal. Certainly, without admitting the truth of this conclusion, the Board again urges that the petitioner, by waiting until April 23, 1986, to file the present petition simply allowed the limitations established by N.J.A.C. 6:24-1.2(b) to expire.

The petitioner argues that it took him until March 1986 to decide that he was entitled to the vice principalship and that his time for filing the petition should be measured from the date upon which he announced his conclusion to the superintendent and the superintendent declined to accept the petitioner's reasoning. Such a view of the import of the 90-day rule would negate it completely. Any employee could, at any time, announce to his employer that he had now decided that what the Board did months or even years before was in error, demanded be undone and upon denial of the request initiate a petition.

The Commissioner has consistently held that only the most unusual and compelling conditions will permit relaxation of the 90-day rule. Newman v. Spring Lake Heights Bd. of Ed., OAL DKT. EDU 4548-83 (Dec. 1, 1983), adopted Comm'r of Ed. (Jan. 17, 1984). In cases in which the controversy relates to an alleged improper RIF, in which there is a claimed denial of tenure and seniority rights, the Commissioner has timed the

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

running of the 90-day period from the notice to the employee of the salary diminution or from the date on which the Board employed another person in a claimed position. The "unusual conditions" generally have either related to cases where the delay resulted because of reliance on representations made to the employee by the Board or where the employee's attorney had lied to him. Bechtel v. Moorestown Bd. of Ed., 1978 S.L.D. 604. Indeed, in a case in which the employee specifically attempted to measure the 90-day period from the denial of a request for reconsideration, the Commissioner determined that the petition was untimely. Bosner v. Old Bridge Tp. Bd. of Ed., OAL DKT. EDU 7185-83 (Mar. 23, 1984), adopted Comm'r of Ed. (May 10, 1984).

Even if it is assumed that the petition is timely, the Board urges that the petitioner has not demonstrated the action of the Board in refusing to reinstate him to the new position was arbitrary, capricious or unreasonable. There is no argument on the record but that the new incumbent in the position did perform the duties of both the former vice principalship and the former supervisorship of Phyical Education, Athletics and Health. The new position quite properly reflects duties beyond those performed or encompassed within either of the prior positions.

The petitioner seems to argue that the performance by the new incumbent of the athletic director duties somehow leads to the conclusion that the position has remained the same. But it is uncontroverted on the record that the new incumbent also performed the major functions of the previous vice principal in the areas of discipline, attendance and overall control and supervision of the cafeterias.

Perhaps most fundamentally absent from the petitioner's position is any claim that he had ever served in or acquired tenure in the position of vice principal. Thus, the petitioner's argument in the instant petition is not that he had an entitlement to the position as it existed after the reorganization by the Board but rather that the position was not, in fact, altered. The only evidence the petitioner has placed in the record in support of this allegation is the series of documents and memoranda noted as exhibits J-14 through J-35. These are a series of memoranda dealing with various matters over the signature of Richard C. Siegel, who was the administrative intern during the 1985-86 school year.

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

The testimony of the high school principal was that Siegel was assigned to assist both her and the vice principal in the performance of a number of administrtive duties and tasks including, but not limited to, fire drills, assemblies, pep ralleys and extracurricular activities. A former vice principal, called by the petitioner, testified that those matters were minor and peripheral in the scope of his duties as vice principal.

The position of the Board is that it has a right to abolish and create new supervisory positions so long as the action is taken in good faith and is neither arbitrary, capricious or unreasonable. Where the position is substantially different from that which had previously existed, there is no abuse of the Board's authority. Gonsalves v. S. Orange-Maplewood Bd. of Ed., OAL DKT. EDU 4680-84 (Jan. 10, 1985), adopted Comm'r of Ed. (Feb. 22, 1985).

DISCUSSION AND DETERMINATION

Addressing first the substantive argument, I **FIND:**

1. That the duties of the controverted position, Supervisor of Physical Education and Athletics/Vice Principal, do overlap the duties performed by the petitioner in his former position, Supervisor of Health, Athletics and Physical Education.

2. That the new position, however, encompasses significantly greater duties than the petitioner performed under his former title.

3. The Board, in view of sharply declining enrollments at the high school, properly determined to reduce its high school administrative staff from 13 positions to six.

4. Several persons other than the petitioner were affected by this reorganization.

5. Nothing in the record indicates arbitrariness, caprice or improper motive on the part of the Board in effecting the reorganization.

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

6. The differences between the duties of the controverted position and the petitioner's former position are firmly founded in educational and management considerations.

The findings leave no doubt that the reorganization resulting in the reduction of administrative positions at the high school was rational, based on sound educational theory and effected in good faith.

e parol and documentary evidence show that the new and controverted position is significantly different from the position formerly held by the petitioner. I **FIND** and **CONCLUDE** that they are different positions with different duties to serve both similar and different educational functions. The mere inclusion of some of the petitioner's former duties in the position does not give the petitioner a right to that position. As noted by the administrative law judge in Gonsalvez, above, this is not a situation where only a title has changed.

N.J.S.A. 18A:28-9 states:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

I further **CONCLUDE** that the reorganization effected here lies clearly within the right to reorganize granted to boards by the statute. Because I have already determined that the position formerly held by the petitioner had substantially different duties form the new position, the Board was not obligated under the tenure law or seniority rules to place the petitioner in the new position. In short, the petitioner simply has not made out a case under any of the authorities he cites that would overcome the presumption of correctness that attaches to Board actions within legislatively delegated authority, Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965) aff'd o.b. 46 N.J. 581 (1966), while the Board, on the other hand, has articulated sound educational

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

reasons for its supervisory reorganization and satisfactorily demonostrated that the controverted position differs significantly from the petitioner's former position.

Accordingly, even if the petitioner's action be timely, I **CONCLUDE** that he has failed to carry the burden of persuasion in this matter and that the petition of appeal must be **DISMISSED**. It is so **ORDERED**.

The petition having been dismissed on substantive grounds, it is not necessary to address the procedural arguments of the Board.

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

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

24 NOVEMBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

NOV 25 1986

DATE

Received/Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 1 1986
DATE

Ronald L. Parker /ss
OFFICE OF ADMINISTRATIVE LAW

ds

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

PAUL MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

In his exceptions petitioner also relies on those pertinent parts of the State Board's decision in Capodilupo, supra, as they appear in the initial decision, ante. He contends, however, that the ALJ applied the wrong test in Capodilupo in denying him the relief he is seeking herein. In this regard petitioner excepts to the initial decision as follows:

> ***In applying this test to the matter sub judice, it becomes apparent that petitioner is entitled to the position of Supervisor of Physical Education, Health and Athletics/Vice Principal. The record shows that petitioner was the tenured Supervisor of Physical Education, Health and Athletics, having been employed in that position from September, 1979 to June, 1985. Effective September 1, 1985, respondent created a position of Supervisor of Physical Education, Health and Athletics/Vice Principal which was petitioner's position combined with some additional duties. Petitioner is fully certified for the new position. In place of petitioner, respondent hired a non-tenured person for the position. Respondent's agent, the Superintendent of Schools, testified that no reasons were provided for replacing a tenured teaching staff member, petitioner, with a newly hired, non-tenured person other than that petitioner had not applied for the position. However, the Commissioner in Camilli v. Northern Highlands Regional Board of Education, Com. Dec. January 3, 1985, aff'd State Board of Education, May 1, 1985, has held it was not incumbent upon petitioner to apply for the position. In the

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

> absence of any sound educational reasons, petitioner, being tenured and certified, is entitled to the position of Supervisor of Physical Education, Health and Athletics/Vice Principal.
>
> It is respectfully requested that in accord with the State Board's decision in Capodilupo, supra., petitioner is entitled to the newly reorganized position of Supervisor of Physical Education and Health/Vice Principal. Petitioner respectfully requests that the Commissioner reject the Initial Decision and order respondent to reemploy petitioner in the aforesaid position, with all salary benefits and emoluments, retroactive to September 1, 1985.***
>
> (Petitioner's Exceptions, at p. 4)

Upon review of petitioner's exceptions, the Commissioner does not agree that Capodilupo, supra, is applicable to the factual circumstances giving rise to the matter controverted herein.

While it is undisputed that petitioner had a tenure and seniority claim to his former position of Supervisor of Physical Education and Health/Athletic Director, it is clear that the Board's action of January 24, 1985, in abolishing that position and thereafter combining petitioner's duties under a newly created position of Supervisor of Physical Education and Athletics/Vice Principal (J-5) was consistent with the provisions of N.J.S.A. 18A:28-9 as enunciated by the Commissioner in accordance with the precepts in Gonsalves, supra.

In this regard petitioner has failed to establish that the Board's action complained of herein was not due to declining pupil enrollment or that the duties of the newly created position of Supervisor of Physical Education and Athletics/Vice Principal were essentially the same as the duties he performed in his former position. To the contrary, the testimony of the witnesses reported in the initial decision, as well as the documents in evidence, establishes that while the duties of the two positions controverted herein do overlap, the combined new position of Supervisor of Physical Education and Athletics/Vice Principal encompasses significantly greater duties than petitioner performed in his former title.

In the Commissioner's judgment, petitioner may not rely on Capodilupo, supra, in support of his claim to the newly created position of Supervisor of Physical Education and Athletics/Vice Principal inasmuch as he had never previously performed any of the major duties of vice principal in his former title, nor had he previously acquired tenure in the position of vice principal.

Consequently, without having demonstrated that he has acquired a tenure status as a vice principal, petitioner herein may not seek the same remedy fashioned by the State Board in Capodilupo

You are viewing an archived copy from the New Jersey State Library.
by asserting a tenure claim over the nontenured incumbent currently employed by the Board in the newly created position of Supervisor of Physical Education and Athletics/Vice Principal.

Finally, the Commissioner observes that the ALJ, in denying the Board's Motion to Dismiss this appeal on the grounds that petitioner's claim herein was untimely pursuant to the provisions of N.J.A.C. 6:24-1.2 (90 day rule), was in error. In the Commissioner's judgment the record of this matter clearly establishes that the provisions of N.J.A.C. 6:24-1.2 apply herein.

It is evident that petitioner was aware of the Board's job description adopted in January 1985 for the newly created position of Supervisor of Physical Education, Athletics and Vice Principal (J-3). Support for this conclusion appears in petitioner's memorandum to the Board under date of May 2, 1985 (J-10). However, petitioner's formal challenge to the duties contained in the job description was not made before the Commissioner until April 23, 1986, approximately one year later.

In this regard the Commissioner cannot accept the "wait and see" attitude that petitioner conveyed to the Board on May 2, 1985 (J-10) in attaching any legitimacy to petitioner's argument for failing to comply with the 90 day rule.

Consequently, the Commissioner finds and determines that petitioner's claim herein is subject to the provisions of N.J.A.C. 6:24-1.2 and must also be dismissed on these grounds.

Accordingly, for the reasons set forth above, the initial decision is affirmed in part and reversed in part. Petitioner's tenure claim to the position of Supervisor of Physical Education and Athletics/Vice Principal is deemed to be totally without merit. The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 8, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6809-86
AGENCY DKT. NO. 326-9/86

G.B.C. ON BEHALF OF
J.T.C., A MINOR,
Petitioner,
v.
BOARD OF EDUCATION OF
BOROUGH OF HADDONFIELD,
CAMDEN COUNTY,
Respondent.

G.B.C., petitioner, pro se

Alan R. Schmoll, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: November 17, 1986 Decided: November 25, 1986

BEFORE NAOMI R. DOWER-LABASTILLE, ALJ:

G.B.C. petitioned the Commissioner to reverse the determination of the Board of Education (Board) to deny J.T.C. numerical course credit for an Intermediate Algebra course taken at Camden County College. The matter was transmitted to the Office of Administrative Law (OAL) on October 10, 1986, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

The Commissioner noted upon the transmittal sheet for the case that no answer had been received from the Board and that a motion for default had been filed. The record consists of all the file documents. A prehearing was scheduled for

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

November 25, 1986, and the case was assigned to this administrative law judge (ALJ). Upon a review of the file, I determined to grant the motion for default and so advised counsel for the Board by letter dated November 17, 1986, when I closed the record. It should be noted that the case file does not reflect that Alan R. Schmoll, Esq. actually filed an appearance in the case. The only reason his name has been listed as counsel is that the Commissioner's transmittal service list records him as such. In fact, the petitioner served all papers directly upon the Secretary of the Board, not on the counsel listed by the Commissioner's office. Under these circumstances, if Mr. Schmoll did not represent the Board in this case, he should note in an exception addressed to the Commissioner that the Board should be listed as unrepresented.

Based on the record, I **FIND:**

1. On September 5, 1986, G.B.C. served a copy of a verified petition in this matter upon Beneval Schoelkoff, Secretary of the Board of Education of Haddonfield, in his office.

2. The petition and proof of service was sent to the Commissioner on September 9 and stamped filed on September 25, 1986.

3. On September 26, the Commissioner's office advised G.B.C., with a copy to Alan Schmoll, Esq., that the proof of service was not notarized nor was the secretary's signature provided.

4. On October 6, G.B.C. supplied a notarized proof of service.

5. On September 26, G.B.C. moved for a default and relief and supplied a notarized proof of mailing of the letter requesting default to Beneval Schoelkoff, Secretary of the Board, and to the Commissioner, who transmitted the file and motion to OAL on October 10, 1986.

6. OAL sent a contested case notice to the parties on October 17, 1986.

7. As of November 17, when the ALJ received the file preliminary to a scheduled prehearing, no answer had been filed to either the petition or motion.

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

DISCUSSION AND CONCLUSION

N.J.A.C. 1:1-9.1(a)2 provides that no technical forms of motion are required. The letter/motion requesting default was filed with the Commissioner prior to transmittal of the case and that office so noted that a motion was pending and that the petition had not been answered. N.J.A.C. 6:24-1.4(a) requires that a petition be answered within 20 days. Seventy days have passed since service of the petition. N.J.A.C. 6:24-1.4(d), (e) provides that if answer is not filed, the petition will be transmitted to OAL for proceedings pursuant to N.J.A.C. 1:1-5.1. That rule provides that if a party unreasonably delays joining issue, the ALJ may enter a summary decision either sua sponte or upon motion of the aggrieved party. Petitioner has made such a motion.

N.J.A.C. 1:1-9.2(c) provides that no action be taken for 20 days after filing of a motion (unless the ALJ modifies the time period), and that responsive papers be filed in 10 days. Over 40 days have passed since the petitioner moved for default. After I notified the Board that the record was closed and default would be entered, counsel for the Board argued that the petition was not "perfected" since amended proof of service was not filed until October 6, and that it had no proof of the request for default, although notarized proof of mailing had been filed. The Board does not cite any rule or statute supporting its position that a petition must be "perfected." Indeed all rules are to the contrary. N.J.A.C. 6:24-1.4(e) sets the answer period at 20 days from receipt of service. N.J.A.C. 1:1-7.1 and N.J.A.C. 1:1-7.2 do not provide that a filing is not "perfected" unless service is proved. Even R. 1;5-3 says, "Failure to make proof of service does not affect the validity of the service. In this case service was proved. Insofar as the request for default is concerned, it was not required since I would have entered default suasponte.

The facts in the petition must be assumed to be uncontroverted and I will treat them as such in this discussion. J.T.C. is a junior at Haddonfield High School and has demonstrated superior achievement, especially in mathematics. He wanted to take as many math and other classes as possible, so he successfully completed Intermediate Algebra at Camden County College. The course is a close equivalent of Algebra II which is given at the high school. Apparently, J.T.C.'s grade was quite good and may have a positive affect in his class standing. The high school had previously permitted several students to substitute college for high school credits under an "independent study" policy. The principal, superintendent and finally, the Board itself denied G.T.C. numerical grade

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

credits for the college course on July 31, 1986. The principal remedy requested is the grant of such credit.

G.B.C. also requests that the Board rescind credits allegedly granted to other students in similar circumstances and that the Board be required to adopt and practice policies which guaranty uniform, fair, accurate and prompt responses to parties such as petitioner. In a default summary decision, I **CONCLUDE** it would be improvident to grant relief with respect to the grades of any student who is not before me. Such persons' due process rights would preclude it. Nor will I broaden the remedy to affect any matters not fully addressed in this record.

The remedy of giving J.T.C. numerical credit for Algebra II either directly or as independent study is a very narrow one. This decision has no precedential value whatsoever on the merits since it is granted by default. Insofar as the petition may raise questions concerning Board policies, the Commissioner has full authority to make such independent investigation concerning a Board's conduct and policies as he sees fit. Thus, granting a remedy to J.T.C. by default would not appear to adversely affect the public interest in education. I **CONCLUDE,** pursuant to the rules cited above, that default should be granted.

It is, therefore, **ORDERED** that the Board of Education of Haddonfield grant J.T.C. numerical course credit for Algebra II by entering the subject and the numerical grade received from Camden County College upon his transcript.

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

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

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

November 25, 1986
DATE

NAOMI R. DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

NOV 26 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 2 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ks/ee

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

G.B.C., on behalf of J.T.C., a minor,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law in the form of default judgment granted in favor of petitioner has been reviewed. The Board's exceptions and petitioner's reply thereto, which were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c, are summarized below.

The Board excepts to the recommended decision of the ALJ, requesting that the Commissioner consider the exceptions as either a motion to vacate a default judgment or, alternatively, a motion to reopen the record pursuant to N.J.A.C. 1:1-16.4e. Firstly, the Board contends that the ALJ failed to consider the confusion created by the defective filing of the Petition of Appeal and the good faith belief of the superintendent that an answer was not due until petitioner corrected his filing. Secondly, it contends that even assuming the superintendent's understanding of the legal requirements for filing the petition was technically erroneous, the default judgment should be vacated because of the honest mistake and/or excusable neglect on the part of the Board, the lack of prejudice to petitioner and the existence of a meritorious defense to the claim.

With respect to the first point, the Board argues inter alia, that the ALJ failed to consider the extenuating circumstances surrounding the Board's failure to answer and that she misinterpreted N.J.A.C. 6:24-1.4(e) as being mandatory rather than discretionary. It asserts that had the ALJ exercised discretion before entering the default judgment, she would have found that the Board legitimately believed that no answer was due.

As regards the second point, the Board argues that the interests of justice require that default judgment against the Board be vacated. In support thereof, it cites general rules of New Jersey Practice R. 4:50-1 and Marder v. Realty Construction Co., 84 N.J. Super. 313 (App. Div. 1964) as expressing the standard for vacating a default order, i.e., the presence of mistake, inadvertence, surprise or excusable neglect and a meritorious defense. Further, it emphasizes that the courts have consistently recognized that applications for setting aside default judgments are viewed with great liberality, citing, among other cases, Foster v.

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

New Albany Machine and Tool Co., 63 N.J. Super. 263 (App. Div. 1960).

With respect to the above, the Board reiterates that its nonresponse to the petition can only be characterized as an honest mistake or excusable neglect in that the superintendent, a nonlawyer, honestly believed that since the petition was not perfected, the time limit for the Board's answer did not begin to run and that no culpable or contumacious conduct existed. Moreover, it believes it has a meritorious defense, namely, that its actions in denying J.T.C. grade point average credit for the algebra course was not arbitrary, asserting that it acted consistently with its established practice of only granting graduation or prerequisite credit for courses taken outside of Haddonfield Memorial High School. In support thereof, it refers to the superintendent's affidavit attesting to the fact that grade point average and class ranks are based only on a student's performance in courses taken inside the district; otherwise, the educational process would be tainted "***whereby class rank and grade point average are determined, not by merit, but by the student's ability to find the least demanding correspondence or night school course money can buy." (Board's Exceptions, at p. 12)

In addition, the Board alleges that J.T.C. has been given the same credit other high school students have been given for courses outside the school district, namely, he has been allowed to advance to any math course where Algebra II was a prerequisite. In not allowing him to apply the numerical grade toward his grade point average and class rank, the Board argues that he is being treated as every other student.

Petitioner rejects the arguments advanced by the Board to vacate the default order, submitting a rebuttal to said arguments, as well as an affidavit. More specifically, petitioner urges that the ALJ did, in fact, exercise discretion in reaching the conclusion that default judgment in his favor was warranted and that the granting of such judgment was proper in view of the several opportunities which the Board had for submitting an answer or at least expressing its "confusion" over the procedure. Further, he asserts that the Board sought to exploit any procedural irregularity/technicality to thwart his position.

As regards the Board's argument that interests of justice require vacating the default judgment order, petitioner questions whether the New Jersey Court Rules apply to administrative tribunals insofar as R. 1:1-1 does not include such tribunals and points out that Marder, supra, did not involve an administrative tribunal. He characterizes as incredible any assertion that honest mistake or excusable neglect exists because the superintendent is not an attorney. Further, he rebuts the assertion that no student is allowed to have outside courses credited for grade point average/class standing. He cites a number of specific instances in support thereof.

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

Upon a careful review of the record, including the exceptions and reply exceptions, the Commissioner is in agreement with the ALJ's findings and her analysis with respect to N.J.A.C. 6:24-1.4(a) and those portions of N.J.A.C. 1:1 et seq. pertinent to the filing, service and response to petitions and motions (see initial decision, ante). Further, the Commissioner would ordinarily accept the recommendation to grant default judgment to petitioner because he finds unpersuasive the Board's assertions that the ALJ neglected to consider the "confusion" in its nonresponse or that honest mistake or excusable negligence mitigates such judgment. However, given the circumstances surrounding this case, he cannot in good conscience support the granting of default judgment because a doubt exists that a just result would be reached if he decides to accept the initial decision.

The effect/net result of a decision respecting numerical credit for grade point average purposes is not limited solely to the particular pupil involved in a dispute such as herein. Rather, it impacts on other pupils in the class as well, in that class standing or rank is ultimately affected by the determination. Thus, the Commissioner believes that to achieve a result just to all those impacted requires that the dispute herein not be decided on the basis of default judgment but by way of hearing on the merits of the case. The issue of granting credit for outside courses is not one to be taken lightly. The Commissioner has in a prior case acted to prohibit the inclusion of courses taken outside a district, albeit a private summer school, to arrive at class standing/rank because it was deemed discriminatory against students who could not or did not avail themselves of such courses. Rucker and Andriola v. Board of Education of Kinnelon, 1978 S.L.D. 541, 1979 S.L.D. 91.

While vacation/setting aside of a default judgment is not at issue because the ALJ's decision is a recommendation, not a final order, guidance was found in court decisions such as Marder, supra, in reaching this determination wherein Marder states:

> Generally, a defendant seeking to reopen default judgment must show that the neglect to answer was excusable under the circumstances and that he has a meritorious defense. (citations omitted) (at 318)

Moreover, Foster v. New Albany Machine and Tool Co., 63 N.J. Super. 262 states:

> ***[O]ur courts have held that great liberality should be allowed in opening a judgment which went by default. Any reasonable ground for indulgence is tolerated. Any doubt should be resolved in favor of the application to the end of securing a just result. (at 269-70)

While the Board herein fails to meet the first prong, i.e., excusable neglect, it is the Commissioner's belief that in the interest of securing a just result, the matter should not be decided

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

by default but on the merits of the case as stated above. Therefore, the matter is remanded to the Office of Administrative Law for an expedited hearing on the merits.

This decision is in no way meant to condone the inexcusable negligence of the superintendent in this matter, rather it is intended to assure that no injustice to any pupil results when the district determines class rank/standing if numerical credit were granted to J.T.C. for that purpose.

COMMISSIONER OF EDUCATION

January 9, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 287-87
(EDU 6809-86 ON REMAND)
AGENCY DKT. NO. 326-9/86

G.B.C., ON BEHALF OF
J.T.C., A MINOR,
Petitioner,
v.
BOARD OF EDUCATION OF
BOROUGH OF HADDONFIELD,
CAMDEN COUNTY,
Respondent.

G.B.C., petitioner, pro se

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: June 22, 1987 Decided: June 30, 1987

BEFORE NAOMI LABASTILLE, ALJ:

G.B.C. petitioned the Commissioner to reverse the determination of the Board of Education (Board) to deny his son, J.T.C., grade point average credit for an intermediate algebra course taken at Camden County College. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

New Jersey Is An Equal Opportunity Employer

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

On November 25, 1986, the undersigned granted a motion for default and entry of remedy in OAL DKT. EDU 6809-86. On January 9, 1987, the Commissioner of Education remanded the case to OAL because "a doubt exists that a just result would be reached if he decides to accept the initial decision." (Id. at p. 10.) The Commissioner retransmitted the case and a telephone prehearing was held on March 6, 1987. Subsequent discovery disputes were resolved by telephone conference and the matter was heard May 11, 1987, in Haddonfield. Petitioner requested time to file a memorandum, which was granted. The record closed on June 22, 1987, with receipt of his submission.

The Commissioner expressed his concerns about the issue in this case as follows:

> The effect/net result of a decision respecting numerical credit for grade point average purposes is not limited solely to the particular pupil involved in a dispute such as herein. Rather, it impacts on other pupils in the class as well, in that class standing or rank is ultimately affected by the determination...The issue of granting credit for outside courses is not one to be taken lightly. The Commissioner has in a prior case acted to prohibit the inclusion of courses taken outside a district, albeit a private summer school, to arrive at class standing/rank because it was deemed discriminatory against students who could not or did not avail themselves of such courses. Rucker and Andriola v. Board of Education of Kinnelon, 1978 S.L.D. 541, 1979 S.L.D. 91. (Id. at p. 10.)

PETITIONER'S CASE

Petitioner moved for a continuance at hearing. He had asked for an adjournment shortly prior to hearing, and I determined the matter should be fully addressed on the record at hearing. Petitioner expressed surprise that the Board did not plan to call as a witness Dr. Alfred Arena, former high school principal. On April 24, the Board sent petitioner its witness list, which did not include Arena's name. Petitioner had not subpoenaed Arena and sought time to do so, but his reason was, in essence, that he did not believe the Board's answers in discovery were complete and accurate. Petitioner had asked the Board to report the number of students who received grade point average credit for courses of independent study or courses taken outside the high school, with specifics of the courses and where they were taken.

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

In discovery, I would not permit petitioner or his agents to personally review the files of all the students due to confidentiality rules. I therefore directed the Board to supply the information for years 1981-82 to 1985-86. The Board responded "none" with respect to credits for independent study since such grades were pass/fail and could not be averaged. As to courses taken outside the high school, there were two incidences known to petitioner, but subsequent Board testimony explained that in a rare case, a student could receive course completion credit for graduation or as a prerequisite for a more advanced course for a course taken outside the high school, but the grade would not be included in the average unless the course was taken in an approved summer school. The Board represented (and subsequently presented testimony through its superintendent) that an exhaustive review of records was made by the guidance department. As to the two students named by petitioner, Superintendent Barry Ersek personally reviewed their files.

Petitioner's motion for a continuance was denied because I concluded from the discussion that it proceeded from petitioner's hope that facts could yet be uncovered to support his theory that other students had been granted what his son was denied. Petitioner was most reluctant to believe the information supplied by the Board. The superintendent's testimony reinforced my judgment that the information was accurate and my conclusion that petitioner had no good cause for further delay of the hearing.

Both petitioner and his son testified. J.T.C. is an excellent student. He started his math course continuum late. J.T.C. needed Algebra II as a prerequisite to take Math Analysis in his junior year at the high school as a part of an accelerated math program. He took the course at Camden County College in the summer of 1986, and sought grade point average credit for it. The head of guidance (Bruce Morgan) told him it couldn't be done. He then asked for independent study credit but was told that was inappropriate or not possible. Petitioner wrote to the principal (Dr. Arena) asking for credit on grounds that others had received it. He cited C.W., who he believed received such credit for U.S. History. Grade point average credit was denied, but after taking a proficiency test and extra assistance, J.T.C. was permitted to use the Camden County College course as a prerequisite for Math Analysis.

Much of petitioner's testimony and his post-hearing memorandum concerned his complaints of untimely response, inaccurate information, and lack of assistance from the guidance department and former principal. A second theme was petitioner's allegation that the high school administration discriminates in dissemination of information and

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

"tampers with the Legislative intent" by giving some students credits contrary to law. These contentions are without merit on the facts shown, are not germane to the contested case issue, and will not be further discussed.

Petitioner also contends, post-hearing, that discovery orders were not adhered to. Since no grade point average credit was given to other students, the interrogatory answer as to which staff member participated in granting same is "none." Since the high school records did not reveal any grade point average credit was granted in cases like that of J.T.C., petitioner complains that there is no current historical transcript used which is reliable to determine "changes which may have occurred in a pupil's record." The inference is that perhaps records were changed or that the Board's staff or recordkeeping is inadequate. No reasonable person could reach such a conclusion. The Board's superintendent was fully credible.

FINDINGS OF FACT

1. The intermediate algebra course which J.T.C. took at Camden County College included a total of 40 hours of class instruction (2 hours per day, 4 days per week for 5 weeks). He received a grade of 98.6%.

2. The high school math department head reviewed the Camden syllabus and said it would fill the Algebra II exposure up to the point of conic sections and logarithms. After taking a proficiency test, J.T.C. was given an Algebra II course completion credit so that he could take Math Analysis, for which Algebra II was a prerequisite.

3. Camden County College is not an approved summer school. Approved summer school courses include 120 hours of classroom instruction.

4. J.T.C. erroneously believed he could get grade point average credit for the course because two of his acquaintances (or their parents) said they received it.

5. C.W. did not graduate but was told she would receive course completion credit and graduation credit for U.S. History II (a Rutgers summer course) as a result of an unusual exception and for medical reasons. She

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

did not get grade point average credit and no graduation credit has actually been given because she had not graduated.

6. While initially there may have been some question as to what kind of credit would be given, A.D. received course completion credit for French II taken at a college to fulfill a prerequisite requirement for French III. She did not receive either graduation credit or grade point average credit.

7. Independent study, when approved in advance in accordance with published policy, is permitted to supplement, not replace, courses given in the high school. Independent study earns a pass/fail grade and graduation credit based on time spent, but does not earn grade point average credit.

8. Grade point average credit for out-of-district courses is given only for 120-hour approved summer school courses. The Algebra II course at Haddonfield High included 126 hours of instruction.

9. Haddonfield High School is very academically competitive. Numerical percentage grades are used. Ninety percent of the students go to college, and class rank is very important and may determine college admission.

10. Haddonfield's policy is to try to resist any opportunity to shop for an easy course, to assure integrity of class ranking.

11. Haddonfield once had a district-to-district exchange student agreement with Haddon Township to offer courses in Italian, but student interest was insufficient to proceed with the program.

DISCUSSION AND CONCLUSION

N.J.A.C. 6:27-3.4(a)1 requires that to receive credit for a subject not previously taken in high school, the approved secondary school summer session course

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

must include class instruction for no fewer hours than the minimum required in high school (7,200 minutes or 120 hours for five high school credits). It must be supplemented by regular homework.

N.J.A.C. 6:27-3.4(b)1 provides:

> Credit for work taken in an approved secondary school summer session shall be transferable in the same manner as work taken in any approved secondary school. Credits from unapproved secondary school summer sessions shall not be transferable.

I **CONCLUDE** the Board was precluded by law from granting grade point average credits for J.T.C.'s 40-hour intermediate algebra course in an unapproved summer school.

The Board has not, within recent memory, had a policy or practice to give grade point average credits, except for approved summer school courses or as graduation or course completion credits established pursuant to N.J.A.C. 6:8-7.1(d)1.

There is no question that failure to adhere to the grade point average credit rules and policies would be unfair to the other students in this highly competitive academic environment. The Commissioner has recognized the unfairness of policies which would permit an advantaged student to have private school course credits counted as against those who might be unable to obtain such credits. Rucker and Andriola v. Board of Ed. of Kinnelon, 1978 S.L.D. 541, 1979 S.L.D. 91. The issue seen in this case is of a similar nature. The cited rules seek to protect against such unfairness and must be adhered to.

I **CONCLUDE** that the rules and policies were applied uniformly to all students, and the Board's actions were at no time arbitrary and unreasonable in dealing with and denying petitioner's request for grade point average credit.

It is therefore **ORDERED** that the petition of G.B.C. be dismissed with prejudice.

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

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

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

June 30, 1987
DATE

Naomi LaBastille
NAOMI LABASTILLE, ALJ

Receipt Acknowledged:

JUL 02 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 6 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ks

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

G.B.C., on behalf of J.T.C., a minor,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner is in agreement with the ALJ's recommendation to dismiss with prejudice the Petition of Appeal and he adopts it as the final decision in this matter for the reasons stated in the initial decision.

COMMISSIONER OF EDUCATION

August 10, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5432-85
AGENCY DKT. NO. 244-7/85

TIMOTHY WHITE-STEVENS,
Petitioner,
v.
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Schottland, Rosen, Cavanagh and Uliano, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno and Barger, attorneys)

Record Closed: October 24, 1986 Decided: December 3, 1986

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

STATEMENT OF THE CASE

Petitioner Timothy White-Stevens, a nontenured teaching staff member in the employ of the Board of Education of the Rumson-Fair Haven Regional High School District (Board), alleges that the Board's action to rescind the renewal of his teaching contract for the 1985-86 school year was arbitrary, capricious and unreasonable and, further, that the conduct of a particular member of the Board constitutes an interference with petitioner's contract rights. The Board denies the allegations, asserting that its reasons not to renew petitioner's contract for the 1985-86 school year were legally correct and proper, and seeks dismissal of the Petition of Appeal in its entirety.

New Jersey Is An Equal Opportunity Employer

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

PROCEDURAL HISTORY

The herein matter filed before the Commissioner of Education (Commissioner) was, on August 27, 1985, transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 24, 1985, at the Trenton OAL. The hearing was scheduled for January 28 through 30, 1986, and adjourned for settlement discussions which proved to be unsuccessful. Subsequently, petitioner advanced a Notice of Motion for Partial Summary Judgment, with supporting affidavit and brief, on the applicability of N.J.S.A. 18A:27-10 to the instant matter, seeking the renewal of his 1985-86 contract, or in the alternative, payment by the Board for sixty (60) days salary. The Board opposed petitioner's motion. The last transmittal of brief was received by the undersigned on April 28, 1986, and a Decision on Motion and Order was rendered on May 6, 1986, denying petitioner's application. The matter proceeded to hearing on May 27 and 28, 1986, with the record considered closed upon the receipt of the last memorandum submitted on October 24, 1986.

BACKGROUND FACTS

Based upon the testimonial and documentary evidence proffered by the parties, the following facts are neither controverted nor disputed and, therefore, are hereby adopted as **FINDINGS OF FACT.**

In the spring of 1984, the Board's Superintendent of Schools, John J. Ward, reviewed applications for the position of teacher of Physics for the 1984-85 school year. Petitioner's application was among those reviewed and rejected by the Superintendent for the reasons that petitioner lacked the appropriate New Jersey teacher certification and was not immediately qualified for same. The Superintendent secured a qualified and certified candidate for the Physics position. The individual who accepted the position, however, subsequently advised Ward of her inability to proceed and accept the offer for the 1984-85 school year. As a consequence of the late timing of the prospective teacher's rejection, coupled with the scarcity of qualified Physics teacher candidates, the Superintendent was faced with an emergency situation. He then reviewed petitioner's application again, and having personally known petitioner's family, the Superintendent contacted petitioner to inquire as to his interest and availability for the position.

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

Petitioner conveyed his interest and availability for the position. Petitioner candidly advised the Superintendent that he could only obtain provisional certification for the 1984-85 school year. Moreover, petitioner informed Ward that it would be necessary for petitioner to complete successfully four (4) additional education courses and to teach one full academic year before he could obtain New Jersey certification. Petitioner further advised the Superintendent that he expected to complete all of the necessary requirements by June 30, 1985. Petitioner was offered and accepted a teaching contract for the 1984-85 school year. Petitioner, however, was unable to complete the four required courses by June 30, 1985. Subsequent to his termination by the Board, petitioner was granted a New Jersey teacher certificate in Mathematics and Physical Science in December 1985.

Pursuant to N.J.A.C. 6:3-1.19, petitioner was observed and his teacher performance evaluated on four occasions during the 1984-85 school year. He was in receipt of a summative evaluation dated April 1, 1985. There were no subsequent formal observations or evaluations of petitioner's performance.

The Superintendent was made aware that petitioner would not complete all of the necessary education course work before June 30, 1985, for petitioner's full New Jersey teacher certification. The Superintendent, with this knowledge, advised petitioner that a recommendation would be made to the Board for petitioner's continued employment for the 1985-86 school year. On April 16, 1985, pursuant to the Superintendent's recommendation, the Board voted to offer petitioner a teaching contract for the 1985-86 school year.

On April 19, 1985, petitioner was summoned to a meeting with his immediate supervisor, Louis Mitchell, and Barbara Jean Emery, the then vice-president of the Board, whose son was enrolled in one of petitioner's assigned classes. During the meeting, petitioner's grading procedures were discussed, among other things. The Board vice-president indicated her dissatisfaction with petitioner's reduction of her son's third marking period grade for her son's failure to complete a homework assignment. The supervisor and the Board vice-president requested that petitioner reconsider whether the homework assignment should have been counted to arrive at the third marking period grade for the vice-president's son and others in petitioner's assigned class.

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

On April 22, 1985, the Superintendent attended a meeting at the New Jersey Department of Education where, among other things, teacher certification and employment was discussed. Subsequently, on April 23, 1985, the Superintendent met with petitioner regarding petitioner's future and continued employment with the Board.

On April 25, 1985, the Superintendent again met with petitioner to advise petitioner that Ward had reassessed his prior position and that the Superintendent would recommend to the Board that it rescind its prior action of April 16, 1985, to take action not to renew petitioner's teaching contract for the 1985-86 school year. By way of letter dated April 26, 1985, the Superintendent advised petitioner of a special meeting of the Board to be held on April 30, 1985, at which the Board would reconsider petitioner's contract status. The Board met in special session on April 30, 1985, and took the recommended action not to renew petitioner's contract for the 1985-86 school year.

Subsequent events occurred with respect to the supervisor and the Superintendent with regard to petitioner's third marking period grades; however, these events are not dispositive to the issues under consideration and will not be discussed here. Therefore, this concludes the recital of the Background Facts in this matter.

THE DISPUTED FACTS

Petitioner contends that the intervening events between the Board's offer of a contract for the 1985-86 school year and its action to rescind the contract strongly infer that the denial of his continued employment was based upon petitioner's refusal to change the third marking period grade of the son of the then vice-president of the Board. The Board argues otherwise, contending that the Superintendent was caused to reconsider his recommendation to reemploy petitioner, in the interim, by a closer examination of petitioner's teaching performance together with further consideration of petitioner's lack of full certification for the position of Physics teacher.

There is no dispute that subsequent to the Board's action to reappoint petitioner on April 16, 1985, a meeting was held on April 19, 1985, with petitioner, his immediate supervisor and the then vice-president of the Board in attendance. It is further undisputed that the Board's vice-president was in disagreement with petitioner's grading

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

policy as it specifically impacted upon her son's third marking period grade. Although Louis Mitchell, petitioner's supervisor, and the Board vice-president requested that petitioner reconsider his position with respect to the grade which petitioner gave the Board member's son, petitioner was steadfast and did not alter or modify the third marking period grades. Petitioner was of the belief and opinion that the issue of the third marking period grades had been resolved at the April 19, 1985 meeting.

The record demonstrates that on April 17, 1985, Louis Mitchell addressed a memorandum to petitioner in which the supervisor criticized petitioner's inadequate classroom planning. The supervisor asserted, among other things, that petitioner's classroom presentations were out of context, which led to confusion on the part of the pupils in petitioner's classes. Consequently, Mitchell required petitioner to submit his daily lesson plans to his supervisor at least three times per week (P-17). A copy of Mitchell's April 17, 1985 memorandum to petitioner was forwarded to Superintendent Ward.

The Superintendent testified that during this period in mid-April 1985, he and the Board considered the nonrenewal of the teacher contract of its head football coach. This issue led to the disruption of classes by the school's pupils on at least two occasions. It also resulted in a well-attended public meeting of the Board where, among other things, statements in favor of the coach were presented by pupils, adults and representatives of the New Jersey Education Association. The Superintendent asserted that the head coach issue consumed a considerable amount of his and the Board's time and energies before it was finally resolved. Consequently, details of other pending matters were neither addressed nor given the attention normally afforded before arriving at a decision.

Subsequent to the Board's resolution of the head football coach issue, the Superintendent was in receipt of Mitchell's memorandum concerning petitioner's inadequate classroom plans and performance (P-17). Having considered the criticism of petitioner by Mitchell, the Superintendent requested the Assistant Superintendent to conduct an informal observation of petitioner's classroom to "get a feeling of what was happening in the classroom." The Assistant Superintendent advised petitioner, prior to her visitation, that she was to conduct the observation. The Assistant Superintendent testified that petitioner requested to teach a special lesson during the observation;

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

however, the administrator instructed petitioner that he was to proceed with the lesson he had planned for the day. The Assistant Superintendent testified, among other things, that petitioner's classroom performance lacked evidence of planning for the lesson presented. Following her observation of petitioner's classroom performance, the Assistant Superintendent submitted a negative oral report to the Superintendent.

The Superintendent testified that the combined events of Mitchell's memorandum, the Assistant Superintendent's report of her informal observation and his attendance at the Department of Education concerning teacher certification, caused him to rethink and reconsider petitioner's continued employment with the Board. As a consequence of his doubts about petitioner's performance and full certification, the Superintendent met with petitioner and the Assistant Superintendent on April 23, 1985. There, the Superintendent advised petitioner of his intention to recommend to the Board that it rescind its action which authorized the renewal of petitioner's contract for the 1985-86 school year. At the meeting of April 25, 1985, there was no discussion by the petitioner, the Superintendent or the Assistant Superintendent about the petitioner's meeting with Mitchell and the Board vice-president regarding the third marking period grade issue. On April 26, 1985, the Superintendent conveyed his recommendation to the Board members to rescind petitioner's contract by way of memorandum (R-1) in anticipation of a special Board meeting scheduled for April 30, 1985. The Board met in special session on April 30, 1985, where it accepted the Superintendent's recommendation, among others, and through appropriate action, rescinded petitioner's 1985-86 employment contract.

The Superintendent testified credibly that he was unaware of the April 19, 1985 meeting with petitioner, Mitchell and the then Board vice-president or the topics discussed, until after the Board's April 30, 1985 special meeting. He asserted that neither petitioner, Mitchell nor the Board member had informed or advised him of the grading issue prior to April 30, 1985.

Similarly, the Board vice-president testified credibly that she did not discuss with the Superintendent, prior to or on April 30, 1985, the event or the topics addressed at the April 19, 1985 meeting with petitioner and Mitchell. Nor did she mention the April 19, 1985 meeting or her dissatisfaction with petitioner's grading policies at the April 30, 1985 Board meeting, where the Board voted to rescind petitioner's 1985-86 contract.

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

FINDINGS OF FACT

Having carefully considered the entire record in this matter, including the stenographic transcripts of the proceedings and the documents in evidence and having given fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I make the following findings of fact in addition to those Background Facts set forth hereinbefore.

On April 17, 1985, Louis Mitchell, petitioner's immediate supervisor, addressed a memorandum to petitioner criticizing petitioner's inadequate classroom preparation and planning. A copy of Mitchell's memorandum to petitioner was forwarded to the Superintendent (P-17).

Subsequently, on April 19, 1985, Mitchell called petitioner to a meeting in Mitchell's office with the then Board vice-president in attendance. The Board member and Mitchell expressed their dissatisfaction with petitioner's grading policy with respect to the third marking period, specifically as it impacted upon the Board member's son's grade. Mitchell and the Board member requested that petitioner reconsider his position regarding his grading procedures. Petitioner, however, maintained his position and did not alter his procedure, and allowed the third marking period grades to stand.

Upon receipt of Mitchell's memorandum to petitioner (P-17), the Superintendent requested the Board's Assistant Superintendent to visit immediately and conduct an informal observation of petitioner's classroom. The Assistant Superintendent complied with the Superintendent's request, advising petitioner beforehand that she would visit one of petitioner's classrooms on that day. Petitioner requested the opportunity to conduct a special Physics lesson; however, the Assistant Superintendent directed petitioner to conduct the classroom as he had originally planned. Subsequent to the informal observation, the Assistant Superintendent delivered a negative oral report of petitioner's classroom performance to the Superintendent.

On April 25, 1985, the Superintendent called and conducted a meeting with petitioner and the Assistant Superintendent in attendance. Without any knowledge or information about the April 19, 1985 meeting called by Mitchell with petitioner and the then Board vice-president, or the discussion concerning petitioner's disputed grading

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

procedure, the Superintendent advised petitioner on April 25, 1985, of his intention to recommend that the Board rescind petitioner's 1985-86 teaching contract. The Superintendent based his intended recommendation upon reports of petitioner's performance together with the fact that there was no assurance that petitioner would be granted full certification prior to September 1, 1985.

Between April 19, 1985 and April 30, 1985, the then Board vice-president made no contact with the Superintendent concerning the meeting with Mitchell and petitioner nor the subjects of the discussions which occurred thereat. Nor did the Board vice-president raise the subject of the April 19, 1985 meeting with any Board members, and she specifically refrained from any discussion concerned therewith at the April 30, 1985 special Board meeting, where the Board acted upon the Superintendent's recommendation to rescind petitioner's 1985-86 contract.

I **FIND** the testimony of Superintendent Ward and the then vice-president of the Board to be entirely credible with respect to the April 19, 1985 meeting and the lack of discussion thereto during the interval of that meeting and the special Board meeting held on April 30, 1985. I further **FIND** the testimony of the Superintendent and the Board member to be credible in that no discussion of the April 19, 1985 meeting occurred at the Board's special meeting on April 30, 1985, at which the Board took its official action to rescind petitioner's 1985-86 contract. Renan Realty Corp. v. Community Affairs Dept., 182 N.J. Super. 415, 419 (App. Div. 1981); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).

DISCUSSION AND CONCLUSIONS

In this matter, the petitioner has the affirmative burden to establish, by a preponderance of the credible evidence, the alleged claims asserted against the respondent Board. Petitioner has failed to carry his burden in the instant matter. Rather than produce direct evidence to support his claim that the conduct of the then vice-president of the Board interfered with his contractual rights, petitioner invites this administrative tribunal to infer that the events of and between April 19, 1985 and April 30, 1985, constitute such contractual interference. The record clearly demonstrates that no such inference is warranted. To the contrary, the facts herein establish sufficient credible evidence that the Superintendent was unaware of the April 19, 1985 meeting

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

with petitioner, Mitchell and the Board vice-president prior to the Superintendent's meeting on April 25, 1985, where the Superintendent advised petitioner of his decision to recommend that the Board rescind petitioner's 1985-86 contract. The record further discloses that the Superintendent and the Board were unaware of the April 19, 1985 meeting when it took its action to rescind the contract on April 30, 1985. Petitioner has produced no direct evidence to support his claim; therefore, it must fail.

Accordingly, I **CONCLUDE** that petitioner's charge of interference with his contractual rights by the alleged conduct of a particular Board member is without merit and is hereby **DISMISSED.**

With respect to petitioner's claim that the Board's action to rescind his 1985-86 contract was arbitrary, capricious and/or unreasonable, resort is again given to the facts in this matter. The facts clearly demonstrate that subsequent to the Board's action to renew petitioner's contract on April 16, 1985, events occurred which caused the Superintendent to reassess his position and recommendations concerning petitioner's continued employment. These events included negative reports of petitioner's teaching performance by two administrators, together with the fact that petitioner would not acquire full certification by June 30, 1985. The combined effect of these events caused the Superintendent to advise petitioner, and subsequently the Board, that petitioner was not suitable for continued employment with the school district. Neither this determination by the Superintendent, nor the ultimate decision by the Board to rescind his nontenured teaching contract for the 1985-86 school year, constitutes arbitrary, capricious or unreasonable action.

The Commissioner and the courts of this state have consistently held that teaching staff selection is a broad prerogative of the local boards of education. In Porcelli, et al. v. Titus, et al., 108 N.J. Super. 301, 312 (App. Div. 1969), certif. den. 55 N.J. 310 (1970), the Court said:

> . . . We endorse the principle, as did the Court in Kemp v. Beasley, 389 F.2d. 168, 189 (8th Cir. 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials'. . .

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

Given this broad authority, our courts have upheld determinations of local boards of education where it was said in Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965), that:

> When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.

No such showing of arbitrariness, capriciousness or unreasonableness has affirmatively been demonstrated on this record. Rather, the Superintendent's and Board's determination was grounded upon a considered judgment that the school district would be better served without petitioner in its employ.

Accordingly, I **CONCLUDE** that petitioner's claim that the Board's action to rescind his teaching contract for the 1985-86 school year was arbitrary, capricious and unreasonable is without merit and, therefore, the entire Petition of Appeal is hereby **DISMISSED.**

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

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

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

3 December 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DEC - 4 1986
DATE

Lejman Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 8 1986
DATE

Ronald L. Lamb
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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

TIMOTHY WHITE-STEVENS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. Petitioner's exceptions to the initial decision have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

In his exceptions to the initial decision petitioner argues that, inasmuch as the Board had acted on April 30, 1985 to rescind its earlier determination of April 16, 1985 to reemploy him for the 1985-86 school year, it was the Board's burden of going forward with its reasons for taking such action. In this regard, petitioner maintains that the ALJ erred in placing this burden of proof upon him, notwithstanding the fact that the ultimate burden of proving his allegations against the Board rests with him. Petitioner claims that the Board's explanation for rescinding his employment for the 1985-86 school year as it appears in the record is woefully inadequate. Initially, petitioner points out that the ALJ erred in his Order of May 6, 1985 when he denied his Motion for Partial Summary Judgment in this matter on the grounds that the Board's termination of his employment failed to comply with the provisions of N.J.S.A. 18A:27-10. In this regard, petitioner argues the provisions of N.J.S.A. 18A:27-10 required the Board to give him written notice of its second decision of April 30, 1985 not to reemploy him. He therefore takes issue with that conclusion reached by the ALJ in his Order of May 6, 1985 wherein he determined that the Board was in substantial compliance with the provisions of the above-cited statute by virtue of the fact that he received oral notification of the Board's intent.

Petitioner also maintains that the ALJ ignored the testimony and findings in the record relative to the issue of the upward adjustment made in the grade of a Board member's son after April 30, 1985 without his approval. It is petitioner's contention that the grade change impacted upon the Board's determination on April 30, 1985 to rescind its earlier offer of employment made on April 16, 1985.

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

Petitioner therefore disputes the ALJ's analysis of those events occurring after April 16, 1985 which determined that the Board's action to rescind his employment was not arbitrary, capricious, unreasonable or otherwise illegal.

Petitioner takes exception to the analysis of the three events that occurred between April 16 and April 30, 1985 upon which the ALJ's findings and conclusions are predicated. They are the memo (P-17) dated April 17, 1985 from his supervisor, the informal, unwritten classroom observation made by the assistant superintendent after April 17, 1985 at the request of the superintendent and the Department of Education seminar attended by the superintendent on April 22, 1985.

Petitioner's exceptions read in pertinent part as follows:

> The initial area utilized by the Administrative Law Judge involves the April 17 memo of Louis Mitchell which criticized Petitioner's inadequate classroom preparation and planning (P-17). However, there are several key factors related to this memo, which are not mentioned in the Initial Decision. First, the Superintendent, himself, conceded that he did not read the memo in question as a suggestion that the Board rescind the contract previously offered. Additionally, the Superintendent also testified that it was clear from reading the memo that, although it would be necessary to show improvement in the future, there was no necessity referenced therein to take immediate action to terminate the Petitioner. (IIT-22) In fact, to read the document as requiring immediate action is directly antithetical to the language contained therein. The document requested that the Petitioner show improvement and was delivered to him immediately before the Easter break. By the time school resumed, after the Easter break, he had already been orally notified that he was going to be non-renewed. When was the suggested improvement to be shown? Clearly, the imminency and urgency being ascribed to the April 17 memo, result from hindsight and an interpretation of the language therein which strains the imagination.
>
> The second prong, in the analysis of the Administrative Law Judge, relates to an observation of the Assistant Superintendent (Pages 7 & 8). Due to the importance ascribed to this event in the Initial Decision, it is now critical to analyze all of the relevant factors related to this alleged significant event.

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

It is beyond question, that no written memorialization was ever made of the observation. In fact, there was no discussion of the observation until the hearing in this matter. Strong questions are raised regarding the utilization of the observation in the absence of written documentation to support the conclusions offered many months later. In fact, to accept the oral report, as evidenciary (sic), despite its non-recordation, would appear to fly directly in the face of the appropriate references in the New Jersey Administrative Code.

The effect of this observation becomes even more illusory, after an examination of the Superintendent's testimony that the academic criticisms given to the Petitioner, subject to his non-renewal, were not in any way predicated upon the observation. In fact, the Superintendent conceded that the academic insufficiencies predated the original decision of April 16. Obviously, the observation of the Assistant Superintendent, after April 16, results in the acceptance of the Administrative Law Judge of evidence which is tenuous at best.

The third prong in the analysis involves the conference attended by the Superintendent on April 22. This area also is difficult to understand as substantiating the decision to rescind, when it is closely scrutinized.

The Superintendent conceded that the knowledge he obtained at the seminar and his understanding of the legal status of the Petitioner, was precisely the same after the conference as before. (IIT-40 to IIT-46) Therefore, his understanding of the certification situation was the same on April 16 as on April 30. He further conceded that he was aware that the system would not be penalized had the Petitioner been hired to teach in the upcoming year. (IIT-40) Finally, it is compelling to note that despite the "professed" concern regarding the certification issue, the Superintendent conceded during his testimony, that the Board was currently employing a non-certified teacher, who did not possess even a provisional certificate. His alleged concern over the Petitioner's certification seems to clearly conflict with the decision to employ the non-certificated party referenced herein.

(Petitioner's Exceptions, at pp. 3-5)

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

The Commissioner has reviewed the record in light of those exceptions to the initial decision filed by petitioner.

In the Commissioner's judgment, petitioner's claim to reinstatement to his former teaching position or, in the alternative, that he be compensated 60 days' salary by virtue of the Board's failure to provide him with a written notice of its intention not to reemploy him for the 1985-86 school year is without merit. While it is not disputed that the Board technically violated the provisions of N.J.S.A. 18A:27-10 before it took action to rescind its offer of employment on April 30, 1985, nevertheless the record of this matter reveals that petitioner was personally informed by the Superintendent on April 25 that he had reassessed his prior position regarding petitioner's reemployment for the 1985-86 school year and that he would recommend to the Board that it rescind its earlier offer of employment of April 16 at a special meeting to be held on April 30.

Moreover, petitioner was advised in writing (P-22) on April 26, 1985 that his employment status would be discussed in executive session as he had previously requested.

Petitioner was then advised in writing by the Superintendent on May 1, 1985 that the Board had acted on April 30 to rescind its offer of employment to him. At petitioner's request the Board's reasons for its nonreemployment were given to him in writing by the superintendent on June 10, 1985 (P-19) and he was further advised that he was entitled to an informal appearance before the Board regarding its decision. Consequently, the Commissioner finds and determines that the Board had substantially complied with the provisions of N.J.S.A. 18A:27-10 and that its action shall not be set aside on these grounds.

Similarly, the Commissioner is not persuaded that the facts of this matter present a compelling reason for reversing the Board's action on the grounds that petitioner has carried his burden of proving that the action taken by the Board on April 30 to rescind its offer of employment to him was for any other reasons than those he received in writing on June 10, 1985 (P-19). In this regard, the Commissioner concurs with those findings and conclusions in the initial decision which hold that the superintendent was unaware of the issue of pupil grades which was discussed on April 19, 1985 among petitioner, his supervisor and the Board Vice President, at anytime prior to or during the Board meeting of April 30, 1985. Moreover, the record fails to establish that the Board's decision not to reemploy petitioner was due to any dissatisfaction implied or expressed at the April 30 Board meeting involving the third marking period grades petitioner gave to five pupils, including the Board Vice President's son.

Finally, the Commissioner also finds the testimony of the superintendent credible with respect to his reasons for changing his recommendation to the Board on April 30 regarding petitioner's reemployment. His testimony reads in pertinent part as follows:

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

Q. Now, at the meeting itself on April 30th, I take it that it was a closed session, personnel matter?

A. Yes, it was.

Q. During your discussion with the Board of Education as to regarding Mr. White-Stevens was there any discussion concerning his academic performance?

A. Yes, sir, there was.

Q. Did you expand to an extent on that memorandum?

A. Yes, sir. I did.

Q. Could you tell us in what way?

A. Basically, I told the board that Mr. White-Stevens had had difficulties in a particular area of student control and of communicating, and that we had discussed it with him, and I had discussed it with him the previous day or so, and that Mr. Mitchell had been working with him throughout the year. That as much as had feelings that his performance was not that great, that I, although, I had recommended him, I just felt that I had to say to the Board that this is an opportunity to right a wrong that had occurred in my initial recommendation.

Q. In that memorandum you also discussed the question of certification and in particular the word "probably" is underlined. What is meant by that?

A. I referenced this in this sentence that Mr. White-Steven's will probably be certified, meaning of a standard, of having obtained a standard certification in physical science by September one, but I cannot count on it. I really felt that I couldn't guarantee it and there was no guarantee that Mr. White-Stevens would, in fact, be able to finish or, in fact, finish his program and be properly and fully certified September one.

Q. Did he guarantee you that he would have been finished by September first?

A. No, he did not guarantee me that.

(Tr. II-71-73)

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

Accordingly, upon review of the record in this matter, the Commissioner concurs with the findings and conclusions in the initial decision as supplemented herein.

The Commissioner hereby determines that petitioner's claim that the Board's action of April 30, 1985, to rescind his teaching contract for the 1985-86 school year, was arbitrary, capricious and unreasonable is without merit.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 16, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3704-86
AGENCY DKT. NO. 158-5/86

JOAN R. NOLAN,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

John L. White, Esq., for petitioner (LaBrum & Doak, attorneys)

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

Record Closed: October 28, 1986 Decided: December 11, 1986

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

Joan R. Nolan (petitioner) in a Petition of Appeal filed pro se claims entitlement by way of equivalent qualification under N.J.A.C. 6:11-3.31 to a school business administrator endorsement. Petitioner alleges that the refusal of the State Board of Examiners (Board of Examiners or Board) to issue her that endorsement is arbitrary, capricious and against the weight of the evidence particularly after other applicants, she claims, whose qualifications were equal to or less than hers under N.J.A.C. 6:11-3.31 were issued the very same endorsement. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was scheduled for July 21, 1986. When petitioner advised during the course of that conference she engaged an attorney to

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

represent her interest, the conference was immediately adjourned and the office of her attorney, present counsel of record, was immediately contacted. After resolving scheduling conflicts between and among the attorneys and the undersigned, the prehearing was rescheduled and conducted September 26, 1986. The matter was then scheduled and heard October 27, 1986 at the Office of Administrative Law, Mercerville.

BACKGROUND

The ultimate issue in this case is whether petitioner is qualified to be issued a school business administrator endorsement, an administrative certificate. Prerequisite requirements for the issuance for the endorsement as established by the State Board of Education under its general rulemaking power at N.J.S.A. 18A:4-15 are set forth at N.J.A.C. 6:11-10.10. Among the stated requirements include a bachelor's degree following four years of study at an accredited college, a standard New Jersey instructional certificate and three years teaching experience or business training or experience, and 30 semester hour credits in specific subject areas.

Another State Board of Education rule, N.J.A.C. 6:11-3.23, allows for substitution of alternative educational background and/or experience as a basis for the issuance of endorsements. Petitioner does not possess a bachelor's degree although she does possess the required 30 semester hour credits in specific subject areas. Petitioner does not possess an instructional certificate; she claims her experience as a board secretary together with the academic training she does have is sufficient under this rule for the State Board of Examiners to issue her the school business administrator's endorsement. Having made application to the Board of Examiners under N.J.A.C. 6:11-3.31, petitioner was advised by the Secretary of the Board of Examiners on January 27, 1986 that the Board of Examiners " * * * determined that experience presented was not equivalent to a bachelor's degree" and that by a six to four vote it rejected her request to be issued the endorsement. The Board asserts that as of September 1, 1985, when N.J.A.C. 6:11-3.11 became operative, the school business administrator endorsement may not be issued without a bachelor's degree. The Board asserts petitioner was dilatory in completing her application to it before September 1, 1985 and, consequently, the rule applies to her.

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

BURDEN OF PROOF

Petitioner is assigned the burden of establishing by a preponderance of credible evidence that she is qualified under N.J.A.C. 6:11-10.10, by way of N.J.A.C. 6:11-3.31, to be issued the controverted endorsement and that N.J.A.C. 6:11-3.11 does not apply to her.

PETITIONER'S PROOFS

Petitioner has achieved an associate's degree from Edison State College which represents the accumulation of 60 credits. Petitioner, having attended other colleges including the Burlington and Camden County Community Colleges, Glassboro State College, and Rider College, has accumulated 101 credits towards a baccalaureate degree. It is not clear in this record whether petitioner is matriculated in a particular program at an accredited college or university. In addition to her academic credits, petitioner was employed for nine years as an office and business manager for a printing company, she was a business manager for a real estate school, and she has 13 years experience as a board secretary for New Jersey district boards of education.

On a prior occasion in 1979, petitioner had made unsuccessful application to the Board for issuance of the school business administrator endorsement under the alternative educational background and/or experience rule. Though petitioner was advised of her right of appeal at that time (R-9) there is no evidence that she pursued the matter then. Petitioner next indicated to the Board her intention for having her credentials reviewed for purposes of being issued the endorsement on or about January 30, 1981 (R-10). Nothing further occurred at that time. On or about April 4, 1984, petitioner sought the assistance of Dr. Celeste M. Rorro, of the Department of Education's Bureau of Teacher Certification and who, presently, is Secretary to the Board of Examiners. Dr. Rorro, the record shows, assisted petitioner in 1984 and 1985 regarding the completion of her application packet to the Board of Examiners. Throughout the two years, there was an exchange of communications between petitioner and representatives of the Bureau of Teacher Certification. Petitioner's application package was not completed until sometime in late 1985.

On December 30, 1985, petitioner was advised that that Board of Examiners would consider her application at a public meeting to be held January 23, 1986. Petitioner

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

attended that meeting. Thereafter, petitioner received notification that the Board determined the work experience she presented was not equivalent to a bachelor's degree.

At hearing and over the strenuous objection of the Board of Examiners, petitioner produced the application packets of three other applicants for the school business administrator endorsement who, while not having a bachelor's degree, were issued the endorsement by the Board of Examiners. The applicant who filed the application packet identified as P-4 was issued the school business administrator endorsement by the Board of Examiners on or about March 31, 1983; the applicant who filed the application marked P-5 was issued the school business administrator endorsement by the Board on or about February 21, 1984; and, the applicant who filed the application packet marked P-6 was issued the school business administrator endorsement on or about March 2, 1984.

In addition to her academic credits and work experience, petitioner also submitted to the Board of Examiners for its consideration testimonials of her competency, certificates from participation in various workshops regarding school business, letters of recommedation from colleagues and associates, and other related kinds of information.

Dr. Rorro does not dispute any of the foregoing qualifications presented by petitioner to the Board in support of her application to be issued the endorsement by way of the substitution of alternative educational background and/or experience rule, N.J.A.C. 6:11-3.31. Dr. Rorro admits that the three applicants who submitted application packets P-4, P-5 and P-6, no one of whom possessed a baccalaureate degree, were issued the endorsements in 1983 and 1984. Nevertheless, Dr. Rorro points out that N.J.A.C. 6:11-3.11 was not operative until September 1, 1985. Dr. Rorro explains that through this rule all applicants for certificates and/or endorsements issued by the State Board of Examiners under rules adopted by the State Board of Education must have at a minimum a bachelor's degree. The exception to this general rule is in the area of vocational education which, in the skilled trade areas, relies on practitioners in the field to teach vocational education skilled trade students.

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

DISCUSSION AND CONCLUSION

N.J.A.C. 6:11-3.11, heavily relied upon by the Board of Examiners, is reproduced here in full:

> In addition to meeting other requirements specified in these rules, applicants for teachers certificates must be at least 18 years old, have been graduated from an approved high school or have an equivalent education as determined by the State Board of Examiners and have received a baccalaureate degree from an accredited institution of higher education except in certain vocational fields as indicated in N.J.A.C. 6:11-6.3.

This rule was proposed on or about July 2, 1984, by publication in the New Jersey Register as part of proposed amendments to various rules in subchapters one through eight of Chapter 11, Title 6 of the Administrative Code. 16 N.J.R. 1646(a). The summary of the proposed amendment to the then existing N.J.A.C. 6:11-3 states that the rule as proposed would "* * * eliminate the high school diploma and institute the college degree as the basic academic credential required for certification * * *". The proposed amendement was adopted September 5, 1984. 16 N.J.R. 2788(a). Preamendment, the rule provided in full as follows:

> In addition to meeting other requirements specified in these regulations, applicants for teachers certificates must be at least 18 years old, and have been graduated from an approved high school, or have an equivalent education as determined by the State Board of Examiners.

The term "teachers" in the context of "teachers certificates" is equivalent to teaching staff member as defined at N.J.A.C. 6:11-3.4. There, teaching staff member is defined as

> A member of the professional staff of any district or regional board of education * * * holding office, position or employment of such character that the qualifications, for such office, position or employment, required him or her to hold a valid and effective standard or provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse.

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

A board of education may establish the position of school business administrator pursuant to authority granted at N.J.S.A. 18A:17-14.1 and consistent with State Board rules at N.J.A.C. 6:3-1.18. One who occupies the position of school business administrator is obviously a teaching staff member as defined at N.J.A.C. 6:11-3.4 because employment cannot be had without the possession of a valid school business administrator endorsement.

The present rule, N.J.A.C. 6:3-3.11, is obviously part of the State's initiative in improving the quality of academic preparation of professional personnel in the public schools. No challenge is made here to the validity of the rule as duly promulgated by the State Board of Education. Rather, petitioner essentially says that notwithstanding that rule the subsitution of alternative educational background and/or experience rule at N.J.A.C. 6:11-3.31 should be given greater weight for purposes of her application in the same manner that the applicants who submitted application packets P-4, P-5 and P-6 were given even though they did not possess the bachelor's degree.

The weakness of petitioner's argument regarding the three applicants without a bachelor's degree being issued the school business administrator endorsement is that each had their packets filed long before either the effective or operative date of the amendment to N.J.A.C. 6:11-3.11. In petitioner's case, she renewed the application process for the issuance of the school business administrator endorsement under the substitution of alternative educational background rule in 1981 after having been denied the endorsement in 1979. Between 1981 through 1985, petitioner had not fully completed her application packet. From the evidence in this record, I cannot find fault with the Bureau of Teacher Credentials for any delay in this regard. Even if the Bureau could be seen as having caused some delay, at most the delay was minimal and certainly did not extend through the 1984 and 1985 calendar years.

I **CONCLUDE** N.J.A.C. 6:11-3.11, being more specific on general requirements for all certificates and endorsements to be issued by the Board of Examiners, must be given greater effect than the general rule at N.J.A.C. 6:11-3.31.

Having carefully considered the proofs presented by petitioner and the present rules and regulations of the State Board of Education governing the issuance of endorsements generally and specifically for the school business administrator endorsement, I must **CONCLUDE** that because petitioner does not possess a bachelor's

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

degree she is not qualified for the issuance of a school business administrator endorsement under N.J.A.C. 6:11-10.10. Accordingly, the petition of appeal must be **DISMISSED**.

The Petition of Appeal is **DISMISSED**.

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

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

December 11, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

DEC 12 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 16 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

sc

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

JOAN R. NOLAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions filed by petitioner were untimely pursuant to N.J.A.C. 1:1-16.4 even when overlooking the fact that they were erroneously filed with the Office of Administrative Law.

Upon review of the record, the Commissioner entirely concurs with the conclusions of the ALJ and adopts the initial decision as the final decision in this matter for the reasons expressed therein. He finds the ALJ's analysis thorough, well-reasoned and accurate.

Accordingly, the matter is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

January 16, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2893-86
AGENCY DKT. NO. 98-4/86

ELMA MILWIT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, JERSEY CITY LEARNING CENTER and WILLIAM A. BEEBE, DIRECTOR,
Respondents.

Mary Ann Murphy, Esq., for petitioner (Coyle & VanDorn, attorneys)

William A. Massa, Esq., for respondents

Record Closed: November 3, 1986 Decided: December 1, 1986

BEFORE **ARNOLD SAMUELS**, ALJ:

On April 8, 1986, petitioner, Elma Milwit, filed a petition with the Commissioner of Education contesting the termination of her employment by the respondent, Jersey City Board of Education, as of January 24, 1986. The petitioner alleged that the Board improperly terminated her from the position of full-time Adult Basic Skills Teacher and that she had not been afforded a hearing. She further alleged that a new Adult Basic Skills Teacher had been hired since her termination. The petitioner requested reinstatement, compensation for lost wages and other expenses, attorneys fees and restoration of benefits.

New Jersey Is An Equal Opportunity Employer

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

On April 29, 1986, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on June 16, 1986, and a Prehearing Order was filed, defining the issues, fixing a hearing date and regulating other procedural aspects of the forthcoming hearing. The issues to be decided were listed as follows:

A. Was the respondents' action improper and in violation of the petitioner's rights under the school laws?

B. Was the petitioner tenured in her position?

C. Were any of the petitioner's rights violated even if she was not tenured?

A hearing was held on September 23, 1986 at the Office of Administrative Law in Newark, New Jersey. One exhibit was marked in evidence, P-1, the written notification of termination sent to the petitioner on January 13, 1986. Post-hearing briefs were filed by both parties, and the record closed on November 3, 1986, the date on which the last brief was received.

The petitioner, Elma Milwit, testified that she had been a teacher at the Jersey City Learning Center for almost 16 years. She originally taught general education courses (high school equivalency) and reading. For the last three or four years, she taught basic skills to people whose literacy level was zero through fourth grade. Her classes involved individualized studies for each student, depending on the student's background and need. Ms. Milwit often taught different subjects to each student, plus some reading. Most of her students were adults, and the basic skills training given them by the petitioner was considered to be a supplemental program.

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

Ms. Milwit was scheduled to teach six hours a day, and she was paid only for hours worked. The petitioner was not given any sick days or vacation benefits. She was not a member of a health benefits group, and she paid for her own hospitalization. Ms. Milwit and the other teachers similarly situated did not have pension benefits. They were permitted time off with pay only for five personal days a year.

The petitioner is a college graduate. She holds certifications in general business studies, secondary school, and as a teacher of typewriting. Ms. Milwit obtained her college diploma and teaching certifications not because they were required of her by the school, but because she thought she should have them.

The petitioner is aware that no more than a high school diploma was required for her to hold the position of an Adult Basic Skills Teacher, and she also knows that no certification is required for that position. Furthermore, Ms. Milwit acknowledged that she knows she was not tenured.

The petitioner testified that she was called into the Director's office on January 9, 1986 and told that her employment was being terminated immediately because she was nonproductive. The Director informed her that she was not getting the students out into the advanced level quickly enough. Objecting to that conclusion by the Director, she stated that she was never given any instructions as to how quickly the basic skills students should move up from her level.

On January 14, 1986, Ms. Milwit received a letter from the Director, Dr. Beebe, stating that her employment was being terminated at the conclusion of classes on Friday, January 24, 1986. See Exhibit P-1. The reason stated in the letter for the removal action was the lack of a sufficient number of students in the class over the past four months. The Director also wrote that the number of students served did not justify continuation of the class or of the petitioner's services.

William A. Beebe, Director of the Jersey City Learning Center, testified for the respondent. He stated that the WIN (Work Incentive Program) funding from the

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

Department of Labor ceased in 1974, at which time the school was converted to the Jersey City Learning Center. It is now operated under the auspices of the Office of Adult Education in the State Department of Education. Funding is provided on a per person basis for each student who attends the school. The program is purely supplemental and does not ordinarily culminate in the granting of a diploma. Only basic skills such as language, mathematics and reading are taught, and all teachers are paid on an hourly basis. As of January 1986, six teachers were employed in the Basic Adult Education Program. Courses included Basic English Skills, English as a Second Language and a Cuban Refugee Program. Dr. Beebe testified that the minimum qualification for employment as a teacher is possession of a high school diploma. No teaching certification is required.

When asked to state the reasons for the termination of petitioner's employment, Dr. Beebe said that by January 1986 the number of active students in her class had gone down to two, after beginning with 19 or 20 in October 1985. He also said that there were times when the petitioner would not accept certain students and wanted them out of her class, presumably because they were difficult. He confirmed that the latter situation precipitated his talk with her on January 9, 1986, concerning two students who had been accepted into the program and dismissed by her two days later. He acknowledged that he felt all students were not progressing quickly enough, and he told her that also.

When asked about the teachers who remain in the program, Dr. Beebe testified that only three basic skills teachers remained. One of them has been in the system for approximately 15 years, one for 10 years and the last was employed in 1983.

There are almost no contested facts in this matter, except for Dr. Beebe's statement that in addition to expressing his dissatisfaction with petitioner's performance to her on January 9, 1986, he also informed her at that time that the number of students remaining did not justify her continued employment. The petitioner denied that she had been given full disclosure. Therefore, the foregoing discussion is found to be **FACT**. It is also found to be **FACT** that the petitioner was not tenured (as acknowledged by her attorney in the post-hearing brief), that no certification was required for the

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

subjects taught by petitioner, and that petitioner was not certified in the areas she was teaching. No testimony was given by either party as to whether the petitioner was evaluated at any time, although Ms. Milwit testified that she was never given any instruction or guidance relating to the progress she was expected to make with her students.

N.J.S.A. 18A:27-3.1 requires every board of education to observe and evaluate nontenured teaching staff members at least three times during each school year, but not less than once during each semester, followed by a conference between the teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for correction of the deficiencies and improve professional competence. It is **CONCLUDED** that no such evaluations or conferences were held by respondent for the benefit of the petitioner.

N.J.S.A. 18A:27-3.2 provides that a teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request. Ms. Milwit did not make such a written request. Nevertheless, it is **CONCLUDED** that this requirement was satisfied by the brief letter sent to Ms. Milwit by Dr. Beebe on January 13, 1986. However, it is also **CONCLUDED** that the written notice failed to include all of the reasons for the termination; namely, the Director's dissatisfaction with petitioner's work performance.

N.J.A.C. 6:3-1.20 contains detailed procedures to be followed by the board when it receives a written request from a nontenured teaching staff member for a statement of reasons he or she was not reemployed pursuant to the above statute. No such procedure was followed in petitioner's case, but, as stated above, she did not submit the required written request. See Donaldson v. Board of Education of the City of North Wildwood, Cape May County, 65 N.J. 236 (1974), Hicks v. Board of Education of the Township of Pemberton, Burlington County, 1975 S.L.D. 332.

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

The board has the statutory authority to regulate the conduct and discharge of its employees consistent with the law. N.J.S.A. 18A:11-1. In this case the Board did provide the notice that nontenured teaching staff members are entitled to in connection with their termination, although the notice was incomplete. The statute dealing with observation and evaluation of nontenured teaching staff members, N.J.S.A. 18A:27-3.1, does not provide for the imposition of any sanction for a board's failure to do so in a given case. See Ronald J. Perry v. Board of Education of the River Dell Regional High School, OAL DKT. EDU 188-6/77 (October 25, 1979), adopted Commissioner of Education, December 17, 1979, aff'd State Board of Education, April 8, 1980, aff'd N.J. App. Div., April 8, 1981, A-3476-79 (unreported).

In cases involving terminations of nontenured teachers, a board's discretionary authority is broad. There are no requirements other than those stated above to insulate a teacher from the board's action. It is also well recognized that nontenured employees do not accrue seniority rights. N.J.S.A. 18A:28-10, 12. Lichtman v. Ridgewood Board of Ed., 93 N.J. 362 (1983), Union County Regional High School Bd. of Ed. v. Union County Regional High School Teachers' Association, Inc., 145 N.J. Super. 435 (App. Div. 1976). Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509.

Absent a showing of abuse of the board's discretionary powers, the board's determination is entitled to a presumption of correctness. Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 40 (App. Div. 1962). However, a board may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. Cullum v. North Bergen Board of Education, 15 N.J. 285 (1954). Except for the unexpected and precipitous termination of a teacher who had served continuously for a period of 16 years, the petitioner has not shown that the Board has otherwise acted in an arbitrary, unreasonable, capricious or improper manner. The action was inconsiderate and lacking in decency, but the Board acted within the confines of its discretionary authority.

The petitioner recognizes the difficulties imposed upon her by the above standards relating to nontenured teachers. She bases her plea for relief upon principles of basic fairness and recent developments in New Jersey law relating to doctrines of

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

employment at will. Unfortunately, the tort and contract theories of relief urged by petitioner are not applicable in this forum. The unsympathetic treatment of the petitioner by the Board verges on unfairness, but there is nevertheless no basis in administrative case law to provide a remedy for her.

It is therefore **CONCLUDED** that the petitioner has not shown, by a fair preponderance of the credible evidence, that the Board's action terminating her employment was unjustified or unlawful to the point where it should be overturned.

It is therefore **ORDERED** that the determination of the Board be **AFFIRMED** and the petition **DISMISSED.**

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

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

December 1, 1986
DATE

ARNOLD SAMUELS, ALJ

DEC 3 1986

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 4 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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

ELMA MILWIT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, JERSEY CITY LEARNING CENTER AND WILLIAM A. BEEBE, DIRECTOR, HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

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

Upon a review of the record in this matter, the Commissioner is unable to accept the recommended decision of the ALJ and remands the matter to the Office of Administrative Law for further proceedings pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-16.5(c) for the following reasons.

Petitioner occupied a position entitled "adult basic skills teacher" and was employed by the Jersey City Board in a daytime adult basic skills program, the funding and approval for which emanates from the State Department of Education. Integral to any decision regarding the propriety of the Board's action to terminate petitioner is a determination as to whether petitioner was a teaching staff member as defined by N.J.S.A. 18A:1-1 and whether she was eligible for and attained tenure in such position pursuant to N.J.S.A. 18A:28-5.

While it is abundantly clear from a review of the transcript that the ALJ is cognizant of the fact that Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) is controlling in determining if an individual has attained the legislative status of tenure (Tr. 26) and that there have been a number of school law decisions rendered subsequent to Spiewak that have, in fact, determined the adult education personnel involved in those cases to be tenured (Tr. 26-27), a review of the record fails to reveal that the issue of certification and tenure were adequately addressed by the ALJ. This is so notwithstanding the Board's assertion that only a high school diploma/no teaching certificate was required to teach adult basic skills or that petitioner acknowledged she was nontenured because it was "common knowledge" that adult basic skills teachers were not tenured (Tr. 22-23) or that she did not pursue the issue in her post-hearing brief.

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

N.J.A.C. 6:44-2.3(b) requires that each class unit in adult basic education "***will be conducted by a teacher holding a valid New Jersey teacher's certificate.***" Moreover, to the Commissioner's knowledge, the application and contract approval process for adult basic education programs requires the chief school administrator to submit to the State Department of Education a signed assurance that those instructing in such programs hold a valid New Jersey instructional certificate.

Given the absence of documentary evidence in the record with regard to the precise requirements for teaching adult basic education, the matter is remanded for further hearing to address the following:

(1) What are the specific requirements of the State Department of Education for one to teach in an adult basic education program?

(2) Is petitioner a teaching staff member as defined by N.J.S.A. 18A:1-1?

(3) Has petitioner achieved the legislative status of tenure pursuant to N.J.S.A. 18A:28-5 and Spiewak, supra?

(4) Is Bergen County Vocational Technical Schools Ed'n Assoc. v. Ed. of Ed. of Bergen County Voc-Tech, decided October 3, 1983 applicable to the instant matter?

(5) If petitioner is determined to be tenured, were her rights violated by the Board when terminating her?

Moreover, if petitioner as an adult basic skills teacher is not deemed to be a teaching staff member and/or not tenured, a determination as to the propriety of the Board's action is to be considered anew by the ALJ in that he erroneously analyzed the issue of her termination within the context of N.J.S.A. 18A:27-3.1, 27-3.2 and N.J.A.C. 6:3-1.20. Those statutes and regulations apply strictly to teaching staff members who occupy tenure-eligible positions but who have not as yet achieved the legislative status of tenure. They do not apply to those who are not, by law, teaching staff members and are, therefore, not tenure-eligible.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 20, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5576-85
AGENCY NO. 264-8/85

BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN,

Petitioner

v.

DR. RICHARD E. ONOREVOLE,

Respondent

Joseph J. Ferrara, Esq, for the petitioner
(Krieger, Ferrara, Flynn & Catalina, attorneys)

Joseph E. Connolly, Jr., Esq., for the respondent
(Connolly, Vreeland & Connolly, attorneys)

Record Closed: October 31, 1986 Decided: November 14, 1986

BEFORE **WARD R. YOUNG**, ALJ

The Board of Education of the Township of Weehawken (Board) certified 32 tenure charges of insubordination, conduct unbecoming, and other just causes against its Superintendent of Schools, Dr. Richard E. Onorevole, and filed same with the Commissioner of Education on August 1, 1985, pursuant to N.J.S.A. 18A:6-10 et seq.

Onorevole, who had been suspended by the Board without pay on July 25, 1985, denies the truth of the charges and seeks reinstatement to his position.

New Jersey Is An Equal Opportunity Employer

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

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on September 3, 1985, and initially assigned to the Honorable Timothy N. Tuttle, A.L.J. Counsel for the Board at the time of certification and transmittal was Robert P. Glickman, Esq.

A considerable number of delays were encountered during the early months of this litigation which were caused by numerous motions filed by each party on procedural matters which need not be detailed here. However, one such motion bears mention. Respondent sought the discharge of Mr. Glickman as counsel for the Board due to a conflict of interest, which was denied by Judge Tuttle and appealed. The Appellate Division reversed. Judge Tuttle granted a stay of the instant matter until March 31, 1986, pending an appeal to the Supreme Court of New Jersey.

The Board substituted Mr. Ferrara as its counsel and the Office of Administrative of Law was notified of same on January 24, 1986. Judge Tuttle resigned as an Administrative Law Judge and the matter was then assigned to the undersigned on March 4, 1986.

A supplemental prehearing conference was then held on March 19, 1986, at which most procedural motions were resolved and the matter was set down for hearing.

Thirty-six days of hearing began on April 7, 1986 and concluded on August 21, 1986. Seventeen witnesses testified on the Board's case and 31 witnesses testified on respondent's case. Ten witnesses also testified in rebuttal by the Board and four witnesses testified on rebuttal by the respondent.

One hundred eight "P" exhibits were marked for the Board, 89 of which were admitted as evidentiary documents. (The remaining 19 exhibits marked for identification were not submitted as evidentiary documents.)

One hundred forty "R" exhibits were marked for respondent, 128 of which were admitted as evidentiary documents. (Eleven of the remaining exhibits were marked for identification but not submitted, and one exhibit was rejected.)

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

Posthearing briefs were filed by the parties and the record closed on October 31, 1986, upon receipt of the Board's reply brief after a request for a short extension was granted due to the extensive record.

The 32 charges will be addressed seriatim, and the testimonial and documentary evidence relevant to the positions of the parties shall be discussed.

CHARGE #1

ON APRIL 25, 1985, AN ACADEMIC AWARDS DINNER WAS HELD IN THE DISTRICT TO RECOGNIZE THE ACADEMIC ACHIEVEMENTS OF STUDENTS WHICH WAS ATTENDED BY APPROXIMATELY 300 PEOPLE. DR. RICHARD ONOREVOLE WAS NOTIFIED AND WAS EXPECTED TO BE THERE AS PART OF HIS DUTIES AS SUPERINTENDENT. HE WAS TO BE THE OPENING SPEAKER AT THE DINNER. DR. ONOREVOLE FAILED TO AND REFUSED TO APPEAR AT THE ACADEMIC AWARDS DINNER WITHOUT TIMELY NOTIFYING THE BOARD AND WITHOUT ANY VALID REASON.

CHARGE #2

ON SATURDAY, APRIL 27, 1985, AT A SPECIAL SESSION OF THE BOARD OF EDUCATION, THE SUPERINTENDENT FAILED TO APPEAR FOR HIS ANNUAL EVALUATION, AFTER BEING NOTIFIED BOTH BY PHONE CALL AND IN WRITING TO SO APPEAR. THE ANNUAL EVALUATION PROCEEDED WITHOUT THE SUPERINTENDENT WHO DEFIANTLY AND IN DISREGARD OF A BOARD DIRECTIVE AND POLICY FAILED TO AND REFUSED TO SO APPEAR WITHOUT ANY VALID REASON.

Charges #1 and #2 are being addressed together because of the commonality of the charges and the proximity of dates.

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

Onorevole stipulates that he was absent from both the awards dinner on April 25, 1985, and the special meeting of the Board on April 27, 1985. Concerning his absenteeism on those occasions, I **FIND** that the charges are **TRUE**. However, since the sufficiency of all charges found to be true and the evidence in support of same must be weighed to determine if dismissal or a reduction in salary is warranted, circumstances and findings related to the charges shall be incorporated herein.

The high school principal testified that he was in charge of the awards dinner and that Onorevole notified him that he would be absent from the dinner (Tr. II, 11). He also testified that there was no obligation that an invited participant notify any Board member that he would be absent (Tr. II, 26, 49) and that he had hand-delivered the dinner invitation to Onorevole. On cross-examination of the principal on rebuttal, he testified that he left the invitation on the counter of Onorevole's outer office.

Board member Camerlengo, who was also Board President at the time of the incidents, testified that attendance of the Superintendent at school functions is required by board policy, evidence of which was not submitted, and that only extenuating circumstances could provide an excuse for absenteeism (Tr. IV, 7). He also testified that he requested in writing an explanation from Onorevole for his absence (P-2) and that he had received a response (P-3).

Patricia Sasoonian, who is the secretary in the Superintendent's office, testified that she typed a letter to Camerlengo dated April 18, 1985, advising him of the birth of Onorevole's granddaughter and the death of his brother-in-law. She testified further that the letter and copies of same were delivered to Camerlengo and all Board members, the two events were common knowledge in the building and Board members McLellan, Rutigliano and Atallo were in the building often, Atallo on a daily basis (Tr. XVI, 21-23).

Onorevole testified that he did not attend the dinner due to a family emergency. He also testified that he called Olivieri early on the afternoon of April 25 to advise of the possibility of his absence and that he called Olivieri at about 4:00 p.m. to advise of his impending absence from the dinner (Tr. XXV, 11). He testified further that his decision to be absent was made after receiving a call from his wife who was upset concerning the

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

condition of her 81-year-old mother, who was traumatized by the death of her son. He did not notify Board members because he was under no obligation to do so.

A review of the evidentiary documents reveals that Camerlengo requested an explanation from Onorevole for his absence from the dinner (and also from adult program supervisory duties following the dinner). See, P-2. Onorevole responded and reiterated his family problem. See, P-3. See also, R-126, a daily log kept by the Superintendent pursuant to a Board directive. See also, R-1, the April 18 letter to Camerlengo.

Concerning that segment of Charge #1 that Onorevole failed to appear at the dinner "without timely notifying the Board and without any valid reason," I FIND that Onorevole notified Olivieri even though he had no obligation to provide notice to the Board members, and I further FIND that Onorevole had a valid reason for his absence from the dinner.

Charge #2 concerns Onorevole's absence from a special Board meeting on Saturday, April 27, 1985, two days following the Charge #1 issue regarding the April 25 dinner.

Board member Atallo testified that he was not notified of Onorevole's absence at the April 27 meeting prior to the meeting (Tr. II, 94), and that the Onorevole's self-evaluation was submitted after April 27 (Tr. II, 103). Atallo also testified that Onorevole's self-evaluation was considered by the Board but accorded little merit by him (Tr. II, 104), and that the April 27 meeting was the Board's offer to Onorevole for a summary conference.

Board President Camerlengo testified on direct examination that he received no call from Onorevole prior to April 27 concerning his anticipated absence and that he received the April 25 letter from Onorevole on April 29 (R-2) (Tr. IV, 12). Camerlengo testified further that Onorevole had disregarded a June 14, 1984 Board resolution (P-6), by not seeking Board approval for his attendance at a library conference in Atlantic City on April 27. On cross-examination, Camerlengo testified that he may not have received R-2 on April 29 and that only Onorevole was required to keep a daily diary or log (Tr. IV, 35-36). Camerlengo also testified that the library conference was not a Board function and

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

that he was aware of the April 30 evaluation deadline in the 1983-84 school year, but was not aware of same during the 1984-85 school year until he was reminded of it by another Board member on April 9 (Tr. IV, 39-40).

Board member McLellan testified that he was aware that Onorevole responded to the Board's notice of the April 27 meeting and that Onorevole would be absent as Camerlengo had so advised him on April 26 (Tr. V, 29, 32). McLellan also testified that Onorevole's response (R-2) was hand-delivered to him, that he was unsure as to whether he saw Onorevole's self-evaluation and that the Board completed and adopted the evaluation of Onorevole at its April 27 meeting. He testified further that there was no summary conference held with the Superintendent. On redirect, McLellan testified that the Onorevole call to Camerlengo occurred after April 27 (Tr. VII, 152).

Board member Pizzuta testified that he was not present at the April 27 meeting and was not a member of the Superintendent's evaluation committee (Tr. X, 98-99).

Board Secretary Drozdowski testified that he had no recollection of receiving R-2 at any time and was not aware of Onorevole's absence on April 27 until the meeting occurred (Tr. XXXIV, 56).

Onorevole testified that he received the notice of the April 27 meeting from Camerlengo on April 23 (P-8), and that he received the official notice of the meeting on April 25 (P-7). He also testified that he called Camerlengo on April 25 to advise him of his anticipated absence (Camerlengo was in conference and did not return his call) and he advised Camerlengo in writing of a personal-day absence on April 26 (R-84) and his anticipated absence from the April 27 meeting (R-2) (Tr. XXI, 47). He testified further that he had both R-2 and R-84 delivered to Camerlengo on April 25 by the courier whose name is Ruppert, that R-2 was delivered by Ruppert to all Board members on that same date (Tr. XXI, 48), that he received a Camerlengo memo dated April 29 asking him to provide an explanation for his April 25 absence (P-72), and that he responded with a memo dated May 2 (P-73). Neither P-72 nor P-73 are otherwise in evidence.

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

A review of the evidentiary documents necessitates the reproduction of P-6, the Board resolution adopted on June 14, 1984, due to the Board's contention that Onorevole's absence on April 27, (T IV - 194) was "defiantly and in disregard of a Board directive and policy. . . .":

> WHEREAS, the Weehawken Board of Education consistently seeks to improve the quality of education for its students, and recognizes the need for accountability of its staff; therefore
>
> BE IT RESOLVED, that the Superintendent is henceforth directed, on adoption of this Resolution, to:
>
> (1) Daily record his arrival and departure at and from the district office; further, he is to maintain a daily sheet as to activities engaged in and amount of time spent on same;
>
> (2) Record departure and return times for those absences necessitating his personal attendance, noting destination and reason for absence;
>
> (3) Delegate a subordinate on those occasions where the Superintendent's personal attendance is not essential;
>
> (4) Advise the President or, in his absence, the Vice President, in writing, and, on forty-eight hours notice, of any anticipated absence away from the district, noting destination, reasons for absence and name of Acting Superintendent;
>
> (5) Advise the Board in writing, of any contemplated attendance at seminars, conventions etc. necessitating absence exceeding twenty-four hours, and stating reasons for need to personally attend. This notice should be given at the earliest practicable time but no later than the preceding regular monthly meeting. Approval of same shall be at the discretion of the Board, and not arbitrarily withheld; and
>
> BE IT FURTHER RESOLVED, that the aforesaid shall be recorded in a permanent type diary to remain in the custody and control of the Secretary of the Board, and made available for inspection by any member of the Board on request. This diary will be maintained on a weekly basis and the weekly reporting will be finalized not later than the Monday following the Friday of the preceding week's activities.

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

The deposition of Board member McLellan reveals that he testified under oath that a summary conference was held with the Superintendent in 1985, two to three weeks prior to the Board's evaluation on April 27, and that it was necessary for Onorevole to be present on April 27, "if he had anything further to say. . . ."

The annual evaluation of the Superintendent was adopted by the Board at its April 27 special meeting (R-34).

Onorevole advised the Board in a letter dated May 10 of procedural defects in the evaluation process which he alleged are in violation of N.J.A.C. 6:3-1.22 and N.J.A.C. 6:8-3.4 (R-60).

The Visa receipt and billing from Resorts International indicates that Onorevole was in Atlantic City on April 26, that he remained overnight and that he checked out of the hotel on April 27 (R-83).

Onorevole notified Camerlengo with a memo dated April 25 that he would be taking a personal day on April 26, and that Mr. Karabin would serve as Acting Superintendent for the day (R-84).

The Superintendent's diary, pursuant to the Board's resolution incorporated in P-6, reveals that correspondences to Camerlengo identified as R-2 and R-84 were prepared on April 25.

A review of all testimonial and documentary evidence on Charge #2 reveals inconsistencies which require a determination of credibility to establish findings of fact. Atallo testified that Onorevole submitted his self-evaluation after April 27 and the Board considered it although he accorded little merit to it. The Board nevertheless indisputably adopted the evaluation of the Superintendent on April 27.

Camerlengo was not aware of the April 30 deadline for the Board's evaluation of Onorevole in 1985, although he was aware of that deadline date in 1984. He further

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

testified that the library conference attended by Onorevole was not a Board function, but contends P-6 was violated because Onorevole did not advise him of his whereabouts on Saturday, April 27.

McLellan, who in deposition stated that a summary conference was held in 1985, two or three weeks preceding April 27, testified at hearing that no summary conference was held. He further had no recollection of seeing the Onorevole self-evaluation, but the presence of Onorevole on April 27 was requested to see if he had anything else to say before evaluation adoption. Most incredible was McLellan's testimony on redirect, after stating on direct that he was advised of Onorevole's anticipated absence on April 27 by Camerlengo, that the call from Onorevole to Camerlengo to advise him of his absence was made after April 27.

Respondent Onorevole was indeed less than candid with the Board. Because the Board did not offer P-72 and P-73 as evidentiary documents, the record is void of documentary evidence that Onorevole advised the Board regarding the reason for his absence on April 27.

Unanswered questions emanate from a review of the record concerning Charge #2. Contrary to Camerlengo's testimony, the Board was indeed aware of its responsibility to comply with the required evaluation of its Superintendent. Why did it wait until Saturday, April 27, to create an emergent situation? Onorevole received notice of the April 27 meeting from Camerlengo on April 23. Why did he wait until April 25 to notify Camerlengo of his anticipated absence when he knew or should have known of the library conference, and further, why did he not resolve the matter, including his request to reschedule the meeting for April 29, prior to his departure for Atlantic City on April 26? Most perplexing of all, the reasons deemed in Charge #1 to be valid for Onorevole's absence from the awards dinner on April 25 did not appear to deter his departure for Atlantic City on April 26 to attend the library conference.

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

Nevertheless, I adopt the following as **FINDINGS OF FACT** on Charge #2:

1. Charge #2 is true to the extent that Onorevole was absent from the April 27 meeting.

2. The library conference in Atlantic City was not a Board function.

3. The Board knew of Onorevole's anticipated absence at the April 27 meeting, prior to the meeting.

4. P-6 is not applicable for April 26 as a personal-day absence, or for Saturday, April 27, when Onorevole attended a conference as a statutory trustee of the library, and therefore had no obligation to advise the Board of his whereabouts, although it would have been prudent to have done so.

5. As a statutory trustee of the library, Onorevole's attendance at the conference in Atlantic City was a valid reason for his absence from the April 27 special meeting of the Board.

CHARGE #3

THE SUPERINTENDENT WAS APPOINTED BY THE BOARD AS ADMINISTRATOR FOR THE ADULT SCHOOL WHICH MEETS TUESDAY AND THURSDAY NIGHTS AT THE HIGH SCHOOL. AS PART OF THE JOB DUTIES, THE SUPERINTENDENT WAS REQUIRED TO SUPERVISE THE ACTIVITIES AT THE ADULT SCHOOL. ON MARCH 28, 1985, THE SUPERINTENDENT, IN DEFIANCE OF THE BOARD'S POLICIES AND DIRECTIVES, FAILED TO AND REFUSED TO SUPERVISE THE ADULT SCHOOL. ON THAT EVENING, THERE WAS A BOMB SCARE WHICH REQUIRED

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

THE ENTIRE BUILDING TO BE EVACUATED. THE SUPERINTENDENT'S FAILURE TO SUPERVISE THE ADULT SCHOOL ON THAT EVENING WAS EITHER AN INTENTIONAL ACT OR A CARELESS AND NEGLIGENT ONE AND CONSTITUTED AN ACT OF DEFIANCE AND INSUBORDINATION ON HIS PART. HE CREATED A DANGEROUS SITUATION WHICH WOULD HAVE RESULTED IN SERIOUS CONSEQUENCES BY FAILING TO BE THERE.

Onorevole stipulated that he was not present at the Adult School on Thursday night, March 28, 1986, because he opted to attend a library board meeting as a trustee by statute.

Howard Wolf, an elementary principal, testified that he was delegated by Onorevole to represent him at library board meetings. He attended same from 1976 to September 1982 and was relieved as delegate in September 1982 by Onorevole (Tr. IX - 19-20).

It is uncontroverted that Onorevole did not begin to attend library board meetings as a trustee until after the Board acted to appoint him as Director of the Adult School. It is also uncontroverted that following that appointment on September 14, 1982, Onorevole delegated the responsibilities of the position to assistant high school principal Wisniewski in a letter dated September 24, 1982, and advised him that his attendance was required. See, P-13.

The question raised under the issue is whether Onorevole's physical presence at the Adult School when it was in session was mandated by the Board.

Board members Pizzuta (Tr. X, 11) and Ferullo (Tr. XII, 11) testified that it was the Board's intent that Onorevole be physically present at Adult School sessions.

Reference was made to P-10 and P-11, minutes of Board meetings of September 14, 1982 and November 22, 1982, respectively, at which significant resolutions were approved.

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

A careful and thorough review of these resolutions clearly establishes that subsequent to the Board's appointment of Onorevole as Director of the Adult School, mandated physical attendance of Onorevole at the Adult School sessions was not incorporated therein, but P-11 does state the assignment of personal supervision and administration. The November 22 resolution was triggered by Onorevole's delegation of duties to Wisniewski, and paragraph three of that resolution states:

> BE IT RESOLVED, that Item #12 of the current Job Description of the Superintendent of Schools shall be and is now amended to include . . . "Upon the Approval of the Board of Education";

and the undated job description of the Superintendent, P-29 in evidence, states at Item #12: "Delegate to other employees the exercise of powers of the discharge of duties."

Onorevole testified that his physical presence was not required. He testified that the way he handles the supervision of the Adult School is no different than the way he handles his personal responsibilities for the supervision of all programs in the Weehawken schools, wherein his physical presence is a practical impossibility (Tr. XXI, 54-55).

Onorevole also testified that he designated an adult school teacher, Jeannine Carcamo, as a "lead" teacher to call his house if he was needed at the adult school, and someone at home would reach him to transmit the message (T XXI - 53). He also testified that the Adult School met on Tuesday and Thursday, which created conflicts for him not only in regard to library board meetings, but also with meetings of the Board of Education and P.T.A.'s. In those instances, he said, priority number one was Board of Education meetings, and he opted in other conflicts in accordance with the activities scheduled (Tr. XXI, 52).

The unanswered question is why Onorevole required the physical presence of delegate Wisniewski at the Adult School while he believed his own physical presence was not required.

The following are adopted herein as **FINDINGS OF FACT:**

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

1. The Board of Education did not clearly establish that Onorevole was directed to be physically present at Adult School sessions.

2. Onorevole knew that required physical attendance at said sessions was the intent of the Board.

3. Onorevole's newly created interest in personally attending library board meetings beginning in September 1982 was a convenient conflict to rationalize his absence from the Adult School when the library board met.

I **FIND** the charge that Onorevole was absent from the Adult School on March 28, 1985 is true, and further **FIND** that Onorevole's absence from the Adult School on March 28, 1985, was an act of defiance.

CHARGE #4

PRIOR TO APRIL 30, 1985, BOARD MEMBER JOE ATALLO REQUESTED THAT THE SUPERINTENDENT ALLOW HIM TO REVIEW THE PERSONNEL FILES OF ALL NONTENURED TEACHERS TO DETERMINE WHICH NONTENURED TEACHERS WOULD BE REHIRED FOR THE FOLLOWING SCHOOL YEAR. THE SUPERINTENDENT REFUSED TO LET HIM SEE THE FILES STATING THAT "I MAKE THE RECOMMENDATIONS AS TO WHO WILL BE REHIRED." BOARD MEMBER ATALLO INDICATED THAT ALTHOUGH THE SUPERINTENDENT MAKES THE RECOMMENDATIONS, IT IS UP TO THE BOARD TO APPROVE OR DISAPPROVE EACH CONTRACT. BOARD MEMBER ATALLO WAS CHAIRPERSON OF THE PERSONNEL COMMITTEE WHICH WAS AUTHORIZED BY THE BOARD TO REVIEW THE PERSONNEL FILES. THE SUPERINTENDENT'S FAILURE TO COOPERATE AND HIS REFUSAL TO ALLOW THE BOARD COMMITTEE TO REVIEW THE FILES WAS AN ACT OF INSUBORDINATION AND

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

CONSTITUTES CONDUCT UNBECOMING A SUPERINTENDENT. EVENTUALLY, THE SUPERINTENDENT ACCEDED TO LET BOARD MEMBERS ATALLO AND RUTIGLIANO REVIEW THE FILES, BUT ONLY ON THE CONDITION THAT BOARD MEMBER ATALLO SIGN FOR THE PERSONNEL FILES. WHEN REQUESTED, THE SUPERINTENDENT WOULD NOT LEAVE THE BOARD CONFERENCE ROOM. THE SUPERINTENDENT, AFTER BOARD MEMBER ATALLO HAD PERSONALLY SIGNED FOR THE PERSONNEL FILES, TOOK AND REMOVED THE FILES FROM THE BOARD CONFERENCE ROOM, WITHOUT THE PERMISSION OF ANY BOARD MEMBERS, PLACED NOTES IN EACH PERSONNEL FILE INDICATING THAT BOARD MEMBER ATALLO HAD READ THE CONTENTS OF THE FILE AND THEN REFUSED TO RETURN THE FILES TO BOARD MEMBER ATALLO AFTER BEING REQUESTED TO DO SO. IT WAS ONLY AFTER THE SUPERINTENDENT WAS TOLD THAT HE WAS INSUBORDINATE AND THAT HE HAD STOLEN THE PERSONNEL FILES THAT HE RETURNED THEM TO THE BOARD. ALL OF THESE ACTIONS CONSTITUTE INSUBORDINATION, ACTS OF DEFIANCE AND CONDUCT UNBECOMING A SUPERINTENDENT.

Board member Atallo, as co-chairman of the personnel committee, had a memo hand-delivered to the Superintendent's office at 2:00 p.m. on April 15, 1985, requesting that personnel files of all nontenured teachers be brought to the Board conference room by 3:00 p.m. on that same date. See, R-65. Atallo testified that even though file review had been a practice for the preceding five years, Onorevole initially refused to release the files but relented and had Atallo sign for them (Tr. II, 124-129). Atallo also testified that the files were stored in a closet in the Board's secretary's room, that the room was kept locked and that Onorevole absconded with the files the following day. Atallo testified further that he demanded and received the files again from Onorevole on April 16 (Tr. II, 131-134) and transmitted a memo to Onorevole on April 16 demanding a full explanation for his reposssession of the files (P-74). Onorevole did not respond to P-74.

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

On cross-examination, Atallo testified that the Board had not approved a resolution authorizing Atallo's file review (Tr. III, 136), and that he had received and reviewed all nontenured teacher's files without regard to Onorevole's renewal/nonrenewal recommendations (Tr. III, 136-137).

Francis Thalman, who was secretary in the Superintendent's office from July 1979 to November 1983 and who had been secretary in the Office of the School Business Administrator since then, testified that the personnel files were brought into the Board conference room and remained there for at least three days (Tr. XV, 122) and that those personnel files were never reviewed by anyone without the express approval of the Superintendent and only then in the presence of a secretary (Tr. XV, 123-124). She testified that she had no recollection of Board members ever reviewing personnel files without the Superintendent being present.

On cross-examination, Thalman testified that Edith Bonsee, assistant Board secretary, reported for work each day prior to her arrival, that she had no knowledge regarding whether Bonsee may have placed the files on the table and that there were occasions when Board members reviewed personnel files (Tr. XV, 142).

Pat Sasoonian (Tr. XVI, 30) and Jean Diaz (Tr. XVIII, 69), who are both secretaries in the Superintendent's office, testified that they had no recollection of previous reviews of personnel files by Board members, Diaz also testifying that she did not observe Onorevole refuse to provide the files to Atallo (Tr. XVIII, 63).

Onorevole testified that Atallo demanded delivery of the files to the Board's conference room on short notice, and said demand was unusual as it was the first time personnel files were to be removed from the Superintendent's office (see, R-65). He responded with a memo advising Atallo that the Board had not approved a resolution "for any Board member to review the files and have them removed from the Superintendent's office." (R-85). He testified that he offered Atallo the opportunity to review said files in the Superintendent's office; Atallo refused the offer and again demanded delivery of the files to him. Onorevole also testified that he delivered the files as requested between 3:15

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

and 3:30 p.m., but he hesitated in leaving the conference room after delivery of the files (Tr. XXI, 68-69). He testified further that he recovered the files from the conference table the next morning (April 16) and that when Atallo interrupted a conference on April 16 between Onorevole and Board President Camerlengo again demanding the files, Onorevole redelivered the files to the Board conference room (Tr. XXI, 70). Atallo demanded an explanation of Onorevole's conduct in a memo dated April 16 (P-74); Onorevole responded to P-74 with a memo dated April 17 (R-86). The files were eventually returned on May 10 by Board Secretary Drozdowski. See, R-87. Onorevole also testified that he never refused to release the files to Atallo (Tr. XXI, 73).

On cross-examination, Onorevole testified that he picked up the files on April 16 because of his concern for their security (Tr. XXVI, 46). Previous Board personnel committee members had last reviewed personnel files with him in the late 70's or early 80's (Tr. XXVI, 58). Atallo accused Onorevole of absconding with the files on April 16. Onorevole hesitated leaving the files in the conference room on April 15 because it was the first time files were reviewed in his absence, and he wanted to be present to advise Atallo and Rutigliano about the teachers he was and was not recommending for renewal and to answer any questions the Board members might have (Tr. XXVI, 54-55).

Edith Bonsee testified that she locked the files in the closet of the Board conference room at the end of the day on April 15, and removed them from the closet on April 16 and placed them on the conference room table (Tr. XXXIII, 28).

A review of R-87 reveals that the personnel files of 21 nontenured teachers had been delivered to Atallo and returned. A review of the Board agenda for its April 9, 1985 Board meeting reveals that the Superintendent recommended renewal of 11 of these teachers, and nonrenewal of 10.

The following are adopted as **FINDINGS OF FACT:**

1. Onorevole did not refuse to release the personnel files requested by Atallo.

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

2. Onorevole was not insubordinate.

3. Onorevole's behavior did not constitute conduct unbecoming a Superintendent.

4. Onorevole did not steal the files from Atallo's possession.

5. Onorevole did not refuse to redeliver the files to Atallo in the Board conference room.

6. The Board has failed to sustain the truth of Charge #4.

I **FIND** that Charge #4 is untrue.

CHARGE #5

THE SUPERINTENDENT, WITHOUT CONSULTATION WITH THE BOARD, OR WITHOUT DIRECTION FROM THE BOARD, APPOINTED A CITIZENS' ADVISORY COMMITTEE. THIS ACT, ON THE PART OF THE SUPERINTENDENT, WAS AN ATTEMPT TO USURP THE POWERS OF THE BOARD AND HAD NOTHING TO DO WITH HIS FUNCTION AS SUPERINTENDENT OF THE SCHOOLS. AS A RESULT OF HIS ACTIONS, THE BOARD PASSED A RESOLUTION ON DECEMBER 11, 1984 ALLOWING THE APPOINTMENT OF AN ADVISORY COMMITTEE, BUT ONLY FIRST WITH BOARD APPROVAL.

Board member Atallo testified that the Board became aware of meetings of a citizens' advisory committee during the 1984-85 school year and that the Board had not been apprised of the existence of said committee (Tr. II, 145-146). When he sent a memo to Onorevole dated November 26, 1984, seeking a response to seven questions (P-14), Onorevole's response dated November 30, 1984 (R-8), was deemed by Atallo to be

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

unsatisfactory. He sent a follow-up memo to Onorevole dated December 5, 1986 (P-15), demanding a more satisfactory response, and Onorevole responded with a memo dated December 7, 1984 (R-9). Atallo further testified that the Board passed resolutions at its December 11, 1984 meeting which adopted policy relating to citizens' advisory committees (Tr. II, 151), appointed two committees and directed Onorevole (in P-17) "not to attend meetings on Tuesday nights that interfere with his duties as Adult School Director."

On cross-examination, Atallo testified that he had no knowledge of any Board policy prior to December 11, 1984, statute or regulation that prohibited the Superintendent from appointing citizens and staff to an advisory committee (Tr. III, 151-152), and that there was no Board authorization for Atallo to send P-14 and P-15 (Tr. III, 162). Atallo also testified that he believes he has a right as a Board member to send memos to the Superintendent and to require an answer (Tr. III, 162). He testified further that the topic of advisory committees was not an agenda item for the Board's December 11 meeting (R-26) (Tr. III, 165-166)

Board member Pizzuta testified that Onorevole provided the identities of the citizens' advisory committee members at the request of the Board (Tr. X, 18). Pizzuta also testified that there was no rule, regulation, statute or Board policy in effect prior to December 11, 1984, that prohibited the appointment of a citizens' advisory committee by the Superintendent, and that he was aware of the existing adult education advisory committee prior to December 11 (Tr. X, 103-104).

Board President Lorenz testified that he was advised of the existence of a citizens' advisory committee during a phone call from the president of the teachers' union (T XI - 51). Lorenz also testified that personnel matters were being discussed by the committee, and that Onorevole refused to divulge the identities of committee members (T XI - 54, 56). The Board directed Onorevole to abolish his committee at its December 11 meeting, and it established its own committees (Tr. XI, 57).

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

On cross-examination, Lorenz testified that citizens appointed by the Board to its committees on December 11 had been recommended by Board members and various administrators, but the Board had not solicited names prior to the meeting (T XI - 122, 124-126).

Edward J. Lettieri, a former Board member from 1972-1977 and president from 1973-1977, testified that advisory committees functioned during his tenure as a Board member (R-62) and that committees were appointed by the Superintendent (Tr. XV, 8-9). He also testified that he was a member of the committee designed to advise the board regarding district needs (it did not deal with personnel or policy matters), which was abolished by the Board on December 11 (Tr. XV, 18-19). He testified further that he never perceived committee appointments by the Superintendent as a usurpation of the power of the Board (Tr. XV, 21-22).

Francis Thalman, secretary to the Superintendent from 1979-1983, testified that she prepared correspondence to advisory committee members, and automatically transmitted copies of same to the Board Secretary and Board members (Tr. XV, 126). On cross-examination, she recalled the appointment of advisory committees on racial balance and the lunch program (Tr. XV, 145-146).

Dr. Theodore Blumstein, current chief school administrator in Edgewater and former Weehawken Director of Adult/Continuing Education, Curriculum and T. & E. Coordinator from 1976-82, testified that there were many advisory committees during his service in Weehawken, such as T. & E., textbook, and curriculum in all disciplines and that the Board was fully aware of these committees as he was called upon by the Superintendent to make committee status reports to the Board (Tr. XVI, 138-141).

Jean Diaz, who has been employed in Weehawken since 1967 and has been secretary to the Superintendent since 1974, recalled that there were advisory committees on Affirmative Action, Adult School, Title I, and Family Life, and that said committees were appointed by the Superintendent. She reiterated the Thalman testimony concerning copies of correspondence to Board members (Tr. XVIII, 80-81).

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

Pamela Ortiz, a P.T.A. president and member of the disputed committee created by the Superintendent, testified that Board member Rutigliano was present at the first committee meeting on October 23, 1984 (Tr. XXI, 30)

Onorevole testified that he created the disputed committee in the summer and fall of 1984 as a requirement of the Title I application which had been approved by the Board (Tr. XXI, 78), and that he responded to all inquiries of Atallo and the Board (R-8, R-9 and R-88) (Tr. XXI, 80-81).

A review of the school district's Application for Basic Skills Improvement Program ECIA Chapter I and Chapter 212 Laws of 1975, as amended (R-132), clearly reveals a Statement of Assurance at C-6 that "LEA will maintain records showing the names and title of parents and teachers who were consulted regarding the design of the BSI program and the methods used for such consultation," and a response at Section III - 1 that a district advisory council will be maintained. Board Secretary Tullo signed the application which was dated July 11, 1984. The Board did not dispute the assertion that it had approved the filing of the funding application.

I FIND:

1. The appointment of a district advisory committee by the Superintendent was not an attempt to usurp the powers of the Board;

2. The conduct of the Superintendent related to this charge was proper in fulfillment of his responsibilities and function as chief school administrator; and

3. The Board has not sustained its burden of proof of the truth of Charge #5.

I FIND that Charge #5 is untrue.

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

CHARGE #6

DURING THE SUMMER OF 1984, THE SUPERINTENDENT HIRED A NONINSTRUCTIONAL PERSON TO TEACH IN THE SUMMER SCHOOL PROGRAM. THIS ACTION, BY THE SUPERINTENDENT, WAS IN VIOLATION OF N.J.S.A. 18A:17-20, N.J.A.C. 6:3-1.1 and N.J.A.C. 6:3-1.1-2[?] AND THE WEEHAWKEN BOARD OF EDUCATION POLICIES. IT WAS DONE WITHOUT BOARD APPROVAL. AS A RESULT OF THE SUPERINTENDENT'S ACTION, HE WAS FORMALLY REPRIMANDED BY THE BOARD IN AUGUST 1984.

Extensive testimony was adduced on this charge. I find no compelling need to detail same, but shall relate my findings of what occurred based on my review of all relevant testimonial and documentary evidence.

The Board adopted a resolution at its June 12, 1984 meeting on recommendation of the Superintendent and appointed numerous personnel to be employed in its 1984 Summer program, including Emily Cuccarese as a clerical aide (P-18). On Friday, July 13, Superintendent Onorevole called Board President Lorenz to advise him that Cuccarese chose not to accept the appointment and a vacancy occurred as a result thereof (Tr. XXII, 44-45). A replacement was discussed and Lorenz suggested a regular teacher, one Angela Martinelli. Conflicting testimony from Onorevole and Lorenz makes it difficult to discern the description of the vacant position conveyed in that conversation, that is, whether it was for a teacher's aide, clerical aide or teacher. Nevertheless, Lorenz believed the vacant position to be that of teacher, but the position was for a clerical aide (Tr. XI, 58-59). Onorevole called Martinelli who accepted the offer of summer employment as a clerical aide to begin on Monday, July 16 (Tr. XXII, 44).

Board member Atallo called Lorenz, also on July 13, to advise him that the position to be held by Martinelli was noninstructional and that the school business administrator and personnel committee should not be bypassed in the selection of the appointee. Lorenz

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

called Onorevole to advise him of the problem presented by Atallo (Tr. XI, 60-61). Onorevole then called Martinelli to rescind the offer of employment (Tr. XXII, 45). A perplexed Martinelli called Board member Palumbo, presumably for advice, and was advised to call Atallo (Tr. IX, 60-61). Martinelli then called Atallo who told Martinelli to report to work on Monday, July 16 (Tr. VI, 23-24).

Martinelli was employed as a clerical aide and compensated for her services, but the record is void of any action by the Board at a public meeting authorizing her appointment.

The above background is is adopted herein as **FINDINGS OF FACT.**

N.J.S.A. 18A:17-20, describing the general powers and duties of the Superintendent, is incorporated herein by reference. N.J.A.C. 6:3-1.1 is irrelevant to the charge. N.J.A.C. 6:3-1.12 embodies the "[d]uties of district superintendent of schools; chief school administrator," and states at (d) that "[h]e or she shall appoint such clerks as may be authorized by the district board(s) of education."

P-29 represents the Board-adopted job description of the Superintendent of Schools. Although undated, it was offered in evidence by the Board under Charge #9 and was represented as to have been in effect during the 1984-85 school year. This document states that the duties and responsibilities of the Superintendent shall include, but not be limited to:

> . . .
>
> 7. Secure and nominate for employment or promotion the best-qualified and most competent personnel.
>
> 8. Recommend the assignment or transfer of any or all employees of the Board.
>
> . . .

The Board adopted a resolution on March 15, 1983, "that the Business Administrator shall assume the administrative responsibility for all noninstructional personnel, . . .". (P-

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

19). The record is void of any Board action revising the job description of the Superintendent. Nevertheless, the Board adopted the recommendation of the Superintendent concerning noninstructional personnel on June 12, 1984 (P-18) with no allegation that he acted ultra vires, as well as on numerous other occasions since the Board claims it restructured its administrative organization to dual control in January 1981. See, R-91.

I **FIND** that Board member Atallo authorized the employment of Martinelli and that there were no violations of the statute or administrative code incorporated by the Board in Charge #6, and I further **FIND** that the Board has failed to meet its burden of proof to sustain the charge as certified. I **FIND** that Charge #6 is untrue.

CHARGE #7

THE SUPERINTENDENT FAILED TO NOTIFY THE BOARD IN A TIMELY MANNER ABOUT THE LENGTHY ILLNESS OF EILEEN HOCKMAN. THE SUPERINTENDENT, THEN, HIRED A PER DIEM SUBSTITUTE WHO HAS TO BE OFFERED A CONTRACT SINCE THE PER DIEM SUBSTITUTE IS SERVING MORE THAN A MINIMUM NUMBER OF DAYS.

Eileen Hockman, a regular elementary school teacher, became ill on February 22, 1985, and underwent emergency surgery on February 23. The substitute who replaced her was Georgeann Santore, a fully certified elementary level teacher.

The thrust of the Board's charge concerns a lack of awareness of Hockman's absence until after Santore had substituted for 20 consecutive days, which allegedly forced the Board to place Santore under contract pursuant to an administrative code requirement, without consideration by the personnel committee.

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

The normal course of communicating teacher absences in excess of three days to the Board through monthly reports was followed (Tr. XVI, 103-104). The Superintendent advised the Board president of Hockman's illness in early March and Board member Ferulla's wife sent a gift to Hockman prior to March 12. Santore was appointed by the Board to complete the year as Hockman's replacement on May 14, which provided ample time for personnel committee consideration even if notification did not occur until April. The preceding recitation is adopted herein as **FINDINGS OF FACT** based on my review of extensive testimonial and documentary evidence.

I ALSO FIND the Superintendent's recommendation of Santore's appointment in the best interest of the continuity of the educational process for the children in Hockman's class. It is also noted that Board perceptions of an administrative code requirement that Santore be placed under contract are erroneous, as the limitation of 20 consecutive days of substituting pursuant to N.J.A.C. 6:11-4.4, is inapplicable as Santore is a fully certified teacher assigned within the scope of her certificate. **I FIND** that Charge #7 is untrue.

CHARGE #8

THE SUPERINTENDENT, IN VIOLATION OF THE BOARD INFORMING HIM NOT TO HOLD ADVISORY COMMITTEE MEETINGS ON TUESDAY AND THURSDAY EVENINGS SINCE THEY WOULD CONFLICT WITH HIS OBLIGATION AS ADULT SCHOOL DIRECTOR, CONTINUED TO MEET WITH THE ADVISORY COMMITTEE ON THOSE EVENINGS. THIS ACTION OF THE SUPERINTENDENT CONSTITUTES INSUBORDINATION AND CONDUCT UNBECOMING A SUPERINTENDENT.

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

It cannot be disputed that the Board passed a resolution on December 11, 1984, "that the Superintendent not attend meetings on Tuesday nights that interfere with his duties as Adult School Director." (P-24).

Board member McLellan testified that Board members Atallo and Rutigliano saw Onorevole hold an advisory committee meeting in violation of the resolution (Tr. IV, 97). Interestingly, Atallo and Rutigliano were witnesses in the proceeding and never testified to that fact. McLellan's testimony must be deemed to be hearsay and insufficient to be considered a residuum of competence evidence upon which to base a finding of truth to the charge.

In 1984-85, Board President Lorenz testified that the conflict between Adult School and Board of Education meetings created no problem because Onorevole was accessible and available, and guessed the same would be true of conflicts between Adult School and advisory committee meetings that were also held in the same high school building (Tr.XI, 149-151).

I **FIND** the Board has failed to meet its burden of proof as to the truth of the charge. I **FIND** Charge #8 is untrue.

CHARGE #9

THE SUPERINTENDENT FAILED TO BECOME MEANINGFULLY INVOLVED IN THE 1985-86 BUDGET PROCESS AND FAILED TO ATTEND IMPORTANT BOARD OF EDUCATION BUDGET MEETINGS ON JANUARY 12, 1985 AND JANUARY 28, 1985. AFTERWARDS, HE PUBLICLY CRITICIZED THE BOARD'S BUDGET. THIS BEHAVIOR CONSTITUTES INSUBORDINATION AND CONDUCT UNBECOMING A SUPERINTENDENT.

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

It is stipulated that Onorevole was absent from Board meetings on January 12 and 28, the former due to four days of illness, and the latter to attend a postoperative medical conference concerning his brother-in-law. Onorevole called the Board president to advise of same (Tr. XXII, 57-58).

A review of all testimonial and documentary evidence reveals the budget development process in 1984-85 to have been similar to previous years, with the exception of Board action employing the services of its auditor, George Kassab, to compile, collate and review budget data and present same to the Board. This action obviously reduced the participation of the Superintendent's involvement in total budget preparation. See, R-76 and R-95. Nevertheless, the Superintendent's involvement with staff to transmit a budgetary proposal to the school business administrator and Kassab appears to have been as extensive as it could have been. See, R-129.

There was considerable testimony regarding the failure of the Superintendent to work with the Finance Committee, but the record is void of documentary evidence such as notices or minutes regarding the activities of that committee. Onorevole testified that he has no awareness of such committee meetings (Tr. XXII, 76), and I believe him, notwithstanding the fact that the committee may have met.

I cannot find that the Superintendent's absence from the meetings on January 12 and 28 negates his meaningful involvement in budget development, notwithstanding the varied concepts that may be applied to the meaning of meaningful.

Concerning the basis for the alleged criticism of the budget by the Superintendent, a "Weehawken Dispatch" newspaper article which quoted Onorevole as saying he thinks the budget ". . . is not adequate educationally", I find it insufficient to support a charge of unbecoming conduct. See, R-38.

I **FIND** that the Board has not met its burden of proof by a preponderance of the credible evidence to sustain the charge, and I **FIND** that Charge #9 is untrue.

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

CHARGE #10

PRIOR TO MARCH 15, 1983, THE SUPERINTENDENT ILLEGALLY AND WITHOUT BOARD APPROVAL, ORDERED AND OBLIGATED THE BOARD TO PAY $25,000 FOR PRINTED MANUALS. AS A RESULT OF SUCH ACTION, THE BOARD, ON MARCH 15, 1983, REPRIMANDED HIM AND PLACED A REPRIMAND IN HIS PERSONNEL FILE. THIS ACTION CONSTITUTES INSUBORDINATION AND CONDUCT UNBECOMING A SUPERINTENDENT.

There are no factual contentions in dispute related to this charge. The initial printing of Individual Language Arts Manuals (ILA) was advertised for bidding and awarded to Technical Reproduction Corp. in June 1976 (P-92), with the process repeated in June 1977 (P-83). Reprinting of the manuals has been done annually since 1977 by the same corporation without bidding until the 1984-85 school year.

The only issue incorporated in this charge is the alleged illegal reprinting order in 1982-83 in violation of bidding statutes.

Board member Atallo, a principal antagonist of respondent Onorevole, testified that the ILAs are textbooks on writing skills developed and compiled by the Weehawken staff (Tr. III, 26).

Jeannette Alder, project director of the ILA program since its inception in 1970, testified the program was initially approved by the New Jersey State Department of Education under Title 4C, but was later transitioned into the National Diffusion Network (NDN) in 1974 (Tr. XVII, 101). The Weehawken Board is the local conduit, and the State was the conduit for U.S. Department of Education until 1974 (Tr. XVII, 102-103). Manual reprintings were approved by the grantors, State and Federal Departments of Education, with additional approval to retain revenues from the sale of same to other districts to cover project costs (Tr. XVII, 104-105) (R-74). No local funds were needed or utilized (Tr. XVII, 126-128).

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

Relative to the bidding controversy, Paul C. Garbarini, the Board's auditor prior to 1981-82, indicated in response to a query from Onorevole that "[n]ew bids were not requested yearly as the manual was not revised nor were the printing costs increased, even when the price of textbooks rose sharply in all areas." (R-15).

The bidding issue arose, according to Atallo's testimony, when George Kassab, the Board's auditor since April 1981 brought it to the Board's attention (T VI - 63). Atallo also testified that Kassab's brother is in the printing business, but Kassab himself is not (Tr. VI, 71-72). This is disputed by the May 1, 1983 corporate report to the New Jersey Secretary of State, which lists George Kassab as president of Emerson Speed Printing, Inc., with his brother Habib as vice president/secretary. (See, R-40) (Tr. VI, 72-74).

The Board advertised for bids in the 1984-85 school year for manual reprinting, which were opened on July 12, 1984 with Troy Printing as the low bidder. Emerson also bid and was the third lowest bidder (R-42). The Board rejected all bids on August 14, 1984 (R-43). Atallo testified that he could not recall the reasons for the rejection. N.J.S.A. 18A:18A-37. The Board rebid and on September 24, 1984, awarded the printing to low bidder Emerson (R-41) (Tr. VI, 90-91).

Onorevole, reprimanded by the Board for his role in the nonbid reprinting purchases, responded with R-75, R-15 and R-14.

It is interesting to note that the reprinting purchase order dated August 26, 1981, was approved by "Bd. Sec./S.B.A. Tullo" with the voucher for payment approved by the Board with no apparent comment regarding a bidding requirement.

Questions raised herein are whether bidding was required for textbook reprinting, and if so, whether the responsibility for same falls upon the Superintendent of Schools.

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

N.J.S.A. 18A:18A-5 states:

> Exceptions to requirement for advertising. Any purchase, contract or agreement of the character described in N.J.S. 18A:18A-4 may be made, negotiated or awarded by the board of education by resolution at a public meeting without public advertising for bids and bidding therefor if
>
> a. The subject matter thereof consists of:
>
> . . .
>
> (5) Textbooks, copyrighted materials, kindergarten supplies, and student produced publications and services incidental thereto;
>
> . . .

See also, N.J.S.A. 18A:18A-42h.

The State Board of Education suggests "major areas of the duties and responsibilities which may be considered by the district board of education as functions of the school business administrator . . ." under N.J.A.C. 6:3-1.18, and at (a)2ii indicates "[p]urchasing and supply management. Is responsible for all purchasing in accordance with the law and school board policy." See also, (a)5.

The above regulation, as well as N.J.S.A. 18A:17-14.1, clearly vests discretionary authority with local boards of education to define the duties of its school business administrator.

The Weehawken Board adopted a job description for its business administrator, which includes the duty and responsibility "[t]o serve as purchasing agent for the school district." See, R-93, pp. 5 and 6, item #15. The job description further requires the school business administrator "[t]o prepare the necessary specifications required for bidding of supplies, equipment, etc." See, item #16.

I FIND the reprinting of the textbook known as the I.L.A. manual to be exempt from the bidding laws in New Jersey pursuant to N.J.S.A. 18A:18A-5a(5). I FURTHER FIND, regardless of the aforesaid finding, that responsibilities for bidding rests with the school business administrator.

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

Finally, I **FIND** that the Board has failed to sustain the truth of Charge #10 by a preponderance of the credible evidence and as a matter of law.

CHARGE #11

IN SEPTEMBER 1982, THE SUPERINTENDENT ORDERED A TEACHER, ANNA MIRANDA, WHO WAS ONE COURSE SHORT OF FULL CERTIFICATION AS A SPECIAL ED TEACHER, TO CEASE TEACHING IN THE DISTRICT. THE TEACHER WAS TENURED AS A COMP. ED. TEACHER AND SHOULD HAVE REMAINED TEACHING IN THAT CAPACITY. OVER THE PRINCIPAL'S OBJECTION AND WITHOUT BOARD APPROVAL, THE SUPERINTENDENT TOOK SUCH ACTION, WHICH RESULTED IN A SUCCESSFUL LAWSUIT AGAINST THE DISTRICT BY ANNA MIRANDA, COSTING THE DISTRICT UNNECESSARY SUMS OF MONEY.

The factual contentions related to this charge are uncontroverted. Miranda was tenured as a supplemental teacher. Her transfer to a position of teacher of the handicapped was recommended by Onorevole and approved by the Board on her representation that she would be fully certified for that position. Upon a determination that Miranda had not met certification requirements, Onorevole recommended and the Board approved the recision of her appointment pursuant to N.J.S.A. 18A:27-2, and effectively teminated her employment.

Miranda filed a petition of appeal claiming a violation of her tenure rights and asserting that she should have been reassigned as a supplemental teacher. The matter was amicably resolved with Miranda being compensated for nine days of withheld salary for the first half of September 1982.

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

It cannot be disputed that the rescission of Miranda's appointment as a teacher of the handicapped was proper in the absence of certification and pursuant to N.J.S.A. 18A:27-2. Nor can it be disputed that the New Jersey Supreme Court resolved the tenure acquisition issue for supplemental teachers on June 23, 1982, in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Judicial notice is taken herein of the extensive litigation prior to and following Spiewak to achieve settled law on the tenure rights of supplemental teachers. The gravamen of this charge is whether responsibility for the Miranda litigation and costs incurred therein rests solely with the Superintendent of Schools. I think not.

I believe Onorevole acted in good faith in a clearly open-handed manner according to his perception of the law at that time, and fully communicated his position in making recommendations to the Board. The Board acted according to its own perception at that time in approving said recommendations, which in turn triggered the short-lived litigation and the necessary consultation of legal counsel. The Board must therefore be estopped from self-exoneration by its effort to place full responsibility on its Superintendent and the utilization of this charge as a basis for seeking his dismissal.

I **FIND** that the de minimus consequences of the Miranda litigation resulting from a mistaken perception of law must be shared by the Board, and I further **FIND** that the diaphanous nature of the issue in this charge must lead to its facile resolution. I **FIND** that this charge is untrue.

CHARGE #12

COMPUTERS WERE PURCHASED FOR THE SCHOOL, COSTING APPROXIMATELY $75,000. THE SUPERINTENDENT FAILED TO DEVELOP A CURRICULUM FOR THE STUDENTS FOR USE OF THE COMPUTERS IN VIOLATION OF BOARD POLICY, N.J.S.A. 18A:17-20 AND N.J.A.C. 6:3-1.1—2. [N.J.A.C. 6:3-1.12]

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

It cannot be disputed that computers and related hardware and software costing $62,915.56 were authorized for purchase on February 28, 1984, for delivery to the Webster, Wilson and Roosevelt elementary schools with Chapter I and II finding. See, R-55 and R-56.

It was clearly established that these purchases were primarily intended to be utilized to enhance the learning process of elementary school pupils in need of remediation in reading and mathematics, and must therefore be distinguished from existing computer programs in the secondary school.

The dictionary definition of curriculum is a course of study, while reference is made in the administrative code to the educational program. See, N.J.A.C. 6:8-3.1.

It is indeed reasonable to assume the adoption of the educational program (curriculum) by the Weehawken Board pursuant to N.J.A.C. 6:8-3.5 would be construed to be Board policy. No such policy was submitted in evidence, however, and the Board appears to rely on its adoption of a resolution on June 14, 1984, incorporating goals and objectives for its Superintendent for the 1984-85 school year as its policy. Goal No. 5 of that resolution states:

> In-depth preparation to Board on goals, objectives and curriculum for computer literacy program.

The minutes of that Board meeting also state that the Superintendent "indicated his displeasure in not being consulted in the formulation of these goals and objectives," and further "requested an interpretation of the term 'in-depth preparation' and 'recommendations' indicating that the terms were vague and open to a variety of interpretations." See, P-38. No response by the Board is in the record.

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

N.J.S.A. 18A:17-20 states:

> The superintendent of schools shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the state board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.
>
> He shall have a seat on the board or boards of education employing him and the right to speak on all educational matters at meetings of the board or boards but shall have no vote.

The only documentary evidence submitted by the Board on this charge is a letter dated April 24, 1985, to Onorevole from Board member Rutigliano requesting information. See, P-36. A prompt response dated April 25, 1985, was transmitted. See, R-17. Other documentary evidence of communications related to this charge was submitted on behalf of respondent. See, R-57, R-100, and R-103.

It is also interesting to note that the resolution of approval of programs in the elementary schools adopted by the Board at its February 12, 1985 meeting does not include a "computer program." See, R-104.

N.J.A.C. 6:3-1.12 is incorporated herein by reference with the belief that N.J.A.C. 6:3-1.1-2 as stated in the charge was a typographical error.

A review of all testimonial and documentary evidence related to this charge results in the adoption of the following **FINDINGS OF FACT:**

1. Computers were purchased for utilization as a teaching aid to enhance the improvement of basic skills for pupils in need of remediation.

2. No computer course of instruction was adopted for the elementary schools by the Weehawken Board of Education.

3. There was and is no clear-cut Board policy requiring a computer curriculum for the elementary schools.

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

4. The Board has failed to meet its burden of proof that the respondent Superintendent has violated either Board policy, N.J.S.A. 18A:17-20 or N.J.A.C. 6:3-1.12.

5. I FIND that charge #12 is untrue.

CHARGE #13

THE SUPERINTENDENT HAS FAILED TO AND REFUSED TO IMPLEMENT THE GOALS AND OBJECTIVES OF HIS 1984 ANNUAL EVALUATION BY THE BOARD.

The goals and objectives referred to in this charge were incorporated in a resolution adopted by the Board at its June 14, 1984 meeting, and are as follows:

1. Meetings with entire administrative staff to discuss problems of mutual concern to the district.

2. Strict adherence to Board policy.

3. In-depth recommendations to Board on annual budget preparations.

4. In-depth preparation to Board on goals, objectives, cost and curriculum for gifted and talented program.

5. In-depth preparation to Board on goals, objectives and curriculum for computer literacy program.

6. Adequately preparing Board with information on a timely basis for Board members to make appropriate judgments and decisions.

7. Strict adherence to written directions from Board committee chairpersons.

8. Encouraging administrators, through written communications, to attend Board Workshops.

(P-38)

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

Notwithstanding the fact that the minutes of the Board's June 14, 1984 meeting incorporate the Superintendent's indication of "his displeasure in not being consulted in the formulation of these goals and objectives," and notwithstanding requirements under N.J.A.C. 6:3-1.22, the possible invalidity of the Board's resolution shall not be addressed. Same is not an issue in this proceeding and may never have been contested in a timely fashion.

The Board proceeded with efforts to meet its burden of proof by a preponderance of credible evidence of the truth of this charge almost exclusively through testimonial evidence, with reliance on the April 27, 1985 evaluation of the Superintendent. See, P-40. Each goal will be addressed in seriatim. A summation of findings on the charge will then follow.

Goal #1

Board member Atallo testified that Superintendent Onorevole "did not meet with the entire administrative staff and discuss the problems as the Board directed him to. He purposely excluded the high school principal [Olivieri] on a number of meetings." (Tr. III-42). On cross-examination, Atallo testified that his information came from Olivieri with verification from some other principals (Tr. VI, 131).

Board member McLellan reiterated the testimony of Atallo that this issue came to his attention from Olivieri (Tr. IV, 106). He also testified that there was no formal meeting and explanation of the goals (Tr. V, 112), and further stated that they were developed unilaterally with no input or consultation with Onorevole (Tr. V, 93).

Board member Pizzuta testified that Olivieri had complained of being excluded from some meetings held by the Superintendent, and that it was the Board's desire that no administrators should be excluded from any of the Superintendent's meetings (Tr. X, 51, 52).

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

Onorevole stipulated that he did not invite all administrators to all meetings held during the school year, and made an administrative determination according to the agenda for each meeting. High school principal Olivieri was not invited to attend meetings held with elementary personnel that were related to basic skills, and elementary principals were not invited to meetings held with Olivieri and the athletic director that were related to a discussion of an interscholastic athletic problem. He further testified that Business Administrator Drozdowski refused to attend "cabinet" meetings. He also stated that all principals, vice-principals and directors were invited to meetings when issues of mutual concern were on the agenda (Tr. XXII - 65, 66).

Interestingly, Bernard Karabin, a Weehawken elementary principal, testified as a rebuttal witness for the Board and stated that he was chairman of a student report card committee, but that he did not attend a meeting held by the Superintendent with Principal Wolf and 8th grade teachers concerning low achievement levels. When asked if he should have been at that meeting, he stated "I do not see any reason why if at my school my 7th graders or any other grade have an amount of failures, that I would have to have everybody attend my meeting." (Tr. XXV, 21).

Goal #2

Board member McLellan testified that Onorevole did not strictly adhere to Board policy in his hiring of Martinelli, his unilateral delegation of his duties as adult school director to Vice-Principal Wisniewski, and the closing of school for the Jewish holidays (Tr. IV, 106, 107, 110).

Board member Pizzuta testified that this established goal "came about from the ILA manuals. It was felt it should have been brought to the Board's attention that they were not being bid and areas in that concern where things came up that the Board was either uninformed on or it was felt the Superintendent acted outside the scope of his authority." (Tr. X, 52).

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

Board member Ferullo testified that this established goal resulted from the Superintendent's failure to adequately communicate problems or resolutions sufficiently in advance of Board meetings (Tr. XII, 47).

Goal #3

Board member McLellan stated that Onorevole gave no budget overview, but relied on principals and other staff members to make presentations (Tr. IV-112).

Board member Ferullo testified as to Onorevole's failure or refusal to implement this goal by stating "[w]ell, as far as I can recollect, the Board requested to try to predict the number enrollment of the students, how the money was actually going to be spent, to give as much knowledge as possible to the direct, the actual budget being drawn up, to meet with the administrators consistently to ensure that a proper budget was prepared." (Tr. XII, 48).

Onoreveole's testimony concerning this goal was a reiteration of his testimony under Charge #9.

Goal #4

Board member McLellan testified that "[w]hat we wanted from the Superintendent was a written gifted and talented curriculum." (Tr. IV, 115). Board member Pizzuta concurred (Tr. X, 53).

Michael Blake, Director of Special Education, testified that the program for gifted and talented pupils was under his supervisory jurisdiction, and that said program was initiated as a pilot program in February 1984. He also testified that no written curriculum had developed and that the Superintendent had not prepared any goals and objectives for the program (Tr. VII, 163-165).

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

On cross-examination, Blake testified that the program initiated in February 1984 was on a part-time basis, but was expanded as a pilot program on a full-time basis for the 1984-85 school year. He also testified that he and the program's teacher had developed an outline of goals and objectives as requested by Onorevole and that the program was being developed partly on the Renzulli model and partly on the strengths of the assigned teacher. In responding to questions related to curriculum development, Blake stated that goals and objectives normally precede curriculum development, and that he served on curriculum committees in math and science which required two years for curriculum development (Tr. VII, 165-172).

Onorevole conceded that no curriculum for the gifted and talented had been developed, and that the development of an outline and activities was in progress. He also conceded that the program was intended to be activity—oriented based on each pupil's individual strengths, and that the Board had been apprised that the program was following the Renzulli model (Tr. XXIII, 69-73). See also, R-109.

Goal #5

I FIND no compelling need to address this goal due to the findings under Charge #12 that no computer course of instruction was adopted by the Board for the elementary schools and the finding that no clear Board policy existed which required a computer curriculum for the elementary schools.

Goal #6

Board member Atallo testified that "the Superintendent was notoriously guilty and negligent in coming in at the 11th hour with Resolutions for the board to vote on." (Tr. III, 44). Board member McLellan testified that Onorevole had not alerted the Board until the end of March concerning "an exceptional high amount of failures of eighth grade students." (Tr. IV, 121). Board member Pizzuta concurred with Atallo's testimony (Tr. X, 55).

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

Onorevole testified that data related to the Board's meeting agenda were hand-delivered to Board members on Friday preceding the Tuesday meetings. He stated there were occasions when late issues were presented to the Board on the meeting night, when items came to his attention after the agenda was prepared and delivered to Board members on Friday. Most "pocket" resolutions were presented by Atallo to the Board at its meetings (Tr. XXIII, 74, 75).

On cross-examination, Onorevole again conceded that there were occasions when he presented resolutions to the Board at meetings which had not previously been delivered in the normal Friday delivery, but these occasions were exceptions and were not the norm (Tr. XXVIII, 103, 104).

Goal #7

Board member Atallo testified that Onorevole did not provide satisfactory responses to requests of Board committee chairpersons (Tr. III, 51). On cross-examination, Atallo stated that he did not have authority as an individual to direct the Superintendent, but held to his position regarding his right to transmit inquiries and expect responses (Tr. VI, 149).

Board member McLellan stated that personnel committee chairperson Atallo transmitted a written directive to Onorevole "to come up with some type of plan for streamlining high school staff," but no response was ever received (Tr. IV, 124). He further stated that this occurred during the 1983-84 school year prior to the adoption of the goals incorporated in this charge (Tr. IV, 126). On cross-examination, McLellan stated that the directions given to Onorevole by Atallo were not authorized by the Board (Tr. V, 160).

Board member Ferullo testified that "[t]here were times when the chairpersons of the Committees had written communications to the Doctor, and he failed to respond on those communciations." (Tr. XII, 51). On cross-examination, Ferullo stated that he could not provide any specific instances to support his testimony on direct-examination, but he

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

did state that any communication requested by him in his role as chairperson was done "[t]hrough the president of the Board at the regular Board meeting." (Tr. XII - 135).

Goal #8

Board member Atallo testified that administrators did not attend Board meetings in 1983-84, that they started attending in 1984-85 and that they started "sort of coming to all the meetings" in 1985-86 (Tr. VI, 155).

McLellan stated that "we [Board] wanted communications sent to the different administrators encouraging them to take part in Board of Education meetings." (Tr. IV, 128).

Pizzuta testified that he was not aware of any deficiency as far as the Superintendent was concerned with regard to encouraging administrators to attend Board workshops (Tr. X, 144).

Onorevole testified that he encouraged administrators to attend Board workshops through written communications as well as personal oral notification regarding those workshops at cabinet meetings (Tr. XXIII, 85). (See, R-18, Tab 4, minutes of August 9, 1984 cabinet meeting, page 4, item #12).

SUMMATION

I FIND respondent Onorevole did achieve Goal #1, and did not neglect to invite any administrator to any meeting when agenda items concerned responsibility rather than curiosity.

The varied perceptions indicated by Board members of the specificities related to Goal #2 would seem to indicate the absence of a consensus of the entire Board in support of this allegation. Nevertheless, the varied perceptions of Board members McLellan,

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

Pizzuta and Ferullo have been or will be addressed in Charges #3, 6, 10 and 20 as well as in Goal #6 of this charge and need not be repeated here.

Other than what may appear elsewhere as indicated, I **FIND** that the Board has failed to meet its burden of proof through a preponderance of the credible evidence and the showing of any significant violation of Board policy.

I **FIND** insufficient evidence to support the allegation of the Board that Onorevole did not achieve Goal #3, which was more fully addressed in Charge #9.

I **FIND** the incorporation of Goal #4 in the certification of this charge to be premature in light of the progress that was unquestionably made toward the achievement of this goal, and I further **FIND** the Board's expectations in the embryonic stage of this program's development to be unreasonable.

I also **FIND** the expected achievement of Goal #5 to be patently unreasonable in light of the findings in Charge #12.

Goal #6 was adequately achieved, notwithstanding infrequent presentations of resolutions on the night of Board meetings when circumstances appeared to deem same necessary. I so **FIND**.

Notwithstanding the questionable obligation of a Superintendent to respond to a heavy demand for responses to inquiries and directives from individual Board members, without Board authority to transmit same, I **FIND** no preponderance of credible evidence that Onorevole did not put forth reasonable efforts to patiently respond to said inquiries, and I therefore **FIND** said Goal #7 to have been adequately achieved.

I also **FIND** that Onorevole did achieve Goal #8.

The burden of proof as to the truth of Charge #13 has not been met. I **FIND**, therefore, that this charge is untrue.

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

CHARGE #14

IN 1982, THE CATHOLIC CHURCH UTILIZED SOME SCHOOL FACILITIES ON A MUTUALLY AGREED UPON ARRANGEMENT. THE SUPERINTENDENT, WITHOUT CONSULTING THE BOARD, OR WITHOUT OBTAINING AUTHORITY FROM THE BOARD, INDICATED TO FATHER HEINE OF THE CATHOLIC CHURCH THAT HE WAS INCREASING THE AMOUNT THAT THE CATHOLIC CHURCH WOULD HAVE TO PAY THE DISTRICT FROM $1,000 TO $1,500

Documentary evidence submitted by both parties refutes the accuracy of the alleged facts incorporated in this charge. School facilities were unquestionably utilized by the church from 1979-1981. They were not utilized in 1981-82. The rental "fee" had been established at $2000 annually, payable in two equal installments. Father Kelly voluntarily increased the fee to $2500 by increasing the second installment for the 1979-80 school year to $1500. See, P-41 and P-42.

Nevertheless, the thrust of this certified charge is that Onorevole increased the fee without Board consultation or authority.

Initially, Board policy delegates the approval of school use and the setting of fees to its superintendent. See, R-27, P8-5.2 and P8-5.4. The only required communication to the Board occurs when permission sought for school use is denied. See, R-27, P8-5.2 as amended at page 3 of exhibit. Further, the Board was fully aware of the fee paid and the voluntary increase of same by Father Kelly as said correspondence and fee payment, incorporated in P-41, was reported to the Board, See, R-58, page 2. This charge is pure sophistry, and I **FIND** the Board has failed to meet its burden of proof to sustain it.

I **FIND** that Charge #14 is untrue.

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

CHARGE #15

IN 1982, THE SUPERINTENDENT SUBMITTED A BILL TO THE BOARD TO RENT HIS CAROUSEL PROJECTOR. THIS WAS AN ATTEMPT BY THE SUPERINTENDENT TO UNNECESSARILY CHARGE THE BOARD FOR RENTAL OF HIS PERSONAL EQUIPMENT.

CHARGE #16

OVER THE YEARS, THE SUPERINTENDENT HAS SUBMITTED BILLS CHARGING THE BOARD MILEAGE TO AND FROM HIS HOME TO BOARD MEETINGS AND CHARGING FOR TRAVELLING EXPENSES FROM SCHOOL TO SCHOOL WITHIN THE DISTRICT. THE SUPERINTENDENT ALSO WOULD CHARGE MILEAGE TO GO TO GRADUATION. THIS CONDUCT WAS IN VIOLATION OF BOARD POLICY AND WAS UNPROFESSIONAL CONDUCT.

Charges $15 and #16 are consolidated herein for decision purposes due to the similar nature of same.

It is stipulated that Onorevole submitted a voucher to the Board for the use of his carousel projector for a period of several weeks. Onoreveole's testimony that school business administrator Tullo secured rental quotes of $40 - $75 per week and that the voucher submitted totaled $40 was undisputed by the Board. Also undisputed was the testimony of Dr. Blumstein, a former administrative staff member, that a projector which coordinated slide and sound was deemed to be advisable for use in budget presentations in seeking public support for same, and the school district did not own such a projector.

Relative to mileage reimbursement, a stipend once paid to Onorevole for in-district mileage was terminated in 1976 or 1977, after which travel vouchers were honored by the Board (Tr. XXII - 181). The Board, however, denied reimbursement for in-district and out-of-district travel during the period June 1, 1983 to June 24, 1983. See, P-43.

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

Onorevole stipulates that he was told by a single Board member to cease submitting travel vouchers after the rejection of P-43, but did not heed such direction, and some vouchers were in fact approved for reimbursement after the issuance of P-43. Onorevole also testified that he was unaware of any Board policy which prohibited the submission of travel vouchers (Tr. XXII, 181-182). The record is void of any Board-adopted resolution or policy which Onorevole is alleged to have violated.

Board member Pizzuta testified that the Board reimbursed the truant officer and any staff member for travel beyond their normal scope of duty (Tr. X, 64). On cross-examination, Pizzuta stated that Board members Atallo, McLellan, Rutigliano and Rovito objected to any travel reimbursement for Onorevole (Tr. X, 153).

Although the prudence of the voucher submission in Charge #15 may be questioned, there is no known Board policy, statute or regulation that prohibits any voucher submission from one who perceives reimbursement for expenses to be proper. The testimony of former Board member Reilly was succinctly on point when he stated that no prior Board approval was ever necessary for the submission of a voucher, and that the Board's determination not to honor any voucher should not be construed to be an attempt to unnecessarily charge the Board (Tr. XV, 73). I concur.

The stipulation by respondent Onorevole mandates a finding that Charge #15 is true. However, the nature of this charge also demands a review in proper perspective in according an appropriate weight with other charges found to be true in reaching a determination as to whether dismissal or salary reduction is warranted. This will be addressed in a summation of all charges which are found to be true, infra.

Concerning Charge #16, I **FIND** same to be untrue in the absence of Board policy to support the allegation of a violation of same. I also **FIND** the allegation of unprofessional conduct to be untrue, consistent with the dicta incorporated under Charge #15, and I **FIND**, therefore, that Charge #16 is untrue.

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

CHARGE #17

THE SUPERINTENDENT, IN VIOLATION OF BOARD POLICY AND ESTABLISHED PROCEDURES, ORDERED EQUIPMENT FROM OUT OF STATE VENDORS IN ORDER TO RECEIVE FREE GIFTS WITH THE PURCHASES WHICH HE KEPT FOR HIS OWN PURPOSES. THE ACTIONS OF THE SUPERINTENDENT WERE IMPROPER AND CONSTITUTED CONDUCT UNBECOMING A SUPERINTENDENT AND RESULTED IN THE BOARD SPENDING MORE MONEY FOR PURCHASES THAN WAS NECESSARY.

I **FIND** no compelling need to recite the extensive testimony adduced on the charge. I am satisfied that the normal purchasing procedure in Weehawken involves the processing of a purchase order (p.o.) from the purchaser to the Superintendent for approval and transmittal of the order to the business office, where the p.o. is validated by the signature of the Board secretary/school business administrator (S.B.A.) and a p.o. number is affixed to the p.o. Said p.o. is then transmitted to the vendor and the transaction is considered authorized. Upon receipt of the purchase and invoice, the latter is processed for payment by the Board after certification by the purchaser.

The time element is reduced for emergency purchases through the insertion of an "X" designation by school or office on the p.o. by the purchaser when an oral order is made in lieu of a p.o. number inserted at the business office, followed by the transmittal procedures above.

This charge relates to the purchase of felt-tipped pens unquestionably ordered orally by Onorevole, but procedurally deficient as the p.o. post-dated the invoice. The vendor in this instance was the Mytel Company located in Beverly Hills, California. The Mytel invoice was received on October 25, 1982 (See, P-45). The p.o. was transmitted to the business office by the Superintendent's office on November 5, 1982 (See, P-45). The only discrepancy between P-45 and P-46 is found in the purchase order number, X-600 on the former and 901 on the latter.

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

A promotional gift of a radio in the form of an antique car was sent to Onorevole, has remained in a file cabinet since receipt and it apparently has not been used. A promotional gift of a pocket calculator was received the previous year and remained in the Superintendent's office.

The recitation above is adopted herein as **FINDINGS OF FACT**. Said **FINDINGS** are supplemented by the following after a careful review of all testimonial and documentary evidence and keen observations of the demeanor of all witnesses:

1. The procedures utilized in the 1982 purchase from Mytel deviated from established procedures and are determined herein to have been an abuse of discretion by Onorevole.

2. The 1982 purchase was not made for the purpose of receiving a free gift.

3. The gifts received in 1981 and 1982 were not retained by Onorevole for his personal use, and are the property of the Board of Education.

4. Onorevole's transgression in this matter does not rise to the level of unbecoming conduct.

5. Although School Business Administrator Tullo testified that he could have purchased the pens locally for less cost, no finding on this allegation is made in the absence of more credible documentary evidence.

I **FIND** Charge #17 to be partially true with the greater segments of the charge found to be untrue.

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

CHARGE #18

THE SUPERINTENDENT POSTED SUMMER JOB POSITIONS WITHOUT RECEIVING AUTHORIZATION FROM THE BOARD AS TO WHAT POSITIONS WOULD BE AVAILABLE. THIS ACTION BY THE SUPERINTENDENT WAS IN DIRECT DEFIANCE OF THE BOARD. THE BOARD DID NOT AUTHORIZE ANY STIPEND OR SALARY FOR THE POSITIONS. HOWEVER, THE SUPERINTENDENT ARBITRARILY AND WITHOUT BOARD APPROVAL SET A SALARY AND DISTRIBUTED THIS TO THE FACULTY VIA MEMORANDUM.

The relevant facts deemed to be significant are undisputed, and a recitation of the chronology of events appears to be the best approach in addressing this charge.

Board member Atallo's testimony that the 1985 summer program consisted of four hours per day and four days per week for a period of five weeks was undisputed.

Personnel employed in the 1984 summer program were compensated at the rate of $36 per diem, or $9 per hour (P-18).

The Board adopted a resolution at its November 14, 1984 meeting to compensate personnel assigned to home and adult school instruction at the rate of $11 per hour (R-47).

The Board adopted a resolution at its May 14, 1985 meeting authorizing the submission of an application for funding the 1985 basic skills summer program under Chapter I (R-45). The Chapter I budget for the summer program incorporated nine teachers at a cost of $7,920 (R-46). Based on Atallo's testimony that personnel would be engaged four hours per day and four days per week for five weeks, the budget reflects compensation at the rate of $44 per diem or $11 per hour.

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

The disputed posting of May 20, 1985 incorporated the summer program offerings and personnel needs of 12 basic skill teachers with compensation at $44 per diem (P-50) (P-75 is a duplicate).

Board members Camerlengo and Atallo co-signed a memo to Onorevole dated May 22, 1985, directing him to remove the posting and demanding responses to queries concerning personnel needs and the $44 per diem compensation (R-30). The record is void of any Board authorization for this memo. Onorevole responded on May 24, 1985, indicating that a survey of parents resulted in an expectation that 155 pupils would attend the basic skills program and he reasoned that 12 teachers would be needed. He further indicated that the $44 per diem compensation resulted from the $11 hourly rate which was incorporated in the Chapter I budget (R-30). Onorevole testified that his projected need for 12 basic skills teachers was in error.

The Board adopted a resolution at its June 11, 1985 meeting appointing six basic skills teachers for the summer program with a remaining need for four more. This represented one more than reflected in the Chapter I budget and two less than the number posted. The resolution also incorporated compensation at $40 per diem (P-51).

It would appear reasonable to believe that the Board would not deviate from the compensation rate it adopted the previous fall for home and adult school instruction as well as that same rate incorporated in the Chapter I budget. However, the record is void of specific Board authorization for 1985 summer staff needs or compensation for employment in the program prior to its June 11, 1985 resolution, other than its action on the Chapter I funding application.

I do find it reasonable for the Superintendent to have believed that the compensation rate would be $44 per diem based on the aforementioned facts. The posting of a need for 12 basic skills teachers, conceded to be an error, was indeed a harmless error as no commitment is made until the Board acts at a public meeting.

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

I do not believe the Superintendent abused his discretionary authority in posting his perceived personnel needs for the summer program, although it would indeed have been prudent to seek Board assurance that it would in fact fill the posted vacancies. Concerning the pay issue, I **FIND** that the Board tacitly approved the $11 per hour and $44 per diem compensation rates by its previous actions incorporated in R-45, R-46, and R-47. To believe otherwise, in the absence of an amended Chapter I funding application and budget, would create the appearance of fraudulent conduct by the expenditure of less than the approved funding.

I do not find the Superintendent's action in direct defiance of the Board as alleged. I **FIND**, however, the allegation of posting without Board authorization of approved positions to be true, and the sustained charge shall be accorded appropriate weight in my summation, infra.

CHARGE #19

> THE SUPERINTENDENT ASSIGNED NONCERTIFICATED PERSONNEL TO BOARD APPROVED TUTORIAL PROGRAMS FOR EIGHTH GRADE STUDENTS AFTER SCHOOL WHO WERE IN ACADEMIC DIFFICULTY. SUCH ACTION ON THE PART OF THE SUPERINTENDENT WAS IMPROPER AND WITHOUT BOARD APPROVAL AND CONSTITUTES UNPROFESSIONAL CONDUCT.

It is undisputed that, pursuant to the testimony of Board member Atallo, Bruce Prato's assignment to teach in a Board-approved tutorial program after school for 15 sessions is the basis of this charge, and that Prato held a county substitute certificate at that time (Tr. VII, 20, 22).

N.J.A.C. 6:11-4.4 states at (c):

> The certificate will be issued for a three-year period, but the holder may serve for no more than 20 consecutive days in the same position in one school district during the school year. . . .

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

Barbara Pastore, an eighth-grade teacher in Weehawken, testified that regular classroom teachers generally agreed to provide an additional 30 minutes of assistance twice a week to about 52 pupils in academic difficulty who faced possible retention, and that an administrative determination had been made to provide more assistance time by teachers other than those to whom the pupils were regularly assigned (Tr. II, 6-11).

I **FIND** the Board has failed to meet its burden of proof to sustain this charge, and I FIND this charge to be untrue.

CHARGE #20

THE SUPERINTENDENT VIOLATED BOARD POLICY AND STATE LAW BY ESTABLISHING THE SCHOOL CALENDAR WITHOUT BOARD APPROVAL.

N.J.S.A. 18A:36-2 states:

> The board of education shall determine annually the dates, between which the schools of the district shall be open, in accordance with law.

It is not disputed that the Board adopted school calendars at public meetings annually by resolution. It is also an undisputed fact that no calendar incorporated school closings on the Jewish holidays of Rosh Hashanah or Yom Kippur. See, P-55.

The Weehawken schools were nevertheless closed on said holidays by the Superintendent of Schools since 1974, and possibly 1967. These 1984 closings (presumably authorized by emergency powers granted to the Superintendent pursuant to Board policy), resulted from approximately 13 anticipated teacher absences, and an insufficient number of available substitutes to replace them. See, R-140.

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

A disputed fact exists concerning whether there was discussion at the Board's April 10, 1984 meeting which directed the Superintendent not to close the schools on said holidays in 1984. School Business Administrator Tullo testified that there was such direction by Board correspondence. Yet, no written document was offered into evidence (Tr. XIII -90). Some Board members testified that such a discussion occurred. Board member Pizzuta and Onorevole testified that it did not occur. (Tr. X, 79, 80 and Tr. XXIII, 122).

I am satisfied that emergency school closing powers granted to the Superintendent are basically intended for decision-making on days of inclement weather, or other instances, when there is insufficient time to gather a Board for a policy decision. I do not find a school closing for a religious holiday to be an emergency.

It cannot be said that the closing of school for Rosh Hashanah in 1984 was unanticipated or a surprise to anyone. This had been a practice for at least 10 years. The Board was also alerted to the closing when it received the agenda for its September 11, 1984 meeting, as it had been notified in previous years. See, R-78, R-114 and R-115. If the Board had in fact directed the Superintendent to keep the schools open for Rosh Hashanah in 1984, it is not unreasonable to have expected a reaffirmation of its position since the holiday was still over two weeks away.

Since only the Board is authorized to establish the annual school calendar, and since the closing of schools for Rosh Hashanah was not incorporated in the adopted calendar for 1984-85, I must **FIND** a violation of such policy to have occurred. However, in light of past practice in this district, I find such charge to be one that requires clearly stated limitations on the Superintendent's emergency school closing authority.

I **FIND** that this charge is true.

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

CHARGE #21

THE SUPERINTENDENT ESTABLISHED AN ARBITRARY, CAPRICIOUS AND UNREASONABLE DIRECTIVE TO THE PRINCIPAL OF WEEHAWKEN HIGH SCHOOL, DR. PETER OLIVIERI, TO DELIVER ALL LETTERS, MEMORANDA, PURCHASE ORDERS, PERSONALLY, BY APPOINTMENT TO THE OFFICE OF THE SUPERINTENDENT ON EACH THURSDAY AT 2:00 P.M. THIS DIRECTIVE OF THE SUPERINTENDENT WAS AN ABUSE OF HIS DISCRETION WHICH THE BOARD RESCINDED AT A SPECIAL MEETING ON APRIL 22, 1985.

A strained relationship existed between Olivieri and Onorevole. A contributing factor in that relationship was the refusal of Onorevole to accord the title of "Doctor" to Olivieri upon receipt of a transcript from Walden University validating a Ph.D. degree conferred on July 22, 1983. Onorevole's refusal was based on documentation that Walden was not regionally accredited, nor were credits from Walden accepted for certification or licensure purposes by the education departments in either New Jersey or Minnesota. See, R-117. The Weehawken Board, nevertheless, accorded Olivieri the title of "Doctor."

The disputed directives to Principal Olivieri from Onorevole were triggered initially by the failure of Onorevole to respond to a request from Olivieri for a day off from work. Said request was allegedly dropped on the counter in the Superintendent's office, but was also allegedly not received by the Superintendent. Olivieri's complaint of no response to his request then resulted in the disputed directives to avoid a recurrence of the problem (P-56 and P-57). Olivieri then filed a grievance with the Board (P-59). The Board, without consultation with Onorevole, directed him to rescind P-56 and P-57, as well as a previous directive from the Superintendent to the high school principal concerning the latter's general lunch time. See, P-61.

The above is not factually disputed and is adopted herein as a **FINDING OF FACT.**

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

Although the testimony of Board member McLellan and Principal Olivieri is suspect credibility-wise, I **FIND** no compelling need to recite same since the gravamen of this dispute is whether Onorevole abused his discretion as Superintendent in the issuance of directive P-57 to avoid recurrence of any lost communication. I think not, although the wisdom of sending such a directive is debatable in the absence of an effort to resolve the communications transmittal problem through discussion by reasonably intelligent administrators. Interestingly, I **FIND** that arbitrariness, capriciousness and unreasonableness must attach to the Board's action in the absence of a consultation with its Superintendent concerning the directive, or any effort to amicably resolve the grievance filed by Olivieri.

I **FIND** the charge to be untrue.

CHARGE #22

IN THE FALL OF 1981, THE SUPERINTENDENT RECOMMENDED TO THE BOARD THAT HARRY UNTEREINER, A SOCIAL STUDIES TEACHER, BE RIFFED. THE BOARD, IN RELIANCE ON THE SUPERINTENDENT'S RECOMMENDATION, RIFFED THIS TEACHER, LEARNING AFTERWARDS THAT HE HAD MORE SENIORITY THAN OTHER TEACHERS. THIS RESULTED IN UNTEREINER FILING AND WINNING A GRIEVANCE WHICH COST THE BOARD UNNECESSARY EXPENDITURES OF MONEY. THE SUPERINTENDENT'S CARELESSNESS, NEGLIGENCE, MISLEADING AND UNPROFESSIONAL CONDUCT AMOUNTS TO CONDUCT UNBECOMING A SUPERINTENDENT.

The only documentary evidence in the record on this charge is a letter dated June 26, 1981, to Untereiner from Secretary/Business Administrator Tullo stating that the Board acted by resolution on June 25, 1981, not to renew Untereiner's employment for 1981-82 and

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

placed the tenured teacher on a preferred eligibility list. See, R-119 (the time of occurrence incorporated in the charge is obviously erroneous).

Testimonial evidence is meager. Board member Atallo testified that Onorevole recommended the reduction in force (RIF) of Untereiner and the Board acted on that recommendation. Untereiner filed an action "and the courts found for him . . ." (Tr. III, 98-100). On cross-examination, Atallo stated that the matter was amicably resolved by the parties (Tr. VII, 85).

A great number of reductions in force took place in the early 1980's due to declining enrollments. There were indeed many diverse interpretations of seniority regulations, even prior to a 1983 amendment, which spawned a considerable amount of litigation. I know of no other instance wherein a petitioner prevailed and the chief school administrator was then charged with "carelessness, negligence, misleading and unprofessional conduct" amounting "to conduct unbecoming a Superintendent."

The record is void of the minutes of the meeting at which the Board acted to RIF Untereiner. Nor is there any evidence that the Board consulted with legal counsel prior to its RIF action, which alludes to negligence on its part. Misinterpretation or misapplication of the regulatory scheme by a lay person or persons does not rise to the level of "conduct unbecoming."

I FIND that the Board has failed to sustain the allegation of conduct unbecoming a Superintendent, and **FIND**, therefore, that this charge is untrue.

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

CHARGE #23

IN AUGUST 1982, THE BOARD OF EDUCATION RIFFED TED BLUMSTEIN, THE ADULT SCHOOL DIRECTOR. AT THE AUGUST 1982 BOARD MEETING, THE SUPERINTENDENT PURPOSELY MISLED AND MISINFORMED THE BOARD THAT TITLE I FUNDING WHICH WAS USED FOR TED BLUMSTEIN'S SALARY COULD ONLY BE USED FOR HIS POSITION, WHEN IN FACT THAT WAS NOT TRUE.

The origin of this charge is found in an alleged dispute between Superintendent Onorevole and Business Administrator Tullo concerning the impact of the Blumstein RIF on Fiscal Year 1982/Adult Education funding. The Board accepted Tullo's input and alleged in its certification of this charge that Onorevole purposely misled and misinformed its members.

In this regard, the undersigned takes note of the following significant matters: The testimony of Board member Atallo and Administrator Tullo differed as to when the dispute between Onorevole and Tullo may have occurred; in turn, their testimony conflicted with that of Onorevole as to what actually occurred. Furthermore, even the Board minutes do not reflect the different positions taken by Tullo and Onorevole. Additionally, the record is devoid of any documentary evidence to prove the existence of an amended application after the Blumstein RIF or an approval of same by the Bureau of Adult, Continuing, Community Education (Bureau). Finally, the testimony of Onorevole reflected that he did not advise the Board (a) that a Blumstein RIF would result in a loss of funding, and (b) that the budgeted salary for Blumstein in the FY 1982 application could only be used for the position of Director; he did advise them, however, that a budget revision would be necessary (Tr. XXIII, 139, 140).

I **FIND** not one iota of evidence in the record concerning anything "purposeful" about the advice rendered to the Board by the petitioner. The Board has not established

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

by a fair preponderance of the credible evidence that Onorevole misled it or misinformed it on purpose.

Accordingly, I **FIND** that this charge is untrue.

CHARGE #24

DURING 1979, 1980 AND 1981, THE SUPERINTENDENT DRAFTED A CONTRACT FOR TITLE I AND COMPENSATORY EDUCATION TEACHERS WHICH WAS OUTSIDE OF THE COLLECTIVE BARGAINING AGREEMENT. THESE TEACHERS RECEIVED THE ARBITRARY AMOUNT OF $9,000. AS A RESULT OF THE SUPERINTENDENT'S ACTION, AND HIS RECOMMENDATIONS TO THE BOARD, A LAWSUIT WAS INSTITUTED BY THE WEEHAWKEN EDUCATION ASSOCIATION WHICH THE BOARD UNSUCCESSFULLY APPEALED BASED ON THE SUPERINTENDENT'S RECOMMENDATIONS. THE SUPERINTENDENT'S ADVICE AND RECOMMENDATIONS WERE MISLEADING, INACCURATE, AND UNPROFESSIONAL. THE ACTIONS AND RECOMMENDATIONS OF THE SUPERINTENDENT CONSTITUTE CONDUCT UNBECOMING A SUPERINTENDENT.

The Board did not come forward with any testimonial or documentary evidence to sustain the truth of this charge. Since the Board has not met its burden of proof, I **FIND** that this charge is untrue.

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

CHARGE #25

IN 1977-1978 AND THEREAFTER, THE SUPERINTENDENT, WITHOUT CONSULTING THE BOARD, DEPRIVED CERTAIN TEACHERS AT CERTAIN SCHOOLS WITHIN THE DISTRICT OF 120 MINUTES PER WEEK OF PREPARATION TIME. THE SUPERINTENDENT'S ACTIONS WERE IN CLEAR VIOLATION OF THE NEGOTIATED AGREEMENT BETWEEN THE TEACHERS AND THE BOARD AND RESULTED IN THE TEACHERS FILING AND WINNING AN ARBITRATION CASE AND LAWSUIT. THE ACTIONS AND RECOMMENDATIONS OF THE SUPERINTENDENT WERE BASED ON ARROGANCE, NON-REFLECTIVE THINKING, HIS NEED FOR POWER AND TO BE IN CONTROL, AND ARE CLEARLY IMPROPER UNDER ALL OF THE EXISTING CIRCUMSTANCES. SUCH ACTIONS BY THE SUPERINTENDENT CONSTITUTED UNPROFESSIONAL CONDUCT.

The arbitration awards submitted as documentary evidence in support of this charge refer to actions and arguments of the Board. The only testimonial evidence adduced was from Board member Ferullo, who stated that he was vaguely familiar with this charge (Tr. XII, 76). On cross-examination, he stated a belief that the Board acted on a resolution prior to his becoming a Board member in 1978 (Tr. XII, 154, 155).

I FIND that the Board has failed to meet its burden of proof through a preponderance of credible evidence that the successful filing of an action by the Association resulting in an arbitration award and judgment was caused by the unprofessional conduct of its Superintendent. See, P-63 and P-64.

I therefore **FIND** that Charge #25 is untrue.

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

CHARGE #26

EDITH BONSEE, ASSISTANT BOARD SECRETARY TO THE BOARD OF EDUCATION HAD ACCUMULATED A NUMBER OF VACATION DAYS WHICH SHE WANTED TO CARRY OVER INTO THE NEXT YEAR. SHE WAS TOLD BY THE SUPERINTENDENT THAT SHE HAD TO USE THEM BY APRIL 30 OR SHE WOULD LOSE THEM. THE SUPERINTENDENT, HOWEVER, REQUESTED THAT THE BOARD ALLOW HIM TO CARRY OVER HIS UNUSED VACATION DAYS INTO FUTURE YEARS. THE SUPERINTENDENT, WITHOUT BOARD APPROVAL, WAS ESTABLISHING A POLICY, QUITE INCONSISTENT, FOR HIS STAFF AND FOR HIMSELF. THIS ACTION BY THE SUPERINTENDENT CONSTITUTES A USURPATION OF THE BOARD'S POLICY-MAKING FUNCTION AND AMOUNTS TO CONDUCT UNBECOMING A SUPERINTENDENT.

Edith Bonsee, a clerk-stenographer in the Board office in calendar year 1981, filed a request with Business Administrator Tullo for a third week of vacation during the summer of 1981 because of a planned trip to Switzerland, with an earned fourth week to be decided at a later date (P-66). Tullo approved the request (Tr. VII, 179).

It was stipulated that no written vacation policy had been adopted by the Board. It was undisputed, however, that the accepted practice and procedure required that vacation time earned in one school year had to be used prior to the end of the following school year. There was no accumulation of unused vacation time.

It was alleged that the Superintendent attempted to intervene to countermand the approval of Bonsee's vacation request because it was ostensibly inconsistent with past practice. Such an attempt was nevertheless ignored by Bonsee on advise of Tullo (Tr. VIII, 143, 144).

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

It has also been alleged by the Board that Onorevole submitted a request dated March 23, 1983, that he be allowed to use accumulated unused vacation time contrary to the practice in effect and his presumed position in the Bonsee matter almost two years earlier (P-67). P-67 advises the Board president of the information requested by him; vacation days taken and those not used from 1978 through 1982.

Board member Pizzuta, who was president from 1981-83, also testified. He stated that his "recollection is vague at this time" but that he believes there was some discussion concerning unused vacation time, and guessed Onorevole wanted remuneration or some type of consideration (Tr. XI, 23-24). He further testified that he requested the data supplied by Onorevole in P-67, but believed that it was an outgrowth of the aforementioned discussion (Tr. XI, 26).

Onorevole testified that he never established a vacation policy for himself that was different than the accepted practice in effect for other staff members, and did not request the Board to allow him to accumulate unused vacation time. He further tesified that P-67 was a response to a request by Pizzuta and not a request to use accumulated unused vacation days (Tr. XXIV, 41, 42).

I **FIND** that P-67 is a response to an inquiry by Pizzuta and cannot be construed to be a request to use accumulated unused vacation time contrary to the practice applicable to other staff members. Onorevole's testimony is, however, suspect due to its incompleteness as it would be illogical to believe that Pizzuta would have requested the data supplied in the absence of a discussion of same that could only be beneficial to Onorevole.

Nevertheless, no accumulated unused vacation time was utilized by Onorevole (Tr. XXIV, 43). In the event Onorevole made a request for the use of or remuneration for said time, discretionary authority to grant or deny any such request would rest solely with the Board.

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

I FIND no credible evidence in support of the Board's allegation that Superintendent Onorevole was establishing a policy without Board approval or made any attempt to usurp the Board's policy-making function, and further that this charge is nothing more than folderol, and is therefore untrue.

CHARGE #27

THE SUPERINTENDENT, WITHOUT BOARD APPROVAL, AND IMPROPERLY, PLACED ON THE BOARD OF EDUCATION AGENDA A RESOLUTION INVOLVING CO-CURRICULAR ACTIVITIES FOR 1985 WHICH INCLUDED AN INCREASE IN THE STIPENDS OF COACHES AND ACTIVITY ADVISORS. THIS WAS DONE WITHOUT BOARD APPROVAL. THE ACTIONS OF THE SUPERINTENDENT CONSTITUTE A USURPATION OF THE BOARD'S FUNCTION AND AMOUNTS TO INSUBORDINATION AND CONDUCT UNBECOMING A SUPERINTENDENT.

It was stipulated by Board counsel that responsibility for the preparation of Board meeting agendas rests with the Superintendent (Tr. XVIII, 124). It can hardly be disputed that agenda items in resolution form are proposals for discussion and possible action by the Board.

N.J.S.A. 18A:17-20 states:

> The superintendent of schools shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the state board . . . .
>
> He shall have a seat on the board or boards of education employing him and the right to speak on all educational matters at meetings of the board or boards but shall have no vote.

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

N.J.A.C. 6:3-1.12(c) states under the "Duties of district superintendent of schools; chief school administrator":

> He or she shall exercise such educational and administrative leadership, supervision, and guidance as may be necessary for producing best possible educational conditions and outcome.

I **FIND** the placement of items on an agenda by the Superintendent for Board discussion and policy determinations to be an exercise of leadership by the chief school administrator fully in accord with the statutory and regulatory scheme, which in no way can be construed to be insubordinate, a usurpation of the Board's function, or conduct unbecoming a Superintendent. I therefore **FIND** no compelling need to recite any of the extensive testimonial evidence adduced on this charge or refer to any documentary evidence.

I FIND that Charge #27 is untrue.

CHARGE #28

DURING THE SCHOOL YEARS 1980/81 - 1985/86, THE SUPERINTENDENT FAILED TO PROPERLY AND ADEQUATELY REVIEW AND RECOMMEND TO THE BOARD PERSONNEL NEEDS IN LIGHT OF DECLINING ENROLLMENT AND ECONOMIC RESTRAINTS. THE BOARD INDICATED IT WANTED THE SUPERINTENDENT TO ADVISE WHAT WAS NEEDED IN ORDER TO BRING CLASS SIZE WITHIN THE BOARD POLICY. THE SUPERINTENDENT FAILED TO AND REFUSED TO MAKE SUCH RECOMMENDATIONS FOR RIFFING PERSONNEL TO THE BOARD. THIS CONSTITUTES IRRESPONSIBLE AND FISCALLY POOR MANAGEMENT. EVENTUALLY, THE BOARD, WITHOUT HAVING THE RECOMMENDATION OF THE SUPERINTENDENT, MADE ITS OWN RIFS. IN ORDER TO KEEP THE BOARD IN THE DARK AND NOT APPRISE IT OF THE STUDENT ENROLLMENT, THE

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

SUPERINTENDENT PRESENTED INCORRECT AND UNREALISTIC ENROLLMENT FIGURES IN SEPTEMBER OF EACH YEAR. THE ACTIONS AND INACTIONS OF THE SUPERINTENDENT CONSTITUTE INSUBORDINATION AND CONDUCT UNBECOMING A SUPERINTENDENT.

It is difficult to comprehend the rationale of the Board in certifying this charge in light of other charges certified, a stipulation and the undisputed testimony of Onorevole. The other charges referred to are #22 and #32, which incorporate Board admissions of reduction in force recommendations made by the Superintendent. The stipulation referred to is that the Superintendent provided enrollment projections to the Board annually. The undisputed testimony of Superintendent Onorevole is that no Board policy related to class size exists, but an administrative guideline of a minimum class size of 10 is in effect at the high school. Further, no nexus has been shown of the Board's only unilateral RIF (Blumstein) in the record of these proceedings and class size.

I must, therefore, **FIND** those segments of this charge which refer to class size within Board policy, the failure and refusal of the Superintendent to make reduction in force recommendations and the plurality of unilateral RIFs by the Board to be untrue. Only the Board's allegation of the Superintendent's presentment of incorrect and unrealistic enrollment figures in September of each year remains. It must be presumed that the Board is referring to projected rather than actual enrollments.

Onorevole conceded a sharp decline of actual enrollment from those projected for September 1983 of 63 pupils, which were predominantly at the high school and primarily caused by unanticipated resident changes. Same was promptly reported to the Board (R-121).

The only data in the record are enrollment projections and actual enrollments for September in the years 1982, 1983 and 1984 (P-69 and R-120). A review and analysis of this data indicates that Onorevole erred in his projections by approximately 3.5% for the composite period.

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

I cannot find this margin of error to constitute conduct unbecoming a Superintendent. **I FIND** that Charge #28 is untrue.

CHARGE #29

AT ALL TIMES DURING HIS PERFORMANCE AS SUPERINTENDENT, HE HAS ACTED DEFIANTLY, ARROGANTLY, UNRESPONSIVELY, AND UNCOOPERATIVELY TOWARDS THE BOARD'S DIRECTIVES AND POLICIES, BELIEVING HE WAS NOT RESPONSIBLE TO THE BOARD'S AUTHORITY.

CHARGE #30

AT ALL TIMES, THE SUPERINTENDENT HAS ENGAGED IN PETTY AND UNPROFESSIONAL CONDUCT TOWARDS THE BOARD OF EDUCATION, DEMONSTRATING HIS LACK OF RESPONSIBILITY TO THE AUTHORITY OF THE BOARD. THE SUPERINTENDENT HAS SET HIMSELF UP AS BEING ABOVE THE AUTHORITY OF THE BOARD AND BEING RESPONSIBLE TO NO ONE IN THE DISTRICT. HE MISPERCEIVES HIS ROLE AS SUPERINTENDENT AND FAILS TO RECOGNIZE THE AUTHORITY OF THE BOARD OF EDUCATION.

CHARGE #31

THE SUPERINTENDENT HAS LOST ALL SUPPORT FROM THE BOARD OF EDUCATION AND IS NOW ENGAGED IN ACTIVITIES WHICH ARE OUTRIGHT ANTAGONISTIC TOWARD THE BOARD. THE SUPERINTENDENT'S CONDUCT CREATES DEVISIVENESS IN THE DISTRICT. HIS ACTION AND LACK OF ACTION PREVENTS THE DISTRICT FROM PROVIDING A THOROUGH AND EFFICIENT EDUCATION TO THE YOUNGSTERS.

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

Charges #29, 30 and 31 incorporate general allegations and conclusory statements by the Board. It was agreed by counsel for the parties, with concurrence by the undersigned, that these charges be consolidated as they represent a composite of the 29 other charges, and shall not be addressed directly. Rather, the summation will incorporate the composite findings and conclusions in the disposition of this matter.

CHARGE #32

IN SEPTEMBER 1981, THE SUPERINTENDENT RECOMMENDED THAT ROBERT SCHMIDT BE RIFFED AS AN ENGLISH TEACHER, AND TEACHER OF READING. THE SUPERINTENDENT THEN ASSIGNED NON-CERTIFIED STAFF TO TEACH THESE CLASSES. ROBERT SCHMIDT FILED SUIT AND WAS SUCCESSFUL IN REGAINING HIS TEACHING POSITION. THIS LAWSUIT COST THE BOARD OF EDUCATION EXTENSIVE ECONOMIC LOSS DUE TO THE SUPERINTENDENT'S NEGLIGENCE AND FAILURE TO ASSIGN PROPERLY CERTIFIED STAFF.

Robert Schmidt was notified on or about April 2, 1981, of the abolishment of his teaching position and termination of his employment effective May 31, 1981, and he then filed a petition of appeal with the Commissioner of Education (R-124). [The matter was docketed by the Department of Education as 223-6/81A and by the Office of Administrative Law as EDU 4857-81].

The Board prevailed in an initial decision by the administrative law judge, which was affirmed by the Commissioner and the State Board of Education. The Appellate Division remanded and subsequently reversed (Tr. XXIV, 67, 68). [The matter was docketed in the Appellate Division as A-4842-82T5 and decided on June 4, 1984.]

Notwithstanding the fact that it was the Board that acted to RIF Schmidt and was the respondent in the aforementioned litigation, the Board appears to be comfortable in charging the Superintendent with negligence after Schmidt prevailed at the termination of

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

the lengthy process of litigation of a unique legal issue. Such a charge must be deemed to be ludicrous, as if levied against the administrative law judge, Commissioner of Education and the State Board of Education, all of whom upheld the Board in that action.

Concerning that segment of the charge that the Superintendent failed to assign properly certified staff, no testimonial or documentary evidence was produced in support of same.

I FIND the charge to be untrue.

The following is a summary of findings of the veracity or falseness of the charges:

CHARGE	TRUE	UNTRUE
1	X	
2	X	
3	X	
4		X
5		X
6		X
7		X
8		X
9		X
10		X
11		X
12		X
13		X
14		X
15	X	
16		X
17	X	X
18	X	X
19		X
20	X	
21		X
22		X
23		X
24		X
25		X
26		X
27		X
28		X
29	-	-
30	-	-
31	-	-
32		X

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

Having found charges 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 19, 21, 22, 23, 24, 25, 26, 27, 28 and 32 to be **UNTRUE, I CONCLUDE** they shall be and are hereby **DISMISSED.**

Having found charges 1, 2, 3, 15, and 20 to be **TRUE**, and charges 17 and 18 to be **PARTIALLY TRUE**, it is now essential to address those charges to determine if dismissal or salary reduction is warranted.

The extensive hearing schedule and testimonial and documentary evidence in this matter induces reflection on the broader issue of Weehawken school operations which triggered the certification of charges.

The genesis of the malodourous relationship between Onorevole and the Board cannot be gleaned from a review of the record, but it is reasonable to believe it occurred around the time of the election of Joe Atallo as a member of the Board in March 1980. Such reasonableness emanates from the credible testimony of secretary-clerk Patricia Sasoonian who stated that "[h]e [Atallo] was very helpful in getting my job, that I wouldn't have anything to worry about, that he was going to get me my job. He also mentioned back in '81 that he was going to get rid of the Superintendent. He also said that when my husband was going to run, that I would be out of a job if my husband continued to run for political office. Thus, that was how I was fired the two times." (Tr. XVI, 121, 122).

Atallo denied he ever made the above statement when he testified on rebuttal.

Jack Sasoonian, husband of Patricia, testified as a rebuttal witness for respondent and verified that Atallo stated, in the kitchen of Sasoonian's home early in 1981, that he would get rid of Onorevole (Tr. XXXVI, 6, 7).

This case, in large measure, turns on the credibility of testimony adduced from witnesses called by both parties to support their positions. For testimony to be credible, it must be worthy of belief. State v. Kenilworth, 69 N.J.L. 114 (Sup. Ct. 1903), aff'd, 69 N.J.L.. 674 (E. & A. 1903). Credible testimony must be plausible and natural, Indiana

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

Metal Products v. NLRB, 442 F. 2d 46, (7th Cir. 1971), and it should not be extraordinarily surprising, suspicious or incomplete. Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482, 498 (1956). Testimony offered which appears to be fabricated may allow the trier of fact to assume the truth of that which the witness denies. In re Bebar, 315 F. Supp. 841 (E.D.N.Y. 1970), citing Dyer v. MacDougall, 201 F. 2d 265 (2d Cir. 1952).

I believe the Sasoonians. I do not believe Atallo.

The propriety of the role exercised by individual Board members is seriously questioned. Demands made of the Superintendent through written memos from individual Board members are documented in these proceedings. Individual Board members were frequently in the high school building which also houses the offices of the Superintendent and Board Secretary/Business Administrator. Mrs. Sasoonian testified that "Mr. Atallo could say almost on a daily basis, quite a few times a week; Mr. Rutigliano, at least a couple of times a week, sometimes around lunchtime, sometimes, you know, just like before 4:00." (Tr. XVI, 23).

In In the Matter of the Tenure Hearing of Harry I. Buch, 1977 S.L.D. 95, the Commissioner said at 103-104:

> On the other hand, schools cannot operate effectively when individual board members ignore, disobey, or are indifferent to the rules and procedures which have been designed for the good order of the school and the welfare and protection of all those individuals associated with the institution. Such misconduct is not tolerated among its employees and pupils, nor can it be tolerated among board members.

In In the Matter of the Tenure Hearing of Paul W. Jones, 1971 S.L.D. 520, the Commissioner stated at 544:

> The Commissioner is also constrained to observe that the instant matter is proof of the need, in these times of increasing stress for a clear distinction between (a) the responsibility to establish policy to guide school operation, which is a board's prerogative and obligation and (b) the responsibility to administer those policies, which the board, not individuals of the board, have established. This responsibility for administration of the policy determinations of the whole board is clearly delegated to the superintendent of schools. . . .

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

It is therefore not appropriate that individual Board members insert themselves into the very sinews of policy implementation reserved as an administrative function of the professional staff. The absence of judgmental self-restraint by individual Board members only demeans the Board as a public body.

Similar to the recommendations of the Commissioner in Buch, it is recommended herein that the Superintendent and Board initiate plans to include its administrative staff as participants in workshop meetings conducted by an employed educational consultant, which should be designed to correct the misperception of roles which has been so divisive.

The Commissioner also addressed administrative lines of communication, as well as undue intrusion by Board members, in The Matter of the Tenure Hearing of Wilma J. Colella, 1984 S.L.D. ____ (October 12, 1984), when he said at 38:

> The Commissioner notes that the appropriate reporting mechanism for building level administrators should be to the chief school administrator who ultimately has to bear responsibility for the effective daily operation of the schools and for reporting directly to the Board on matters that relate to said operation.

Concerning all of the charges certified by the Board, I **FIND** them to be mostly spurious, synthetic, petulant and banal.

The Superintendent must be commended for his disciplined conduct during a lengthy period when he endured the wrath of the Board in reprimands and adopted resolutions of repeal. He, however, did not always distinguish himself in the exercise of sound judgment in dealing with the issues incorporated in the charges found to be true or partially true. The diaphanous nature of the issues in those charges leads to a facile resolution of the discipline to be imposed.

I **FIND** that Superintendent Onorevole has been held up by the Board to public ridicule, humiliation and embarassment. I **CONCLUDE** that Superintendent Onorevole has suffered sufficient indignities for his transgressions to preclude the imposition of further discipline.

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

The Commissioner said at 106 in In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, 1966 S.L.D. 77, aff'd, State Board of Education, 1966 S.L.D. ____ (December 7, 1966), aff'd, N.J. Sup. Ct. (App. Div), 1967 S.L.D. 351:

> The Commissioner is assiduous to protect schoool personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control.

The Board is hereby **ORDERED** to reinstate Onorevole to his position as Superintendent of Schools, and to compensate him for salary lost during the first 120 days of his suspension.

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

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

14 November 1986
DATE

WARD R. YOUNG, ALJ

NOV 17 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

NOV 18 1986
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

g/e
am

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

IN THE MATTER OF THE TENURE HEARING OF DR. RICHARD E. ONOREVOLE, SCHOOL DISTRICT OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Ward R. Young, ALJ.

It is observed that the Board's exceptions, as well as respondent's reply to those exceptions, were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c. Each of these submissions is at least ninety typewritten pages in length and includes extensive reference to the transcripts of the testimony taken at the thirty-six days of hearing in this matter. Said submissions, as well as the post-hearing briefs of the parties, are incorporated herein by reference.

The Commissioner requested and received on December 12, 1986 an Order of Extension from the Office of Administrative Law to file his final decision in this case. The Commissioner has reviewed the Board's exceptions to the initial decision and respondent's reply to those exceptions, in addition to making a careful review of the transcripts of the proceedings.

Essentially, the Board avers in exceptions that the ALJ did not address in his initial decision all the relevant and material testimony with respect to the charges. It submits that a review of the testimony establishes that the "acts and omissions of the Superintendent disclose his nature, character and the attitude which he harbors against the lay trustee members of the Board of Education." (Board's Exceptions, at p. 92) The Board argues that while its members should be able to rely upon its superintendent to report to them accurate and complete details concerning the various issues with which they are confronted, such a relationship does not exist in the Weehawken District.

Further, the Board claims that the testimony establishes that respondent is guilty of the conduct described in the tenure charges and that that conduct requires imposition of "a substantial penalty." (Board's Exceptions, at p. 93) The Board finds that the conclusion of the ALJ that respondent has been held up by the Board to ridicule, humiliation and embarrassment deserving of no further discipline has no support in the record. The Board charges:

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

> These characterizations are symptomatic of a repetitive attempt by the Law Judge to insulate the Respondent from the consequences of his acts. It is noteworthy that throughout the initial decision blatant inconsistencies in the testimony of the Respondent have been ignored.***
> (Board's Exceptions, at p. 93)

Respondent's reply exceptions counter, charge for charge, the exceptions of the Board. He avers that the Board, in each of the thirty-two charges certified, has failed to sustain its burden of proof and urges the Commissioner to affirm the decision and adopt the recommendations of the ALJ.

The Commissioner, upon review of the extensive post-hearing submissions, as well as the transcripts of these proceedings, finds and determines that the Board's exceptions to those findings and conclusions in the initial decision are its own inferences with regard to the relevant findings of fact in this matter and are deemed to be misplaced and essentially without merit.

Clearly, we have here a classic case of lack of communication and cooperation between the superintendent and the Board of Education. The evidence indicates that the Board determined that it wished respondent to be dismissed. It engaged in a series of actions designed to make life difficult for him and to circumvent totally all freedom of action the superintendent might otherwise enjoy. It thwarted his attempts to implement his administrative duties to the point where there have been serious breaches of the division of policy development and implementation thereof, as noted by the ALJ in the initial decision, ante.

On the other hand, it is equally clear that respondent determined to resist in every way possible what he viewed as the Board's interference with the management of his district. In so doing, he appears to have sought to return, measure for measure, what he perceived to be the overbearing actions of individual members of the Board. The question then arises as to whether any such transgressions on the part of the superintendent constitute just cause to dismiss or reduce his compensation, as set forth in N.J.S.A. 18A:6-10. Under the circumstances, the Commissioner concurs with the ALJ that no further penalty is appropriate.

The Commissioner is in agreement with respondent that despite the submission of hundreds of exhibits, and notwithstanding the Board's reliance upon its "policies" in certifying these charges against respondent, nowhere is there to be found in the record a copy of the district policy handbook or school code embodying said policies. The Commissioner notes with approval the statements contained in respondent's reply exceptions:

> ***Not one provision of this code was introduced by the petitioner, even though they testified

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

> that the Weehawken School Code is the adopted policy of the Board of Education.***
>
> It is submitted that the petitioner has the burden of proof with regard to these charges. They have the burden to present the Weehawken School Code which reflects the policy of the Board of Education. They have failed to do so, not because of an oversight, but because the Weehawken School Code does not support their position.
>
> It did not escape the Administrative Law Judge *** that the witnesses presented by the Weehawken Board of Education have attempted to construe their directives as the policy of the Weehawken Board of Education. These directives, issued outside of the regular Board of Education meetings, almost always came from individual Board of Education members. (emphasis in text)
>
> (Reply Exceptions, at pp. 90-91)

The Commissioner concurs with these statements and adopts them as his own. His review of the transcripts convinces the Commissioner that respondent was, in fact, responsive to the inordinate number and kinds of "directives" demanded by said individual board members. (See Exhibits P-2, 8, 14, 15, 20, 36, 70, 71, 72, 74, and 85; R-65 and 89.) However, as noted by the ALJ, respondent was under no obligation whatsoever to respond to any directives save those properly promulgated by the Board as a whole at official public meetings. (See N.J.S.A. 18A:17-20 and N.J.S.A. 18A:11-1.)

Moreover, the Commissioner agrees with the ALJ's summation of the general conditions of the Weehawken school operations which may have been a factor in the certification of the instant charges, as set forth in the initial decision, ante. He surmises, as did the ALJ, that such circumstances were likely an unfortunate predicate to the filing of the instant tenure charges and created a hostile atmosphere in which to perform the tasks statutorily mandated to be carried out by the superintendent.

Finally, the Commissioner is entirely in accord with the ALJ that "[t]his case, in large measure, turns on the credibility of testimony adduced from witnesses called by both parties to support their positions." (Initial Decision, ante, citations omitted) The Commissioner's review of the record did not reveal, in even a single instance, a reasonable basis for overturning the credibility determinations of the ALJ. See Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976) (Standard of judicial review of factual determination made by administrative agency is whether findings could reasonably have been reached on sufficient credible evidence present in record considering proofs as whole and with due regard to opportunity of one who heard witnesses to judge their credibility.)

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

Consequently, the Commissioner finds and determines that Charges 4-14, 16, 19, 21-28 and 32 are untrue and are thus dismissed with prejudice. The Commissioner further finds Charges 1, 2, 3, 15 and 20 are true, and that Charges 17 and 18 are partially true. The Commissioner also agrees with the ALJ's findings that while respondent did not always demonstrate sound judgment in dealing with the situations presented to him, under the difficult circumstances that exist in the district, no further disciplinary action is appropriate. See In the Matter of the Tenure Hearing of Joseph A. Maratea, School District of the Township of Riverside, Burlington County, 1966 S.L.D. 77, aff'd State Board 106, aff'd New Jersey Superior Court, Appellate Division 1967 S.L.D. 351.

The Commissioner encourages the Weehawken District to implement the recommendation of the ALJ found in the initial decision, ante, that "the Superintendent and Board initiate plans to include its administrative staff as participants in workshop meetings conducted by an employed educational consultant, which should be designed to correct the misperception of roles which has been so divisive." Additionally, the Commissioner hereby directs individual members of the Board to cease from occupying the time and energy of the superintendent with personal and individual information, responses, directives, etc., as distinguished from those communications to the superintendent from the Board as a whole.

The initial decision is affirmed for the reasons expressed therein as amplified in this decision.

COMMISSIONER OF EDUCATION

January 22, 1987

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

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. RICHARD E.	:	
ONOREVOLE, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE TOWNSHIP OF WEEHAWKEN, HUDSON	:	ORDER
COUNTY.	:	
	:	

It appearing that respondent herein by way of a single timely exception requested that he be granted 150 days compensation for salary lost during his suspension, which dated from July 25, 1985 through December 23, 1985; and

The Commissioner having failed to incorporate said exception in his decision dated January 22, 1987 and having subsequently reviewed the matter; now therefore

The Commissioner hereby directs the Board to tender an additional 30 days remuneration to respondent pursuant to N.J.S.A. 18A:6-14, but in all other respects affirms the initial decision as stated, ante.

IT IS SO ORDERED this 30th day of January 1987.

COMMISSIONER OF EDUCATION

January 30, 1987

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

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. RICHARD E.	:	STATE BOARD OF EDUCATION
ONOREVOLE, SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF WEEHAWKEN, HUDSON	:	
COUNTY.	:	
_____	:	

Decided by the Commissioner of Education, January 22, 1987

For the Petitioner-Appellant, Krieger, Ferrara, Flynn and Catalina (Joseph J. Ferrara, Esq., of Counsel)

For the Respondent-Respondent, Connolly, Vreeland and Connolly (Joseph E. Connolly, Jr., Esq., of Counsel)

This case involves thirty-two tenure charges of insubordination, conduct unbecoming and other just causes based on specific incidents that were certified by the Board of Education of the Township of Weehawken against its Superintendent, Respondent Richard E. Onorevole. After thirty-six days of hearing, the Administrative Law Judge (ALJ) found that five of the charges were true, two were partially true, and that the other charges were untrue. The ALJ's conclusions concerning the validity of the charges were based on his assessment of the extensive testimonial evidence, as well as of the documentary evidence, and in some cases his determinations rested almost exclusively on the testimonial evidence. See, for example, Charge 13, Initial Decision, at 34-41. Thus, the ALJ's determination of Respondent's guilt, as expressed by him, "in large measure, turn[ed] on the credibility adduced from witnesses called by both parties to support their positions." Initial Decision, at 66.

As stated, the ALJ found that some of the charges were true or partially true. He however concluded that Respondent had suffered sufficient indignity for his transgressions so as to preclude the imposition of further discipline.

The Commissioner "affirmed" the ALJ's decision for the reasons expressed in the Initial Decision as amplified by the Commissioner in his decision. In reaching this conclusion, the Commissioner expressed his agreement with the ALJ that the case in large measure turns on the credibility of the testimony adduced from the witnesses. Relying on Parker v. Dornbierer, 140 N.J. Super. 185 (App. Div. 1976), and noting that that case stood for the proposition that the standard of judicial review of determinations of an administrative agency is whether the findings could reasonably have been reached on sufficient credible evidence in the record

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

considering the proofs as a whole and with due regard to the opportunity of one who heard the witnesses to judge their credibility, the Commissioner found no "reasonable basis for overturning the credibility determinations of the ALJ." Commissioner's decision, at 87. Consequently, the Commissioner adopted the ALJ's determination concerning the validity of the charges.

We reverse and remand since we determine that the Commissioner applied the wrong standard of review to the findings of the ALJ. In the Matter of the Tenure Hearing of Patrick Caporasa, Docket #A-4558-85T6 (App. Div. March 19, 1987). As emphasized by the court in Caporasa, the Commissioner is charged with the responsibility of making final decisions in contested cases when acting pursuant to N.J.S.A. 18A:6-9. That responsibility requires that he determine the facts, as well as make conclusions of law. In Re Uniform Adm. Procedures Rules, 90 N.J. 85 (1982). Accordingly, the Commissioner's responsibility for review is not identical to an appellate court. Caporasa, supra.

Further, we emphasize that although the Commissioner should accord due consideration to the fact that the ALJ had the opportunity to observe the parties and their witnesses, c.f. Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 42, 50-54 (1962), Board of Education of the Village of Ridgewood v. Barry Deetz, Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 321 (1986), the Commissioner is not required to adopt the ALJ's assessments of the substance of the witnesses' testimony or his evaluation of objective factors bearing on credibility, such as relationships between parties and witnesses. Board of Education of the Village of Ridgewood v. Barry Deetz, supra.

In remanding this case in order that the Commissioner may properly review the ALJ's findings, we emphasize that we do not intend our decision to indicate the validity or lack of validity of the charges against Respondent. We do not retain jurisdiction.

August 5, 1987

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

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. RICHARD E.	:	COMMISSIONER OF EDUCATION
ONOREVOLE, SCHOOL DISTRICT OF THE	:	DECISION ON REMAND
TOWNSHIP OF WEEHAWKEN, HUDSON	:	
COUNTY.	:	
	:	

This matter has been reversed and remanded to the Commissioner of Education by the State Board of Education's decision dated August 5, 1987, wherein it determined that "the Commissioner applied the wrong standard of review to the findings of the ALJ." (Slip Opinion, at p. 2) The State Board cites In the Matter of the Tenure Hearing of Patrick Caporaso, decided by the Commissioner of Education October 15, 1985, aff'd State Board May 9, 1986, rev'd/rem'd N.J. Superior Court, Appellate Division, Docket No. A-4558-85T6, in support of its determination rejecting the Commissioner's findings and suggests that the proper standard for the Commissioner's review of the ALJ's finding is embodied in such cases as Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 40, 50-54 (App. Div. 1962) and also Board of Education of the Village of Ridgewood v. Barry Deetz, Docket No. A-1264-84T5, Appellate Division, May 10, 1985, certif. denied, 101 N.J. 321 (1985).

Consequently, the Commissioner has undertaken a further review of this matter in conformity with the remand. In doing so the Commissioner relies on the cases cited by the State Board and also on the standard of review of contested cases set down by the New Jersey Supreme Court in In re Masiello, 25 N.J. 590 (1958) which reads in pertinent part as follows:

> [The Commissioner] "[i]n reaching his determination *** must *** give due weight to the nature of the findings below, although his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated." Laba v. Board of Education of Newark, supra, 23 N.J. at page 382. More definitively, this means that the burden of the Commissioner is to weigh the evidence and to make an independent finding of fact on the record presented; and in the process of reaching that finding, he should give due regard to the opportunity of the hearer below to observe the witnesses and to evaluate their credibility. Cf. R.R. 1:5-4(b). (at 606)

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

For the purpose of this review of the record of this contested matter, the Commissioner also relies on the specific provision of N.J.S.A. 52:14B-10(d) which states in pertinent part:

> *** The final decision may incorporate by reference any or all of the recommendations of the administrative law judge.***

In reviewing the Board's exceptions to the initial decision, it is noted that the Board contests, point for point, each of those findings of fact and credibility determinations of the ALJ that led to the dismissal of Charges 4-14, 16, 19, 21-28 and 32 and, further, to his finding that although Charges 1, 2, 3, 15, and 20 are true, and Charges 17 and 18 are partially true, no further penalty is appropriate.

The Commissioner has carefully reviewed all the transcripts of the witnesses' testimony as they relate to each of the exceptions filed by the Board, as well as the replies to those exceptions filed by respondent. The Commissioner has further reviewed the single exception filed by respondent which contends that contrary to the finding of the ALJ in the initial decision, ante, he lost salary for the first 150 days of his suspension, not 120 days as suggested by the ALJ as being the proper additional compensation due and owing him by the Board.

Essentially, the Board avers in exceptions that the ALJ did not address all the relevant and material testimony with respect to the charges. It submits that a review of the testimony establishes that the "acts and omissions of the Superintendent disclose his nature, character and the attitude which he harbors against the lay trustee members of the Board of Education." (Board's Exceptions, at p. 92) The Board claims that the record establishes that respondent "has not fully and fairly informed the members of the Weehawken Board of Education concerning the various issues which arose and which comprise the subject matter of the Tenured Charges." (Id.) The Board avers that while its members should be able to rely upon its superintendent to report to them accurate and complete details concerning the various issues with which they are confronted, "that relationship does not exist in the Weehawken School District." (Id.)

Further, the Board claims that the testimony establishes that respondent is guilty of the conduct described in the tenure charges and that the conduct requires imposition of "a substantial penalty." (Id., at p. 93) The Board claims that the conclusion of the ALJ that respondent has been held up by the Board to ridicule, humiliation and embarrassment deserving of no further discipline has no support in the record. The Board charges:

> These characterizations are symptomatic of a repetitive attempt by the Law Judge to insulate the Respondent from the consequences of his

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

> acts. It is noteworthy that throughout the initial decision blatant inconsistencies in the testimony of the Respondent have been ignored.*** (Id., at p. 93)

The Board submits, in summary, that the Commissioner cannot adopt the findings and recommendation of the ALJ concerning the charges and cannot, as a matter of law, affirm imposition of the sanctions against the Board recommended in the initial decision "where, as here, imposition of the sanction [against the Board] has no evidential basis." (Id., at p. 94)

As noted above, respondent's single exception to the initial decision suggests that he is entitled to 150 days of salary lost during his suspension without pay. Respondent claims he was suspended on July 25, 1985 "and his salary and benefits were not resumed until December 23, 1985 by Order of the Honorable Timothy N. Tuttle***." (Respondent's Exceptions, at p. 1) See Commissioner's Order dated January 30, 1987.

Respondent's reply exceptions refute each exception raised by the Board. He avers that the Board, in each of the 32 charges certified, has failed to sustain its burden of proof and urges the Commissioner to affirm the decision and adopt the recommendations of the ALJ.

Respondent's reply exceptions state, inter alia:

> It is especially crucial for the Commissioner to recognize that the arguments submitted in petitioner's initial brief are now the same arguments it submits to the Commissioner in its exceptions brief. Their assertions were considered by Judge Young, but did not convince the trier of fact when rendering the initial decision. (Respondent's Reply Exceptions, at p. 1)

Respondent further asserts that "a majority of the petitioner's charges claims the respondent breached Board policy; yet, the petitioner never submitted a copy of their policy book into evidence to lay a foundation to substantiate their charges.***" (Id., at p. 2)

Respondent submits that the Commissioner should give due weight and deference to the trier of fact who saw and heard the witnesses and formed a conclusion as to the reliability and weight of the testimony. Citing Clary v. Borough of Eatontown, 41 N.J. Super. 47 (App. Div. 1956) and Rubel & Jensen Corp. v. Rubel, 85 N.J. Super. 27 (App. Div. 1964), respondent suggests that the Commissioner should affirm the trier of fact's opinion, "especially since the petitioner does not allege an error based on law." (Reply Exceptions, at p. 3)

The exceptions and reply exceptions of the parties are incorporated herein by reference.

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

Cognizant of his responsibility to conduct an independent review of the entire record before him, the Commissioner has weighed the evidence related to the findings of fact and conclusions of law set forth in the initial decision. In the process of reaching an independent determination with respect to the findings of fact in the record before him, the Commissioner has given due regard to the opportunity of the ALJ who conducted the plenary hearing in this matter to observe the witnesses and evaluate their credibility, cf., Quinlan, supra; Deetz, supra; In re Masiello, supra. See also N.J.S.A. 52:14B-10(d).

The Commissioner upon careful and thorough review of the transcripts of these proceedings finds and determines that the Board's exceptions to the findings and conclusions are its own inferences with regard to the ALJ's findings of fact. The Commissioner is convinced that the incidents of unbecoming conduct with which respondent is charged in Charges 4-14, 16, 19, 21-28 and 32 are untrue, despite the Board's protestations to the contrary, which suggest that the transcripts substantiate its contention that respondent's testimony and that of his witnesses was contradictory and unsupported by fact. The Commissioner therefore adopts as his own those findings of fact and conclusions of law concerning these charges. Simularly he agrees with the ALJ that Charges 29, 30 and 31 are general composites of the Board's other allegations, specific findings and concerns which are adopted as stated in the ALJ's summation of the charges as found in the initial decision, ante. N.J.S.A. 52:14B-10(d)

Illustrations of the Board's inferences concerning the charges found to be untrue follow.

As to Charge 9, wherein the Board avers that the superintendent "[f]ailed to become meaningfully involved in the 1985-86 budget process and failed to attend important Board of Education Budget meetings on January 13, 1985 and January 28, 1985" (Initial Decision, ante), the Board suggests in its exceptions at p. 27 that "Onorevole acknowledged that he did not discuss the budget process with members of the Board of Education during the 1985/86 school year (20T75:7-25)." The Commissioner's review of the transcript reveals precisely the opposite testimony from respondent:

> Q. During the preparation of the budget during the 1985 -- for the 1985/86 school year, did you have the occasion to discuss the budget or the budget process with members of the Board of Education?
>
> A. Yes.
>
> Q. What did those discussions consist of?
>
> A. They were on State aid, the possibility of additional aid coming through through various legislative bills, our cap amount and that the budget was prepared and that I

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

> had reviewed it and it was submitted to the Business Administrator, and the auditor was collating it. (Tr. XX-76-77)

The Commissioner finds such misinterpretation of the record by the Board inures in respondent's behalf in evaluating the truth or falsity of the charge. His careful review of the transcript citations of both parties relative to this charge, among others, leads the Commissioner to the same conclusion as that posited by respondent in his reply exceptions to Charge 9:

> Again, it is submitted that careful note should be taken of the use of false and misleading statements with regard to this charge. The failure of the Board of Education to present any documentary evidence as well as truthful testimony with regard to this charge reflects very poorly upon the presentation of their case and highlights the basis for which the Administrative Law Judge made his findings. (Reply Exceptions, at pp. 36-37)

Charge 11 avers that Superintendent Onorevole "over the Principal's objection and without Board approval" ordered "a teacher, Anna Miranda, *** to cease teaching in the District *** which resulted in a successful lawsuit against the district by Anna Miranda, costing the district unnecessary sums of money." (Initial Decision, ante)

Upon his careful review of the record in this matter, it is the Commissioner's opinion that such charge, among others, is, as the ALJ notes in the initial decision, of a "diaphanous nature" and "must lead to its facile resolution". The Commissioner so finds having reviewed the Board's exceptions in this regard and respondent's replies thereto. The Commissioner's review of the record comports with respondent's arguments.

The Board argues:

> The resolution appointing her to the Teacher of Handicapped position expressly stated that she was being transferred from Comp Ed to that position. The subsequent rescission of the resolution certainly required the Superintendent to reinstate the teacher to her Comp Ed position. If he was uncertain as to what he should do, he should have brought the matter to the attention of the Board. He did not. The Law Judge did not deal with this issue nor did he deal with the Superintendent's failure to ascertain that Miranda, the teacher who (sic) he recommended to the Board of Education for

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

> appointment as a Teacher of the Handicapped, held the appropriate certification. (emphasis supplied)
> (Exceptions, at p. 45)

The reply thereto from respondent states:

> Once again, the petitioner has resorted to the use of false statements in an attempt to discredit the findings of the Administrative Law Judge. On page 45 of the exceptions, between line 20 and 30, a statement is made by the petitioner. This statement is absolutely false. A review of Ex. P-35 will show that the resolution did not transfer Anna Miranda from Comp. Ed. to the teacher of the handicapped. That particular resolution specifically states that she was "terminated". The repeated use of the words "re-assigned" and "transfer" is another attempt by the Board of Education to mislead and misdirect the attentions of the Commissioner. None of the resolutions introduced by the Board of Education into evidence used those words. The words that are used are "terminate" and "appoint". It is submitted that the words used in the resolutions have quite a different meaning than the words used by the petitioner in its exceptions.
>
> The Commissioner should note that the Superintendent's failure to ascertain whether or not Anna Miranda held the appropriate certificate is not an issue in this matter. However, the Superintendent of Schools presented lengthy testimony, as did his secretary, with regard to the problems encountered with Miss Miranda's certification. This testimony reflects the efforts of the Superintendent of Schools to resolve this problem. The Superintendent was not, as the Board of Education suggests on page 46 and 47 of their exceptions, concerned about additional courses, rather he was concerned about whether or not Miss Miranda was certified to teach the course to which she had been assigned. See Ex. R-77. He employed all the forces that were at his command. In addition to speaking to Miss Miranda himself, he enlisted the aid of his secretary, Mr. Blake and Mr. Palumbo. (XXVIIT163:12-22) (emphasis in text)
> (Reply Exceptions, at pp. 47-48)

Exhibit P-35, Board minutes of the meeting held on August 10, 1982, states:

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

Appointment - Ana Miranda, Teacher of the Handicapped

Mr. Ferullo moved, seconded by Mr. Lorenz for the adoption of the following resolution:

> BE IT RESOLVED, that the Board of Education accept the recommendation of the Superintendent of Schools that Ana Miranda be terminated from the Title I/Compensatory Education Program; and
>
> BE IT FURTHER RESOLVED, that Ana Miranda be appointed as Teacher of the Handicapped assigned to the Roosevelt School for the 1982-83 school year at a salary at the rate of $18,590.

On roll call resolution was unanimously adopted.
(emphasis supplied) (P-35)

P-34, Board minutes dated September 14, 1982, states:

Ana Miranda - Teaching Appointment Rescinded

Mr. Lorenz moved, seconded by Mr. McLellan for the adoption of the following resolution:

> WHEREAS, Ana Miranda has not submitted a New Jersey certificate for Teacher of the Handicapped; and
>
> WHEREAS, pursuant to Title 18A:27-2, employment without a certificate is prohibited and illegal; therefore
>
> BE IT RESOLVED, that the Board of Education accept the recommendation of the Supt. of Schools that the resolution of the Weehawken Board of Education is in conformity with the New Jersey State Statutes and that the prior resolution appointing Ana Miranda, a non-certificated teaching staff member, be rescinded effective immediately.

Comment - Mr. Pizzuta indicated that this action to remove Ms. Miranda a Special Ed teacher due to her lack of appropriate certification by two (2) academic credits short of what is required is truly unfortunate. However, the law is clear in this matter and the action must be taken.

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

On roll call resolution was unanimously adopted.
(P-34)

The Commissioner's review of the facts related to Charge 11 leads him to the same finding as the ALJ concerning Charge 11 herein. The ALJ concludes:

> The Board acted according to its own perception at that time in approving said recommendations, which in turn triggered the short-lived litigation and the necessary consultation of legal counsel. The Board must therefore be estopped from self-exoneration by its effort to place full responsibility on its Superintendent and the utilization of this charge as a basis for seeking his dismissal. (emphasis supplied)
> (Initial Decision, ante)

These resolutions reveal, on face, that it was the Board itself, upon the recommendation of the superintendent, which acted in September 1982 to terminate Ms. Miranda's employment in the district because she failed to timely acquire proper certification for Teacher of the Handicapped. The fact that Ms. Miranda ultimately prevailed in a law suit which restored her to her previously-held position cannot be attributed exclusively to the superintendent. First, responsibility for hiring and dismissing employees ultimately lies with the Board, not its agents.

Further, the Commissioner notes his assumption that the Board employs counsel at all times to advise it on complex areas of the law such as that in question on this charge, tenure acquisition for supplemental teachers. It cannot lay the blame for such actions as found to have occurred in this charge solely at the feet of respondent when said counsel ought to have been consulted too. In this regard the Commissioner notes with approval the ALJ's judicial notice of the extensive litigation on this issue before and after Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) amid which the matter concerning Ms. Miranda occurred. The complexity of this issue is underscored by the fact that the Appellate Division held in Point Pleasant Beach Teachers Association v. Board of Education of the Borough of Point Pleasant Beach, 173 N.J. Super. 71 (App. Div. 1980) that employees such as Ms. Miranda who held Title I and Comp. Ed. positions were not entitled to tenure until reversed by the Supreme Court of New Jersey in Spiewak, supra. Thus, the Commissioner's review of the matters is in accord with the ALJ's that respondent acted "in good faith in a clearly open-handed manner according to his perception of the law at that time, and fully communicated his position in making recommendations to the Board." (emphasis supplied) (Initial Decision, ante)

Later, the ALJ states, "concerning all of the charges certified by the Board, I find them to be mostly spurious, synthetic, petulant and banal." (Id.) The examples cited above

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

concerning charges deemed by the ALJ to be unproved bespeak the Commissioner's accord with the ALJ's conclusions concerning the charges as a whole.

As to Charges 1, 2, 3, 15 and 20 in which the Commissioner agrees with the ALJ who established these charges to be true and, as to Charges 17 and 18 in which the Commissioner agrees with the ALJ who established these charges to be partially true, the Commissioner is convinced that such circumstances, while demonstrating conduct on the part of a superintendent less than commendable, warrant no further penalty in light of the difficult circumstances under which he was compelled to conduct his duties. The Commissioner so finds, noting the reasons expressed by the ALJ in the initial decision as amplified in the Commissioner's decision dated January 22, 1987. Therein it states in pertinent part:

> Clearly, we have here a classic case of lack of communication and cooperation between the superintendent and the Board of Education. The evidence indicates that the Board determined that it wished respondent to be dismissed. It engaged in a series of actions designed to make life difficult for him and to circumvent totally all freedom of action the superintendent might otherwise enjoy. It thwarted his attempts to implement his administrative duties to the point where there have been serious breaches of the division of policy development and implementation thereof, as noted by the ALJ on pages 67-68 of the initial decision.
>
> On the other hand, it is equally clear that respondent determined to resist in every way possible what he viewed as the Board's interference with the management of his district. In so doing, he appears to have sought to return, measure for measure, what he perceived to be the overbearing actions of individual members of the Board. The question then arises as to whether any such transgressions on the part of the superintendent constitute just cause to dismiss or reduce his compensation, as set forth in N.J.S.A. 18A:6-10. Under the circumstances, the Commissioner concurs with the ALJ that no further penalty is appropriate.
>
> The Commissioner is in agreement with respondent that despite the submission of hundreds of exhibits, and notwithstanding the Board's reliance upon its "policies" in certifying these charges against respondent, nowhere is there to be found in the record a copy of the district policy handbook or school code embodying said

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

policies. The Commissioner notes with approval the statements contained in respondent's reply exceptions:

> ***Not one provision of this code was introduced by the petitioner, even though they testified that the Weehawken School Code is the adopted policy of the Board of Education.***
>
> It is submitted that the petitioner has the burden of proof with regard to these charges. They have the burden to present the Weehawken School Code which reflects the policy of the Board of Education. They have failed to do so, not because of an oversight, but because the Weehawken School Code does not support their position.
>
> It did not escape the Administrative Law Judge *** that the witnesses presented by the Weehawken Board of Education have attempted to construe their directives as the policy of the Weehawken Board of Education. These directives, issued outside of the regular Board of Education meetings, almost always came from individual Board of Education members. (emphasis in text)(Reply Exceptions, at pp. 90-91)

The Commissioner concurs with these statements and adopts them as his own. His review of the transcripts convinces the Commissioner that respondent was, in fact, responsive to the inordinate number and kinds of "directives" demanded by said individual board members. (See Exhibits P-2, 8, 14, 15, 20, 36, 70, 71, 72, 74, and 85; R-65 and 89.) However, as noted by the ALJ, respondent was under no obligation whatsoever to respond to any directives save those properly promulgated by the Board as a whole at official public meetings. (See N.J.S.A. 18A:17-20 and N.J.S.A. 18A:11-1.)

Moreover, the Commissioner agrees with the ALJ's summation of the general conditions of the Weehawken school operations which may have been a factor in the certification of the instant charges, as set forth on pp. 66-67 of the initial decision. He surmises, as did the ALJ, that such circumstances were likely an unfortunate

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

predicate to the filing of the instant tenure charges and created a hostile atmosphere in which to perform the tasks statutorily mandated to be carried out by the superintendent.***

***The Commissioner also agrees with the ALJ's findings that while respondent did not always demonstrate sound judgment in dealing with the situations presented to him, under the difficult circumstances that exist in the district, no further disciplinary action is appropriate. See In the Matter of the Tenure Hearing of Joseph A. Maratea, School District of the Township of Riverside, Burlington County, 1966 S.L.D. 77, aff'd State Board 106, aff'd New Jersey Superior Court, Appellate Division 1967 S.L.D. 351.

The Commissioner encourages the Weehawken District to implement the recommendation of the ALJ found on page 68 of the initial decision that "the Superintendent and Board initiate plans to include its administrative staff as participants in workshop meetings conducted by an employed educational consultant, which should be designed to correct the misperception of roles which has been so divisive." Additionally, the Commissioner hereby directs individual members of the Board to cease from occupying the time and energy of the superintendent with personal and individual information, responses, directives, etc., as distinguished from those communications to the superintendent from the Board as a whole.
(Id., at 85-88)

Accordingly, the Commissioner adopts the initial decision for the reasons stated therein as amplified herein. N.J.S.A. 52:14B-10(d) The Commissioner directs that Respondent Onorevole be immediately reinstated to his tenured position of employment as of the date of this decision. He further directs that respondent be compensated for the 150 days of salary and benefits lost as a result of his suspension without pay in accordance with the Order of the Honorable Timothy N. Tuttle, dated January 24, 1986, presuming that the Board has not already complied with such directive upon issuance of the Commissioner's decision which was the subject of the remand herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 31, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 798-86
AGENCY DKT. NO. 9-1/86

JOSEPH PEZZULLO,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF WILLINGBORO,
Respondent.

Jeffrey A. Bartges, Esq., for petitioner

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

Record Closed: October 25, 1986 Decided: December 9, 1986

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

Joseph Pezzullo (petitioner), who has been employed by the Willingboro Township Board of Education since 1971 as Coordinator of the Alternate School, seeks a declaratory judgment that the underlying duties and responsibilities he performs and has performed under that title are synonymous to the duties and responsibilities of the position "school principal". Petitioner seeks an Order from the Commissioner of Education by which the Board would be directed to recognize his employment as coordinator to be in fact and in law employment as a school principal and, as such, to be credited with seniority in the position of principal and to be paid according to the principal's salary policy.

After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a

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

hearing was scheduled and conducted September 29, 1986 at the Willingboro Township Municipal Court, Willingboro. The record closed October 25, 1986, upon receipt of the Board's reply letter memorandum.

BACKGROUND FACTS

The parties do not dispute that the following facts are established by a preponderance of credible evidence of record. Petitioner was initially employed by the Board during October 1970 as its coordinator of community affairs. In that capacity, petitioner was responsible for the institution of a drug abuse program for junior and senior high school pupils in the Willingboro Township public schools. His duties included the preparation of films, lectures to teachers and pupils, individualized and group pupil counseling on a referral basis and the use of outside agencies towards an effective drug abuse education program. Petitioner was housed in the Board's administration building and traveled from school to school within the district to carry out his duties.

During the following 1971-72 academic year, the State Law Enforcement Planning Agency (SLEPA)[1] awarded the Board a grant in the amount of 75 percent of the funds necessary to commence an alternate school program. The Board funded the remaining 25 percent of the total cost. The alternate school, then located in a rented building on State Highway 130 separate from other schoolhouses owned by the Board, was designed to segregate from the Board's general pupil population pupils in grades seven through ten in need of drug abuse counseling during their formal academic training. Petitioner was appointed coordinator of the alternate school at which 17 pupils were initially assigned who were regularly enrolled at one of the Board's other public schools in the district. Pupils referred for attendance at the alternate school by their regular classroom teachers in consultation with petitioner.

Petitioner and two full time teachers worked with these pupils in drug abuse counseling and the teaching of history, English, science and mathematics. The curriculum followed at the alternate school was the curriculum otherwise adopted by the Board for its nonalternate public schools in the district. After being appointed coordinator,

[1] See N.J.S.A. 52:17B-142.

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

petitioner was told in 1972 to secure a principal's certificate. Nevertheless, he ignored that advice until 1978 when he applied for and was issued the certificate. As a general rule, after a pupil spent one year at the alternate school he/she returned to their regularly assigned junior or senior high school in the Willingboro district and resumed their studies. It is noted that the title "coordinator of alternate school" is not a recognized title under the rules and regulations of the State Board of Education, N.J.A.C. 6:11-3.6, and that the Board's use of the title has not been approved by the Burlington County superintendent of schools.

After SLEPA awarded the Board continued finanicial support for the alternate school program in 1972-73 and 1973-74, the Board commenced full financial support in 1974-75 and to the present day the alternate school program is wholly funded from the Board's current expense budget. Over the years the physical location of the alternate school changed from the rented building on Highway 130 to a church in Willingboro for 1972-73, to a building on Highway 130 for which on the Board's behalf petitioner and the superintendent negotiated a lease for 1975-76 and 1976-77, to four relocatable classrooms on property owned by the Board in 1977-78 to finally in 1982 its present location in the C Wing of the Board's Levitt Building which also houses the office of the superintendent, a private day care center and an adult program.

The highest number of pupils assigned the alternate school in any given year occurred in 1975 or 1976 when approximately 58 pupils were in attendance one full year. Presently, 24 pupils are assigned the alternate school which by Board directive effective for 1985-86 serves selected pupils in grades eight through 12. The pupils are presently served by petitioner as coordinator, five full time teachers and one part time teacher, one teachers' aide, and one secretary. While drug abuse education was the initial focus, pupil discipline including poor school attendance by pupils are the concerns being presently addressed by the alternate school.

In support of the position that his employment as coordinator of the alternate school was and is employment as a principal, petitioner points out without contradiction from the Board that as the coordinator he is the only "administrator" at the alternate school; he reports directly to the Director of Secondary Education as do all other principals; he conducts two fire drills each month as required of principals at N.J.S.A. 18A:41-1 and signs fire drill reports as the principal of the alternate school for submission to the Board secretary; he supervises maintenance of the C Wing of the Levitt Building

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

which houses the alternate school and submits appropriate work orders as the principal for work to be done; he maintains daily pupil attendance records in his office, as well as pupil discipline records, grades and test score; he prepares academic programs for each assigned pupil; he attends principal meetings called by the Director of Secondary Education; he carries out directives issued to principals by the Director of Secondary Education and by the Board through memoranda issued by the Board secretary; the alternate school is and has been departmentalized for pupil instruction; and, all pupils assigned the alternate school are offered a daily 200 minutes of instruction in basic English and mathematics, algebra, science, reading, and business. Petitioner notes that no pupil assigned the alternate school receives formal academic instruction elsewhere other than the alternate school with the exception of extracurricular activities which are offered only at the pupil's regularly assigned schools. Petitioner also notes, without contradiction from the Board, that he evaluates the performance of teachers assigned the alternate school; he interviews applicants to be teachers at the alternate school; and, when appropriate, he recommends the nonrenewal of employment of nontenure teachers assigned the alternate school. Petitioner is also the pupil disciplinarian at the alternate school. He suspends pupils pursuant to authority granted principals at N.J.S.A. 18A:37-4; he has appeared before the Board on three occasions seeking to expel pupils from the Willingboro school district; and, he conducts parent conferences regarding pupil suspensions.

Petitioner does not dispute that pupils assigned the alternate school are recorded on the School Attendance Register, N.J.A.C. 6:20-.1 et seq., as being enrolled in one of the Board's regular, nonalternative schools; that the alternate school was not separately monitored by the Department of Education as part of the evaluation process pursuant to the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., and N.J.A.C. 6:8-6.1 et seq.; that he does not perform all duties assigned the Board's two positions of high school principals at its Willingboro High and John F. Kennedy High nor of the positions elementary principal as such duties are set forth in the respective job descriptions. (P-2) (P-3); nor that approximately 1500 pupils are enrolled at each of the Board's two high schools or that approximately 100 teaching staff members are assigned each high school.

An analysis of the job descriptions for the positions high school principal and elementary principal reveals the following. The high school principal is responsible to the Director of Secondary Education, the Assistant Superintendent of Schools, and the Superintendent of Schools. The function of this position requires the high school principal

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

to be the responsible leader for all activities occurring in the building; for carrying out the policies of the Board; to implement the directions of the superintendent; and, to competently fulfill all responsibility assigned. The positions stated requirements on the job description are principal's certificate following the acquisition of a Master's Degree, and five years experience in secondary teaching and/or administration at the high school level. A high school principal in the Board's employ is assigned 46 specific duties including, but not limited to, the planning and supervision of the total school curriculum, initiating and evaluating requests for new courses and programs, conducting in service staff training, initiating and implementing a program of extracurricular activities, to initiate and supervise guidance programs, to plan and implement special activities including graduation, honor society organization, and career day, to be actively involved in the school's parent teachers association, to be the curricular leader of the school, to take necessary measures to insure the school is approved by the middle states association and the Department of Education, to submit reports to the Department of Education, to the Director, the Superintendent and the Board as necessary, on all phases of the school program and to prepare annual text book lists.

The job description for the position elementary principal states that this person is directly responsible to the Director of Elementary Education, then to the Assistant Superintendent of Schools, and to the Superintendent. The function of the elementary principal is to be the responsible leader for all activities occurring in the building; to carry out the policies of the Board; to be responsible for implementing the directions of the superintendent; and, to competently fulfill all responsibilities assigned. The elementary school principal job description assigns to that position 34 specific duties. Those duties include, but are not limited to, the planning, developing and implementation of district curriculum programs to be actively involved in the schools parent teacher association, to plan, prepare and implement in-service programs for teachers in the areas of reading, mathematics, social studies, science, writing, art, physical education, and music, to plan for fire drills, traffic control, safety and large group movement of pupils, and to assist supervisors in program improvement and development. The stated requirements for elementary principal are a principal's certificate following the acquisition of a Master's Degree, five years experience in elementary teaching and/or administration at the elementary level.

Petitioner produced as his exhibit a job description (P-4) for the position coordinator of the alternate school. The description was secured by petitioner from the

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

Board secretary who retrieved the document from an administrative manual. The Board secretary does not recall seeing the description on the Board agenda for approval nor could she verify that the description was formally adopted by the Board. Petitioner does recognize parts of the document; he simply has not seen the document as a unitary whole. Petitioner explains that the stated "function" on the description is his, but that the listed duties are not and have not been his duties as coordinator. The stated duties, petitioner explains, were his duties in October 1970 as coordinator of community affairs. Petitioner contends that his real duties are the duties of the high school principal as set forth in that job description (P-2). The stated qualifications for the position coordinator of alternate school requires a principal's certificate following the acquisition of a Master's Degree, and five years experience in teaching and/or administration.

Petitioner admits the curriculum used at the alternate school is the curriculum adopted by the Board for use in its regular schools and that the alternate school focuses on very basic courses. Petitioner does not conduct in-service programs for teachers, other than talking with them on a one to one basis. Petitioner is not obligated nor does he plan and implement extracurricular or special school activities such as graduation, honor society organizations or career days at the alternate school. These kinds of activities are available to pupils in the alternate school only at the regular high schools in Willingboro. Pupils are not graduated from the alternate school; rather, they are graduated from either the Willingboro High School or from the John F. Kennedy High School. The alternate school has a nonfunctioning parent teachers association. Petitioner has not assumed the role of curricular leader in the alternate school because the alternate school curriculum is the curriculum adopted for use in the regular high schools and, consequently, he rarely if ever initiates and evaluates proposed new courses or new programs.

While petitioner is a member of the Willingboro Administrators Association as are basic skills coordinators following a unit clarification ruling by the Public Employment Relations Commission, N.J.S.A. 34:13A-5.2, his salary as coordinator of the alternate school is not established according to the principals' salary policy (J-1) or that the amount he is paid is lesser than he would be paid if his salary was set according to that policy. The Board, never having appointed petitioner as a principal, does not recognize petitioner having attained tenure or seniority in the position and category of principal.

The evidence of record shows that while in the past unidentified board members informally questioned why petitioner was signing certain reports as principal and that the

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

superintendent informally discussed petitioner's title with some other board members, petitioner did not lay claim to the superintendent nor to the Board that the duties he performs constitute de facto performance as a principal until the present Petition for Declaratory Judgment was filed.

During the pendency of this matter the Board acted during June 1986 to eliminate the alternate school and hence abolish the position coordinator of the alternate school. Shortly thereafter, the Board recreated the alternate school and recreated the position coordinator of the alternate school which petitioner continues to occupy.

This concludes a recitation of all relevant facts of the matter upon which the claims of the parties are based.

ARGUMENTS OF THE PARTIES

While petitioner does not specifically contend that the Board's action in this matter constitutes bad faith or represents an evil intent to evade the tenure statutes, it can be inferred that bad faith and evasion forms the bases for his claim. Petitioner does claim the facts show the duties he performed since 1971 as coordinator of the alternate school constitute his employment to be that of principal of the alternate school and that as such he is entitled to a recognition of having acquired a tenure status in the position of principal, he is entitled to seniority and he is entitled to future compensation according to the rates in the principal's salary guide and he is entitled to retroactive compensation under N.J.S.A. 18A:16-11 for having performed as de facto school principal since 1971.

The Board argues that petitioner's claim must be dismissed through the application of N.J.A.C. 6:24-1.2, the 90 day administrative rule, by the application of the doctrine of laches, and finally, the Board contends the petition should be dismissed for failure of petitioner to establish by a preponderance of credible evidence that he is entitled to any of the relief he seeks. Alternatively, the Board contends that that short of a dismissal the only appropriate order to be entered is a remand to the Board for it to seek a determination from the Burlington County Superintendent of Schools regarding the seniority category to which the position coordinator of the alternate school should be allocated.

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

DISCUSSION OF LAW AND CONCLUSIONS

I.
The 90 Day Rule and Laches

The 90 day rule, N.J.A.C. 6:24-1.2, and the doctrine of laches bars relief would bar retroactive monetary relief should the conclusion be reached here petitioner, as coordinator, served the Board as principal. This is so for the rule requires a petition to be filed " * * * no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing."

Recall that this matter is a contested case by virtue of petitioner seeking a declaratory judgment under N.J.A.C. 6:24-2.1 which is a ruling " * * * with respect to the applicability to any person, property or state of facts of any statute or regulation enforced or administered by the commission." Petitioner has been serving as coordinator of the alternate school, which he now claims is service as a school principal. Petitioner knew since 1971 his salary has not been established by the Board according to the salary policies for other school principals it employs. Yet, petitioner waited until January 9, 1986 to contest those asserted wrongful salary determinations. Laches, the equitable principle aimed to promote justice, would prohibit retroactive monetary relief to petitioner because of the unreasonable delay in asserting his claim. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 152 (1982). This is so even in light of N.J.S.A. 18A:6-11 which provides in full as follows:

> A person who holds de facto any office, position or employment in a school district and who performs the duties thereof shall be entitled to the emoluments and compensation appropriate thereto for the time the same so held in fact and may recover therefore in any court of competent jurisdiction.

What petitioner seeks here is a legal determination from the Commissioner which would be binding upon the Commissioner as well as upon the parties to this action that his service to the Board has been that as principal. Petitioner easily could have sought such a declaration early on in order to vindicate his salary rights. That he elected to wait until January 9, 1986 to file an application for declaratory judgment is an

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

inexcuseable delay which prohibits any retroactive salary relief for the years 1971 through 1984-85.

N.J.A.C. 6:24-1.2 prohibits salary relief for the 1985-86 year. Petitioner knew, or should have known, by at least September 15, 1986, the approximately first pay date for the 1985-86 year the level at which his salary had been established by the Board. Had petitioner disagreed with that salary at that time he easily could have filed either a regular Petition of Appeal or an application for declaratory judgment. Nevertheless, petitioner did not comply with the 90 day rule by waiting until January 9, 1986 to file the application for declaratory judgment.

Neither the 90 day rule nor the doctrine of laches, nevertheless, applies to petitioner's requested relief of seniority credit. This is so for the question is presented by way of a application for declaratory ruling whether petitioner's service to the Board is that of a principal or in some other category in which seniority would accrue. The subject of petitioner's requested contested case hearing is the Board's view that he has not acquired tenure in the position of principal nor has he acquired seniority in the category of principal. If petitioner has been employed as a principal given the facts of the case, the tenure statute is self-effectuating and the benefits conferred thereby accrue. Thus, neither laches nor the 90 day rule can bar one who served the requisite period of time in a particular position in the employ of the Board from having the statute confer upon that person a tenure status.

In conclusion, and if petitioner prevails on the merits, the doctrine of laches bars retroactive salary relief between the period 1971 through 1984-85. The 90 day rule bars salary relief for the 1985-86 school year. Tenure and seniority credit is not barred by either the doctrine of laches or the 90 day rule of N.J.A.C. 6:24-1.2.

II.
The Merits

While the position of principal is recognized throughout the school laws and the regulations of the State Board of Education, there are few duties prescribed that position by the statutes or by administrative rules. See, N.J.S.A. 18A:25-5 (principal to file annual reports with the superintendent), N.J.S.A. 18A:37-4 (authority of the principal to suspend

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

pupils) , N.J.S.A. 18A:40-7 (the principal's authority to exclude pupils who are ill), N.J.S.A. 18A:41-1 (the principal's duty to conduct fire drills), N.J.S.A. 18A:41-2 (the principal's duty to ensure fire and smoke doors are closed), N.J.S.A. 40:54-9 (appointment of a principal on board of trustees of free public library); and, generally, N.J.A.C. 6:1-1 et seq. See also, Viemeister v. Bd. of Ed. of Propsect Park, 5 N.J. Super. 215 (App. Div. 1949). In Bennett v. Bd. of Ed. of Twp. of Matawan, 1939-49 S.L.D. 119, 122, aff'd St. Bd. of Ed. 1939-49 S.L.D. 127 (1944), the Commissioner, in deciding tenure charges brought by the board against Bennett, the high school principal, commented "[I]t appears that very few duties of a principal are prescribed by statute. It is apparent, therefore, that, while certain powers and duties may be deemed to be inherent in the principalship, the board of education and the supervising principal [superintendent] must, in the main, delegate and define the duties and responsibilities of the principal." In order for the Board to delegate and define the duties and responsibilities of the principal, it must in the first instance appoint one to that position. Absent affirmative appointment by the Board as principal, the duties assigned and/or performed with tacit Board approval by petitioner, in light of the circumstances, will determine whether he is and has been a de facto principal.

Petitioner contends that because he was the sole "administrator" assigned the alternate school, and in light of N.J.A.C. 6:8-4.3 and the Board's requirement he possess a principal's certificate as coordinator, he is a princpal and entitled to all benefits of that position. Following the adoption of L. 1975, c. 212, effective July 1, 1975, the Public School Education Act of 1975, codified at N.J.S.A. 18A:7A-1, the State Board of Education adopted rules and regulations which define the standards and procedures of evaluation, as well as classification and enforcement of a thorough and efficient system of free public schools. One of those rules, N.J.A.C. 6:8-4.3, upon which petitioner seeks to support his claim, provides in part as follows:

> a. Teaching staff members shall be employed by the district board of education based upon the specific instructional needs of pupils in the district and each school within the district. The district board of education shall provide certified personnel needed to implement a thorough and efficient system of free public schools.
>
> * * *
>
> c. Rules on the principal are:
>
> 1. Each school shall be assigned the services of a full time nonteaching principal to be responsible for administration and supervision of the school.

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

> 2. A district board of education, upon advice of the chief school administrator, may request from the commissioner an exception to the provision of N.J.A.C. 6:8-4.3(c)1
> * * *

A definition of "school" as used within the context of this rule does not appear in State Board rules and regulations nor in Education Law, N.J.S.A. 18A:1-1 et seq. "Public school" is defined at N.J.S.A. 18A:1-1 as "* * * a school, under college grade, which derives its support entirely or in part from public funds." This definition, for purposes of the rule requiring a nonteaching principal be assigned each school is of no assistance. Nevertheless, the term "school" in the context so used by the State Board can be gleaned from other rules and regulations it adopted pursuant to the Public School Education Act. Specifically, and at the secondary level, each school is obligated to work towards state adopted outcome and process goals, N.J.A.C. 6:8-2.1; each school must develop a written educational plan, N.J.A.C. 6:8-3.1; each school must develop, in consultation with teaching staff members, pupils, parents and other district residents, written educational goals, objectives, standards, and action plans, N.J.A.C. 6:8-3.2 and 3.3; each school must develop a curriculum in consultation with teaching staff members, N.J.A.C. 6:8-3.5; and, the board shall provide certified personnel needed to implement a thorough and efficient system of free public schools including but not limited to the teaching of art, foreign language, instructional media, music, physical education, reading, speech, and vocational education, N.J.A.C. 6:8-4.3.

When the function of the alternate school is compared to the comprehensive nature of a high school for purposes of the Public School Education Act and the rules and regulations adopted by the State Board of Education thereunder, it becomes manifestly clear that the alternate school is not a school within the meaning of N.J.A.C. 6:8-4.3(c)1. This is so for the alternate school serves a highly limited pupil population; it has no independent curriculum of study other than the curriculum generally adopted by the Board for use in its nonalternate high schools; it has no independent standards and goals applicable to its students; and, the program offered at the alternate school is severely restricted to very basic academic courses. Pupils are not graduated from the alternate school; pupils at the alternate school have no opportunity to take foreign languages, physical education, art, music, nor do they have ready access to a library, within the construct of the alternate school. Rather, pupils must return to their regularly assigned schools in the Willingboro district in order to be afforded these courses and services. At best, the alternate school must be seen as a program part of the whole program of the

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

regular high schools of the Willingboro district. It may not be validly seen as a separate school within the context of N.J.A.C. 6:8-4.3(c)1 which requires "Each school * * *" to be assigned a full time nonteaching principal.

Next, the evidence of record leads me to conclude that the duties performed by petitioner are such that, according to the job descriptions of high school principal adopted by this Board, he has not performed duties of a school principal and the Board did not intend to engage him as a school principal. The fact that petitioner suspended pupils, attended meetings with the director of secondary education, evaluated the performance of teachers assigned the alternate school, conducted fire drills and signed reports thereof for submission to the Board secretary, though generally performed by a principal, are not the sum and substance of duties of the position of principal. Totally absent from petitioner's duties are the responsibilities of curricular leader, in service training of techers, organization of the total school program so as to afford pupils a thorough and efficient program of education, and the larger management style duties expected of principals including the coordinated use of all resources towards a comprehensive program of education in the school. Petitioner's duties as coordinator of the alternate school appear to have developed over the years according to what he perceived to be the implied scope of his authority. It cannot fairly be said petitioner arbitrarily usurped several statutory duties of the principal position for the Board apparently provided petitioner little guidance in his job. It does appear, nevertheless, that petitioner did exercise the authority to suspend pupils as the situation warranted but he knew his position title was not principal.

It is of no assistance to petitioner that the Board required him to possess a principal endorsement for the job title coordinator of the alternate school. Boards of education have authority to establish greater requirements for positions than the minimum standards for teacher certification in a particular area. VanOs v. Bd. of Ed. of Cinnaminson, 1977 S.L.D. 1040, 1043; Eagan et al. v. Old Bridge Twp. Bd. of Ed., 1983 S.L.D. —, aff'd St. Bd. of Ed., 1983 S.L.D. —, aff'd Superior Court of New Jersey, App. Div. Dkt. No. A-170-83T3 (Feb. 4, 1985). Greater requirements established by a board for a particular position may not be unreasonable and may not be in contravention of any statute or regulation. Tirico v. Little Ferry Bd. of Ed., 1984 S.L.D. — (Oct. 21, 1983). According to the State Board rule, N.J.A.C. 6:11-10.4, which has been in effect since June 11, 1976, 8 N.J.R. 327, a principal endorsement "* * * is required for positions of principal or vice-principal. Holders of this endorsement may supervise instruction, and may also

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

serve as assistant superintendent of schools, and as assistant superintendent in charge of curriculum and/or instruction." Accordingly, because this Board required a principal endorsement to be possessed by petitioner for his employment as coordinator does not inescapeably lead to the conclusion that he was a de facto principal. Nevertheless, it is true N.J.A.C. 6:11-3.6 obligates boards of education to assign recognized position titles to teaching staff members. The rule further obligates boards to seek approval of the county superintendent of schools for the use of unrecognized position titles prior to making appointments of persons to such titles. Coordinator of the alternate school is not a recognized title. This Board did not first seek authorization from the Burlington County superintendent of schools to use that title. Even though the Board committed this procedural error, the absence of approval by the Burlington County superintendent of schools for the use of the title coordinator of the alternate school cannot, in the circumstances of a full plenary hearing and a consideration of all relevant competent evidence as to the duties performed by petitioner, give to petitioner the benefits of the position principal to which he otherwise is not entitled. Petitioner did not establish by a preponderance of credible evidence that this employment as coordinator of the alternate school since 1971 has been as a de facto principal.

The case of Amato v. Bd. of Ed. of Hudson County Area Vocational and Technical Schools, 1984 S.L.D. (Nov. 8, 1984), is inapposite. Amato was appointed by the position job placement coordinator without being in possession of certification. Job placement coordinator is not a recognized title in State Board rules and the board, believing that it was acting properly, did not seek prior approval of the county superintendent of schools for the use of such title. When the board subsequently determined that certification was necessary, it sought to terminate the employment of Amato. It was found that the Board appointed Amato to the position of job placement coordinator, Amato performed the duties of job placement coordinator, Amato was eligible for emergency certification at the time of initial employment, and Amato served the requisite period of time to have achieved a tenure status. Here, petitioner was not appointed as principal and it has been found he did not perform the duties of principal.

Luppino v. Bd. of Ed. of the City of Bayonne, 1980 S.L.D. 1028 is also inapposite. While Luppino claimed the title and benefits of "principal of home instruction", the board appointed him to that very same position. Consequently, it was found Luppino enjoyed employment as principal of home instruction. Here, petitioner was not appointed by the Board to the position of principal.

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

While I **CONCLUDE** petitioner has failed to carry his ultimate burden of persuasion that he performed as de facto principal of the alternate school while employed in the unrecognized title coordinator of the alternate school and is, accordingly, not entitled to the benefits and privileges of the principal position, the Board is nevertheless directed to adopt a job description for the position coordinator of the alternate school and submit that job description to the Burlington County superintendent of schools for his assignment of an appropriate certificate to be held by the person in that title.

Having found and concluded that petitioner, as coordinator of the alternate school since 1971, has not provided services as a principal and is not entitled to the benefits of that position, it remains to be determined the seniority category into which such service belongs under N.J.A.C. 6:3-1.10. Specifically, N.J.A.C. 6:3-1.10(g) provides in full as follows:

> Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with duties performed and not by title. Whenever the title of any employment shall not be found in the classification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed * * *

Categories of seniority are set forth in N.J.A.C. 6:3-1.10(l). Having found petitioner did not perform the duties as principal, he has performed duties beyond that of teacher in view of the fact he supervised and evaluated the performance of teachers. The category most closely compatible with the duties performed by petitioner is that of "supervisors" at N.J.A.C. 6:3-1.10(l)10. Consequently, I **CONCLUDE** that petitioner's seniority as coordinator of the alternate school has been as a supervisor at the secondary level. Secondary, it should be noted, is defined at N.J.A.C. 6:3-1.10(l)15 as follows:

> The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction.

While the evidence of record is not all that clear whether pupils in grades seven and eight who were originaly assigned the alternate school in its early years came from elementary schools having departmental instruction or junior high schools, it is clear that the focus of the alternate school was on the upper grade pupil.

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

Declaratory judgment must be entered on behalf of the Board of Education that the position coordinator of the alternate school is not equivalent to the position of school principal and that petitioner is not entitled by law to tenure or seniority in the position and category of principal, and he has not established an entitlement to a higher salary.

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

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

December 9, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

DEC - 9 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DEC 12 1986
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

sc

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

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

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

This matter was opened by way of a Petition for Declaratory Judgment to construe the applicability of N.J.A.C. 6:8-4.3(c)1, 6:11-3.6 and N.J.S.A. 18A:28-5 to petitioner's service rendered in the position of "Coordinator of Alternate School," a title which is unrecognized within the meaning of N.J.A.C. 6:11-3.6(b).

More specifically, petitioner requests that:

> ***the Commissioner of Education shall construe the provisions of N.J.A.C. [6:8-4.3(c)1], 6:11-3.6, and N.J.S.A. 18A:28-5 and determine and declare that petitioner possesses the title of Principal in respondent's district, having served in this de facto position for more than three years while holding a valid principal certificate from the State of New Jersey, and that he be recognized as such for the purposes of any seniority determinations to be made by the respondent, and such other relief as the Commissioner may deem equitable and appropriate.
> (Petition for Declaratory Judgment, at pp. 2-3)

With respect to the construing of N.J.S.A. 18A:29-4.3, petitioner requests that

> ***the Commissioner of Education*** determine and declare that the petitioner hold the title of principal and should be placed on the proper salary guide with other principles (sic), at a step commensurate with his academic preparation and years of service. (Petition, at pp. 3-4)

The matter was accepted for declaratory judgment pursuant to N.J.A.C. 6:24-2.1 and transmitted to the Office of Administrative Law for proceedings. Subsequent to the transmittal to OAL, the

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

Board raised the defenses of N.J.A.C. 6:24-1.2 and laches as barring the matter. With respect to this, the Commissioner is in agreement with the ALJ's conclusion that, given the circumstances of the instant matter, neither the 90-day rule nor laches bars declaratory judgment with respect to the issue of tenure and the accrual of benefits derived from that legislative status as tenure is self-effectuating so long as the precise conditions of statute are met.

Further, the Commissioner is in full agreement that both the 90-day requirement and laches bar any declaration of retroactive salary relief essentially for the reasons stated in the initial decision. He finds the determination entirely consistent with North Plainfield Education Association v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984) and Weir v. Bd. of Ed. of Northern Valley Regional High School District, New Jersey Superior Court, Appellate Division, Dkt. No. A-3520-84T6, April 9, 1986, notwithstanding petitioner's arguments to the contrary. Unlike the tenure and seniority issues raised in the Petition for Declaratory Judgment, "notice" within the intendment of N.J.A.C. 6:24-1.2 had been provided for each year he voluntarily worked at the salary offered by the Board, yet at no time during his 13 years of service did he initiate any action to challenge the manner in which he was compensated. (See Conner et al. v. Board of Education of River Vale, decided by the Commissioner February 18, 1986, aff'd State Board October 1, 1986.)

Contrary to petitioner's allegations in his exceptions, salary placement is not an entitlement unrelated to one's service as a teaching staff member. Thus, it is subject to both the 90-day time bar and laches. This does not mean, however, that prospective relief is barred if N.J.S.A. 18A:29-4.3 was found to be violated. It is stressed for the record that the Petition for Declaratory Judgment did not request retroactive salary relief but merely prospective relief which is consistent with the purpose of declaratory judgment.

As stated in N.J.S.A. 2A:16-51, the purpose of declaratory judgment is to settle and afford relief from uncertainty and insecurity with respect to an individual's rights and status. It is ordinarily utilized to resolve cases where rights have not yet been invaded. Weissbard v. Potter Drug & Chemical Corp., 6 N.J. Super. 451, 69 A.2d 559 (1949), aff'd 4 N.J. 115, 71 A.2d 629 (1950) At the time of the acceptance of this matter for declaratory judgment petitioner had not been subject to any action calling into question his tenure and seniority rights and his request for salary relief was strictly prospective.

Turning now to the substantive issue of tenure, Spiewak v. Bd. of Ed. of Rutherford, 90 N.J. 63 (1982) is controlling and should have been expressly analyzed by the ALJ. The three-prong

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

test derived from that decision to ascertain one's tenure status is essentially as follows:

1. Was a certificate required for the position?

2. Did the individual possess the certification?

3. Did he/she serve the requisite number of years?

Unless an individual falls within the explicit exceptions in statute, he/she acquires tenure if the above conditions are met.

It is uncontroverted that a certificate was required for the position petitioner occupies. There is no allegation that he did not possess certification appropriate to the position (at least from 1978 forward). Nor is there any doubt that he has served the requisite period of time. Thus, it is clear that petitioner is tenured in the position of "Coordinator of the Alternate School." What is not established is what the exact certificate requirement for the position is since the Board failed in its responsibility to follow the mandate of N.J.A.C. 6:11-3.6(b) which reads:

> (b) If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year. Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis. (emphasis supplied)

Further, the record does not establish conclusively that the Board itself acted to require a principal certificate. The ALJ states in the initial decision, ante, as follows:

> Petitioner produced as his exhibit a job description (P-4) for the position coordinator of the alternate school. The description was

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

> secured by petitioner from the Board secretary who retrieved the document from an administrative manual. The Board secretary does not recall seeing the description on the board agenda for approval nor could she verify that the description was formally adopted by the Board. Petitioner does recognize parts of the document; he simply has not seen the document as a unitary whole. Petitioner explains that the stated "function" on the description is his, but that the listed duties are not***.

While the ALJ has determined that the position filled by petitioner required only a supervisor certificate, such determination was not within his authority. While it may well be that he is correct that the position requires only a supervisory certificate, the provisions of N.J.A.C. 6:11-3.6 vest the authority to reach such determination with the county superintendent. Thus, it is that individual who would examine the provisions of N.J.A.C. 6:11-10.4, 10.8, and 10.9 (authorization and requirements for supervisor and principal certificates) in light of the job description and determine whether a supervisor certificate alone is required or a principal certificate, if more than supervision of instruction is involved, since both certificates authorize one to supervise instruction. Once that determination was made, the type of certificate designated would control the type of tenured position attained, i.e., supervisor or principal, and it would be binding for determining the seniority category the individual would fall within in future seniority determinations. N.J.A.C. 6:11-3.6(b)

Given the above, the Commissioner determines that the county superintendent is to review this matter forthwith so as to fulfill his statutory authority. The outcome of that determination will then control what type of tenured position petitioner enjoys and it will be binding whenever a seniority determination may be necessary in the future.

To accomplish this, the Board is to immediately develop and adopt an accurate and thorough job description delineating precisely what actual duties and responsibilities must be fulfilled/performed in the coordinator of alternate school position. This is not to be perceived as an opportunity for the Board to cast the job description as the Board might like to see it in the future, but rather to reflect the actual duties expected of petitioner in the past.

Turning to the issue of whether the alternate school is a "school" within the intendment of N.J.A.C. 6:8-4.3(c)1, the Commissioner determines that a declaration that one is in charge of a building pursuant to that regulation is not essential to the instant matter insofar as one need not be in charge of a building to be determined a principal. Luppino, supra Therefore, since the

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

Commissioner need not make a determination on the issue, he passes no judgment on the accuracy of the ALJ's analysis and conclusion and does not include such as part of the final decision in this matter.

Insofar as petitioner's request for declaratory judgment to construe N.J.S.A. 18A:29-4.3 is concerned, the record is clear that he is entitled by law to be on a salary guide as mandated by this statute whether he be tenured as a principal or a supervisor. The statute reads:

> The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act for all such members, except that for a superintendent of schools the board may adopt a salary schedule. Such salary schedules shall be subject to the provisions of N.J.S. 18A:29-4.1. Nothing contained in this section of the act shall authorize a board to pay an amount of salary less than the amount such member would be entitled to under any other law. The schedules adopted pursuant to this section shall be filed with the Commissioner of Education within 30 days after the adoption of each such schedule and the adoption of each subsequent revision of each schedule.

However, even if it is determined by the county superintendent that the alternate school position was one requiring a principal certificate, this does not mean that petitioner has a statutory right to be placed on the salary guide for high school principal. N.J.S.A. 18A:29-4.3 allows for the adoption of more than one salary schedule. The precise salary schedule petitioner is placed upon pursuant to this regulation is a matter subject to negotiation and is not a right derived from school law. See Hyman v. Board of Education of the Township of Teaneck, decided by the State Board March 6, 1985, aff'd N.J. Superior Court, Appellate Division, February 26, 1986, cert. den. New Jersey Supreme Court June 27, 1986.

Therefore, it is ordered that petitioner be placed on a salary guide adopted by the Board pursuant to N.J.S.A. 18A:29-4.3 effective as of the date of this decision. He is entitled to no retroactive relief as previously determined herein.

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

In addition to the above, the County Superintendent of Schools is to review all unrecognized titles in use in the Willingboro School District to assure that all are in compliance with N.J.A.C. 6:11-3.6 so as to avoid a repetition of costly litigation such as herein which might not have occurred had the Board fulfilled its regulatory responsibilities.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 23, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6808-86
AGENCY DKT. NO. 331-9/86

THOMAS J. LOMBARDI,
Petitioner,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF RUMSON,
Respondent.

James D. Cutlip, Esq., for petitioner

Brenda C. Liss, Esq., for respondent (McCarter & English, attorneys)

Record Closed: December 3, 1986 Decided: December 18, 1986

BEFORE RICHARD J. MURPHY, ALJ:

Thomas J. Lombardi (petitioner) is a special education teacher employed by the Board of Education of the Borough of Rumson (Board), and challenges its action in transferring him from his position as resource room teacher to the position of teacher of the trainable mentally retarded. Petitioner moved for judgment on the pleadings and the Board made a cross-motion to dismiss the appeal, which was argued and granted on December 3, 1986, on the grounds that the petition was filed beyond the 90-day period established by N.J.A.C. 6:24-1.2.(b), as discussed below.

The petitioner's appeal was filed with the Commissioner of Education on September 16, 1986, and the matter was transmitted to the Office of Administrative Law as a contested case on October 10, 1986 where a prehearing conference was scheduled for December 3, 1986. Prior to that, on October 23, petitioner moved for judgment on the

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

pleadings, to which the Board of Education responded on November 10, with a cross-motion for dismissal. Motions were argued on December 3 at 1:30 p.m., in Trenton, and the motion to dismiss was granted at that time.

The facts necessary to decide the motion are not in dispute. The Board voted on June 11, 1986, to transfer petitioner out of the resource room into a classroom for the trainable mentally retarded, effective September 1986. Petitioner was made aware of this action on June 12, when the minutes of the meeting reflecting the transfer were left in his school mailbox. Petitioner's appeal of the Board's action was mailed to the Commissioner of Education on September 16, and received by him on September 18, 1986, 98 days after petitioner received the notice of the vote to transfer. There is no dispute as to the above facts, and I so **FIND.**

Petitioner claims that prior to the June Board meeting, he had a discussion with the Superintendent of Schools in which he was advised that he would not actually be transferred. (See, petitioner's certification, paragraphs three and four.) Petitioner also testified that he relied on that alleged representation from the Superintendent in not filing an appeal during the summer months. He further stated that he believed that the time of appeal would not begin to run until he was teaching the new class in September. The Superintendent denies this in a certification presented at the argument, but she does admit that she told petitioner in June that some adjustments would be made to address his concerns regarding the mentally retarded class. In any event, the record reflects that the Superintendent was present at the Board meeting on June 11, at which time the petitioner's transfer was voted upon. Further, it is clear that any discussion with petitioner occurred prior to that meeting. Thus, even if petitioner was erroneously advised by the Superintendent, it is clear from the facts that the Board voted with the Superintendent present to transfer petitioner after this conversation took place. I so **FIND.**

The issue is whether petitioner is entitled to judgment on the pleadings or whether the petition should be dismissed as untimely under the 90-day filing period established by N.J.A.C. 6:24-1.2(b):

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

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

Respondent argues that the 90-day deadline established by the above regulation has been strictly adhered to, and cites a number of prior decisions by the Commissioner, as well as the opinion of the Supreme Court in North Plainfield Education Association v. North Plainfield Board of Education, 96 N.J. 587 (1984). The Board notes that petitioner was notified of his transfer on June 12, and waited until at least September 16, some 96 days later, to appeal. Accordingly, respondent contends that the petition should be dismissed as untimely in that petitioner has offered no good cause for his delay in filing his appeal.

Petitioner argues, first, that the action of the Board of Education on June 11, and subsequent notice, was not a final action or notice within the meaning of the above rule, and that his time of appeal did not begin to run until he was forced to take a new class in September. He further contends that he relied to his detriment upon the alleged representation of the Superintendent concerning his transfer, notwithstanding the subsequent action of the Board in voting on that transfer. Petitioner also requests relaxation of the rules in the interest of justice, pursuant to N.J.A.C. 6:24-1.17.

In ruling on a Motion to Dismiss, which is disfavored, the trier of fact is obliged to consider all of the evidence and the legitimate inferences from it in the light most favorable to the party opposing dismissal. In this instance, even a favorable reading of the evidence does not help the petitioner. The undisputed record on this motion reflects that on June 12, he was notified of the vote of the Board of Education to transfer him. Although he may have had discussions with the Superintendent of Education prior to the Board meeting, it is clear that the action of the Board, which had exclusive authority to make the final decision, was subsequent to any conversation and was clearly communicated to the petitioner as a final decision. He then elected to seek no review of this action for a period of over 90 days, until after the school year had started and he had commenced his new assignment. The reasons he offers for his delay are not persuasive. His argument that the Board's decision was not final until he actually reported to school in

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

September for his new assignment disregards the clear import of the Board's action on June 12 to transfer him, and it ignores the Board's final authority in such matters, subject of course, to the Commissioner of Education. Any other result would wreak havoc with an orderly system of assignment of teachers by allowing those transferred to wait out the summer months until the commencement of school to appeal, thereby unnecessarily disrupting the educational process. As for petitioner's claim that he detrimentally relied upon misrepresentation by his Superintendent, it is noted that the Board voted to transfer the petitioner, with the Superintendent present, subsequent to these alleged conversations, and the petitioner was fully aware of this fact through the minutes. Petitioner offers no other good cause to justify any extension of the 90-day filing period established by the rule, which has been consistently enforced by the Commissioner and affirmed by the Supreme Court in the North Plainfield education case cited above. Accordingly, I **CONCLUDE** that no good cause has been shown that would justify such an extension, and I therefore **ORDER** that the petition be dismissed as untimely.

Having granted the Motion to Dismiss, there is no reason to decide petitioner's motion for judgment on the pleadings, although I do note my agreement with respondent's argument that this motion was based on a misconstruction of the answer, and is therefore without merit.

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

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

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

DATE Dec. 18, 1986 — **RICHARD J. MURPHY, ALJ**

Receipt Acknowledged:

DATE DEC 22 1986 — DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE DEC 23 1986 — OFFICE OF ADMINISTRATIVE LAW

ds

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

THOMAS J. LOMBARDI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions reiterate his argument that the 90-day timeline for filing, N.J.A.C. 6:24-1.2, did not commence until he actually reported to his new assignment. Further, he avows that he relied, to his detriment, on the statement of the superintendent that he would not be transferred and that under the totality of the facts in the matter, relaxation of the 90-day requirement is warranted.

Upon review of the record, the Commissioner is in complete agreement with the ALJ that the matter is barred pursuant to the 90-day filing requirement of N.J.A.C. 6:24-1.2 and that no circumstances are presented to warrant invoking N.J.A.C. 6:24-1.17. He finds petitioner's arguments to the contrary entirely without merit.

Accordingly, the Commissioner adopts the recommended initial decision as the final decision in the matter which is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

January 30, 1987

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

THOMAS J. LOMBARDI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, January 30, 1987

For the Petitioner-Appellant, James D. Cutlip, Esq.

For the Respondent-Respondent, McCarter and English
(Thomas F. Daly, Esq., of Counsel)

The State Board of Education has reviewed the proposed settlement submitted by the parties in this matter and finds it to be in accord with the principles expressed in In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, decided by the State Board, April 6, 1983. The State Board therefore approves the settlement in this matter.

May 6, 1987

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

D.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NJSIAA AND BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

For the Petitioner, Thomas M. Venino, Jr., Esq.
(Venino and Venino)

For the Respondent NJSIAA, Michael J. Herbert, Esq.
(Sterns, Herbert, Weinroth & Petrino)

For the Respondent Board, H. Ronald Levine, Esq.

This matter was opened before the Commissioner upon filing of a Petition of Appeal seeking an order of the Commissioner to set aside the determination of the New Jersey State Interscholastic Athletic Association's Eligibility Appeals Committee (NJSIAA) denying petitioner a waiver for the eight semester rule set forth in Article V, Section 4J of the Association's bylaws. The aforesaid rule provides that:

> 4J. Semester of Eligibility - No student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his/her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated. This rule shall not apply to an honorably discharged serviceman/service-woman, in which case the Executive Committee may make any adjustments of this rule as it may deem equitable.

Petitioner also seeks reversal of the determination that academic deficiencies make him ineligible, averring that such deficiencies were not raised during the hearing in the matter held by NJSIAA; thus, he was not afforded a full and fair opportunity to address those issues. Moveover, he argues that the Association misapplied Article V, Section 4E as that provision applies to the marking period immediately prior to the commencement of the season

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

of interscholastic sports for which eligibility is sought. Article V, Section 4E(1) reads:

> To be eligible for athletic competition during the first semester (September 1 to January 31) of the 10th grade or higher, or the second year of attendance in the secondary school or beyond, a pupil must have passed 25% of the credits required by the State of New Jersey for graduation, during the immediately preceding academic year.

The essential facts of the matter are as follows:

1. Petitioner is an 18-year-old senior at Rutherford High School.

2. He entered St. Peter's Preparatory School, Jersey City, in September 1982, played basketball during the 1983-84 and 1984-85 seasons and obtained passing grades, freshman through junior years.

3. In the fall of his senior year at St. Peter's he experienced physical and emotional difficulties which are described in the record.

4. Upon parental consultation with medical and psychological personnel, it was determined that the academic pressures on petitioner should be lifted in the hopes of improving his mental health.

5. Rutherford High School advised that he not transfer midyear. Thus, petitioner's parents determined with the agreement of St. Peter's Preparatory School that he would attend classes there and "audit" his classes for the remainder of the 1985-86 school year rather than withdraw entirely from school. (See October 1, 1986 letter from R. Balduf to R. Kanaby.)

6. Petitioner passed the first marking period of his senior year at St. Peter's but failed each of the remaining marking periods, thus failing both first and second semesters. (See transcripts and senior year report cards from St. Peter's.)

7. By letter of June 15, 1986 to Robert Kanaby, Executive Director of NJSIAA, petitioner's parents sought a waiver of the eight semester rule so that he could play basketball at Rutherford High School.

8. Petitioner's doctor and psychologist believed participation in sports would be helpful to him. (See Kane and Salvador letters.)

9. By letter of August 5, 1986, the principal of Rutherford High School requested NJSIAA to hear the appeal of

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

petitioner's athletic eligibility and provided a transcript from St. Peter's.

10. By letter of August 27, 1986, the principal was informed by the executive director of NJSIAA that the Eligibility Committee determined, based on the documentation presented, there was no justification to waive the eight semester rule.

11. On October 8, 1986 an appeal was heard by the Eligibility Appeals Committee at which time petitioner's parents were given an opportunity to present their appeal to that decision.

12. The Eligibility Appeals Committee unanimously determined on October 8, 1986 that petitioner had been given the opportunity to participate in four full years of basketball and that a waiver was not justified despite the emotional and physical setbacks he had experienced the past year. Further, it was determined that petitioner would be ineligible to participate in sports because of his academic deficiencies which made him ineligible under Article V, Section 4E.

POSITIONS OF THE PARTIES

Petitioner argues that NJSIAA's guidelines allow the granting of waivers to the eight semester rule where it can be shown that a student could not maintain the required academic standards or that he had to continue his secondary schooling beyond the eighth semester because of circumstances beyond the student's control. It points to the examples provided by NJSIAA in its guidelines, namely medical or psychological difficulties. Petitioner believes his circumstances fall within the intendment of the waiver provision and that it was arbitrary and unreasonable for the Association to deny his request.

Petitioner cites in support of his argument Smith v. NJSIAA, decided by the Commissioner August 13, 1981; Lauster v. NJSIAA and Westfield High School, Union County, decided by the Commissioner September 7, 1983 and Snyder v. Bd. of Ed. of the Rumson-Fair Haven Regional High School District, Monmouth County and NJSIAA, decided by the Commissioner October 3, 1983. He contends that the circumstances in his case are nearly identical to those in Lauster, except for the years of participation in sports in question, and argues that where Lauster did not qualify to play, he would have been qualified. Thus, his treatment is inconsistent with the prior decision in Lauster.

With respect to the academic deficiency issue petitioner argues:

> Before [petitioner] encountered his psychological difficulties, he was a reasonable student. The problems he encountered would have prevented anyone from doing well in school. It is not an example of a deliberate choice between sports and

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

> studies, but academic failure due to unavoidable circumstances. His psychological problems interfered with his performance in sports as well as his performance academically. (See transcript of hearing at page 231.) It bears repeating that [petitioner's] doctors advised that he be allowed to play sports as a means to attempt to cure his psychological difficulties.
>
> Throughout the cases, the Association is said to grant waivers for, inter alia, psychological reasons which prevent a student from performing well academically. That stated policy does not square with the treatment of [petitioner] in this case. (Petitioner's Brief, at p. 6)

Respondent NJSIAA argues that petitioner was given full opportunity to present his case to the Eligibility Appeals Committee and was provided full reason for its denial. Moreover, it argues that the Commissioner should not substitute his judgment for that of the Association because its decision was well reasoned; thus, no basis exists to disturb it.

With respect to Article V, Section 4J, respondent contends that its interpretive guidelines explain that despite the explicit terms and objectives of the rule, some schools misinterpret them to mean eight semesters of competition, rather than eight semesters of attendance at a secondary school. These guidelines, Section 3C, state in part:

> ***The fact that a student has not participated for four seasons will not in itself justify allowing such a student to participate in interscholastic sports beyond the eighth semester after his or her entrance into the ninth grade. (NJSIAA Handbook, at p. 59)
>
> ***
>
> ***Specifically, waivers of these provisions have been granted in the past where it was shown that a student could not maintain the required academic standards or that he or she had to continue secondary schooling beyond the eighth semester because of circumstances beyond that student's control. ***Correspondingly, waivers of the eight semester rule have been granted where a student has had to repeat a semester or more because he or she was absent from school because of medical or psychological reasons or because that student was required to be home with a parent or guardian who was ill, or to a classified student whose Individual Education

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

> Program (IEP) mandated that that student extend his or her schooling beyond the normal eight semester program.*** (Id., at p. 62)

Respondent avers that waivers are contemplated only in circumstances where a student is absent from school because of medical or psychological reasons and not as herein where the student continued in school and attained failing grades.

Of this, NJSIAA states:

> ***Indeed, documents provided by the petitioner, specifically his guidance counsellor at St. Peter's, show that the "foremost" concern was "the demands of a demanding college prep program." (See letter of Oct. 1, 1986 from Raymond Balduf to Mr. Kanaby.) While the Committee is not unsympathetic to the plight of the petitioner and he clearly has caring parents, a waiver of the eight semester rule of these circumstances would not be warranted. The specific and very clear purpose of the eight semester and academic standards rule would be severely undermined if a waiver were granted solely because a student could not meet the academic standards of a "demanding program". Indeed, it would directly hinder the stated purpose of maintaining academic standards. A waiver in this case would only serve to provide the petitioner with an advantage, contrary to the express terms of the guidelines. (Respondent's Brief, at p. 5)

In support of its position, NJSIAA cites R.S.R. et al. v. NJSIAA, decided by the Commissioner November 13, 1986 as standing for the proposition that the Commissioner will not substitute his judgment for the Association's so long as it operates within reasonable bounds and absent a clear showing of arbitrary or capricious action. It also cites T.S. et al. v. NJSIAA, decided by the Commissioner November 7, 1983; Snyder, supra; and Van Note v. NJSIAA, decided by the Commissioner April 22, 1983 as supportive of its denial of the waiver request in the instant matter.

In addition, NJSIAA avows that, even if a waiver were granted, petitioner is ineligible to play since he failed to achieve the requisite standards as required by Article V. Section 4E previously quoted herein. It cites, inter alia, Burnside et al. v. NJSIAA, decided by the Commissioner October 15, 1984, aff'd N.J. Superior Court, Appellate Division, Docket No. A-625-84T7, November 15, 1984 as supportive of the restrictive academic standards established for athletic participation.

Moveover, it points to S.S., on behalf of his son, M.S. v. NJSIAA, decided by the Commissioner September 19, 1986 as standing

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

for the proposition that whether the factual situations in a particular case rise to the level of extraordinary circumstances for granting a waiver within the intendment of its rules is a matter which the Commissioner believes is best left to NJSIAA unless he finds it was demonstratively arbitrary and capricious in applying the eligibility rules. Finally, NJSIAA avows that petitioner had adequate due process procedures available to him via the two NJSIAA reviews and the instant appeal.

The Commissioner, upon a thorough review of the record including the transcript of the hearing before the NJSIAA Eligibility Appeals Committee and the arguments advanced by the parties, finds that there is no compelling basis advanced by petitioner to reverse the decision reached by NJSIAA denying him a waiver for the eight semester rule, Article V, Section 4J. The guidelines for waiver are quite explicit that the eight semester rule applies to eight semesters of attendance in a secondary school. These guidelines read in part:

> Unfortunately, despite its explicit terms and its obvious objectives, some member schools have interpreted this rule as applying to eight semesters of competition rather than eight semesters of attendance in a secondary school. The NJSIAA has never permitted a student to participate in any sport for more than four seasons within eight semesters upon initial entry to grade 9***. The fact that a student has not participated for four seasons will not in itself justify allowing such a student to participate in interscholastic sports beyond the eighth semester after his or her entrance into the ninth grade.*** (emphasis supplied)
>
> (Handbook, at p. 59)

The interpretive guidelines for the eight semester rule were developed at the express direction of the Commissioner in the Lauster decision so as to define the basis upon which waivers would be granted. While it is regrettable that petitioner experienced physical and emotional difficulties during the 1985-86 school year, the fact remains that he was in attendance in a secondary school for eight semesters. Moreover, it is clear that, as regrettable as the circumstances may have been, he did in fact fail to meet the academic standards set forth in Article V, Section 4J.

As correctly noted by NJSIAA, the standard of review in this matter prevents the Commissioner from substituting his judgment for that of the Association's, absent a showing by petitioner that it acted in an arbitrary or capricious manner. After thorough consideration of the record, the Commissioner concludes that petitioner has failed in demonstrating this. Thus, he affirms the decision of NJSIAA in denying petitioner's waiver request.

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

Accordingly, the Petition of Appeal is hereby dismissed. Pursuant to N.J.S.A. 18A:11-3, any appeal to this final decision of the Commissioner is to the Superior Court.

COMMISSIONER OF EDUCATION

January 30, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1859-86
AGENCY DKT. NO. 54-2/86

BOARD OF EDUCATION OF THE CITY OF NEWARK,
Petitioner,
v.
MARY JACKSON,
Respondent.

Marvin L. Comick, Esq., for petitioner (Vickie A. Donaldson, General Counsel)

Arnold Cohen, Esq., for respondent (Oxfeld, Cohen & Blunda, attorneys)

Record Closed: November 7, 1986 Decided: December 19, 1986

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

This is a teacher-tenure case which was transmitted by the Commissioner of Education to the Office of Administrative Law on March 18, 1986, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted by the undersigned administrative law judge on May 14, 1986, and the case was heard over several days in late September 1986. Following the hearing, a briefing schedule was established and the record was closed on November 7, 1986.

New Jersey Is An Equal Opportunity Employer

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

The action against respondent, a tenured teacher employed by the Board since 1968, consisted of four separate counts which contained charges of inefficiency, corporal punishment, unbecoming conduct and other just cause. The inefficiency count alleged, generally, that Jackson's performance of her duties was seriously deficient in a variety of ways including, inter alia, her failure to maintain proper classroom management and discipline, her failure to maintain good rapport with and to have a sympathetic understanding of the pupils in her classes, her failure to prepare and/or use lesson plans properly, her failure to provide activities designed to develop critical thinking, her failure to motivate students, and her failure to take corrective action to overcome those deficiencies despite efforts by her superiors to help her. The inefficiency count concluded with an allegation that over a 15-month period, Jackson had received unsatisfactory observation ratings on no less than eight separate occasions.

The second count alleged that in 1982, 1983 and, on one occasion in May 1985, respondent resorted to corporal punishment in disciplining students in her class in violation of N.J.S.A. 18A:6-1. The third count, which alleged unbecoming conduct, again related that Jackson had physically abused students, had been insubordinate, had failed to demonstrate proper classroom management and control over her students, had been unable to take appropriate steps to remedy her unsatisfactory performance, had caused severe morale problems at the schools to which she had been assigned and had wilfully disregarded directives to conform her conduct to the level expected of teaching staff members.

The final count, which was styled as a charge of "other just cause," essentially repeated the prior allegations and concluded that Jackson had by her alleged actions interfered with the proper conduct and administration of the schools, demonstrated a complete disregard for the rights of her students and Board procedures, presented a poor role model for children and colleagues and had generally interfered with the Board's ability to deliver a thorough and efficient education to the pupils assigned to it. As the Board put it, the "singular and cumulative effect of Ms. Jackson's inefficiencies is so staggering as to create a demand for her dismissal as a teaching staff member," and that "to do otherwise could be perceived as the Board's condonation of her unbecoming professional and otherwise inefficient conduct."

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

STIPULATION OF FACTS

Counsel were able at the outset of the hearing to enter into a joint stipulation of facts which is set forth below. It helpfully relates the procedural history surrounding an earlier abortive effort with respect to certification of charges, and also contains the pertinent procedural history with regard to the latest efforts in that respect. The stipulation of facts, in essential part, is as follows:

> Mary Jackson was employed as a regular teaching staff member of the Newark Board of Education on or about May 1, 1968 and in due course became tenured. At the inception of the 1981-82 school year she began teaching at the Louise A. Spencer Elementary School in Newark.
>
> On September 23, 1983, tenure charges were filed against Mary Jackson, then a tenured teacher at Louise A. Spencer Elementary School, alleging that she had been inefficient in the performance of her assigned duties. A copy of the charges, statement of evidence and documentation in support thereof was served on Mary Jackson.
>
> Ms. Jackson was issued notice that she had 90 days to correct and overcome the inefficiency alleged in the charges on October 25, 1983. On January 27, 1984, the tenure charges against Ms. Jackson were refiled with the Newark Board of Education. On January 30, 1984, she was notified that the alleged inefficiencies had not been abated in the view of the administrators at Louise A. Spencer Elementary School and that she had 15 days to respond to the charges.
>
> A statement in opposition to the charges was filed by Ms. Jackson on February 27, 1984. At the request of Ms. Jackson's attorney, Irving J. Soloway, the Newark Board of Education delayed taking action on the matter in order to allow the filing of additional papers in opposition to the charges.
>
> At its meeting on March 13, 1984, the recommendation of the Executive Superintendent of the Newark School System to certify the tenure charges against Ms. Jackson failed for lack of a mover. No further action was taken with respect to the aforementioned tenure charges.
>
> On August 26, 1985, tenure charges were again filed against Mary Jackson alleging that she was inefficient in the performance of her assigned duties, engaged in corporal punishment and conduct unbecoming of a public school teacher in New Jersey.

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

After a review of the charges against Ms. Jackson, the statement of evidence and other documentation in support of the charges the Board determined that there was probable cause to credit the evidence and that Ms. Jackson should be allowed 90 days to correct and overcome the inefficiencies alleged in the charges.

On August 28, 1985, Ms. Jackson was served with a copy of the tenure charges, all documentation in support thereof, along with notice that she had 90 days to correct the alleged inefficiencies.

The Board was advised by the Executive Superintendent on December 26, 1985, that the aforementioned 90-day period had expired and that based on reports from the school site Ms. Jackson had not eradicated the alleged inefficiencies. Thereafter, on January 14, 1986, the Board reviewed and examined the documentation in support of the Executive Superintendent's recommendation and determined that there was probable cause to proceed with the filing of tenure charges against Ms. Jackson.

On January 16, 1986, Ms. Jackson was notified that the Board had voted to proceed with the filing of tenures charges and that she had 15 days to submit a response. Ms. Jackson did not submit a timely response.

At its regularly scheduled meeting on February 25, 1986, the Board voted to certify tenure charges to the Commissioner of Education against Mary Jackson and suspend her without pay pending the final determination of the charges. Ms. Jackson was notified of the action taken by the Board on February 26, 1986. (Exhibit J-1.)

TESTIMONY FOR THE BOARD

The leadoff witness for the Board was Maude F. Patterson, who has served as the principal of Louise A. Spencer Elementary School (hereinafter "Spencer") for the the past ten years. Respondent had been assigned to Spencer beginning in September 1981. On November 18, 1981, Patterson observed a fourth-grade spelling class taught by Jackson and noted a variety of deficiencies, including the dishevelled appearance of the classroom, no particular chair/desk pattern, students without materials and, generally, a haphazard lesson being taught. In a postobservation conference report, Patterson suggested to respondent that she not begin the lesson until all students are ready and have the appropriate materials, that Jackson should devise a system for book ownership, that she

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

should insist on proper headings on papers, that she require written work to be done in ink, that she select monitors for various jobs, such as passing out papers, that she instill pride by making sure the floor is clean, and that she be sure that her instructions are clear and understood and that her lesson is meaningful (Exhibit P-1). Jackson refused to sign the report, as was her prerogative.

Patterson's next observation report, dated April 27, 1982, related to a fourth-grade reading period taught by Jackson (Exhibit P-2). Again, as a result of her observations, Patterson found Jackson's performance to be unsatisfactory. The report form was divided into several sections, the first three containing places for the observerr to note whether the "classroom environs/management," the "teacher's characteristics" and the "lesson implementation" were satisfactory or unsatisfactory. In this respect, a total of 22 separate boxes could be checked. In respondent's case, for that observation, Patterson found Jackson to be unsatisfactory in 18 of those areas. She again noted deficiencies with respect to the performance of the teacher and was particularly critical of the fact that the lesson did not begin on time and that the children were working on spelling when it should have been a reading lesson.

On November 29, 1982, Patterson again conducted a teacher observation, and although there now were six satisfactory ratings out of 22, the respondent continued in Patterson's opinion to demonstrate an overall inability to teach effectively (Exhibit P-3).

Based upon her evaluation of Jackson's performance during the 1982-83 school year, Patterson concluded that she had proven to be ineffective and inefficient as a teacher. To that end, Paterson requested that Jackson receive a "90-day notice." The 90-day evaluation period was then implemented and on January 24, 1984, Patterson directed a memorandum to the executive superintendent for elementary programs recommending that the Board proceed with tenure charges against respondent since, during the 90-day period, Jackson had failed to demonstrate any visible improvement in her classroom performance. In her memorandum, Patterson noted that even though respondent had now

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

been evaluated on seven separate occasions by administrators at Spencer, and by two outside administrators, she continued to fail to fulfill a variety of responsibilities expected of teachers. The areas of concern listed by Patterson were, generally, an inability to teach effectively, to manage the class, to provide for differences in student abilities, to have a wholesome rapport with students, to adhere to Board policy, and to organize and utilize classroom time (Exhibit P-5). As set forth in the joint stipulation of facts, although the effort to pursue these inefficiency charges during early 1984 resulted in a filing of the same at a Board meeting on March 13, 1984, a recommendation by the then executive superintendent to certify the charges to the Commissioner failed for lack of a motion.[1]

On two separate occasions in October 1984, Patterson sent memoranda to the acting assistant executive superintendent for elementary education regarding Jackson's continuing unsatisfactory performance. In a memorandum dated October 12, 1984, Patterson noted that she had never been informed concerning whether any action had been taken by the Board with respect to the 90-day notice given Jackson at the end of 1983, and that respondent was manifesting the same problems without any improvement. Indeed, since the beginning of the 1984-85 school year, new problems had arisen, prompting requests by parents to remove their children from Jackson's class. The prior demonstration of an absence of systematic planning and recordkeeping, children disrupting classes at will, and an overall failure to demonstrate classroom management in general, continued. In that same memorandum, Patterson noted that she had even met with Jackson on the first day of school to discuss the problem, and thought that a mutual understanding had been reached since Jackson appeared receptive to suggestions made.

---

[1]Following the close of the hearing, I received, at my request, a copy of the tenure charges which had been served upon Jackson in 1983. These have been marked Court Exhibit 1. The charges consist of allegations that she had been inefficient in the performance of her assigned duties, thereby resulting in a disruption of the orderly process and administration of the schools, and that on a number of occasions and in a variety of ways, she had failed to create and maintain a proper classroom environment or capably to manage classes to which she was assigned. A specific listing of her alleged inefficiencies covered several pages of those 1983 tenure charges. Many of them were recertified in March 1986. Respondent's motion to dismiss those charges which duplicate earlier charges will be discussed infra.

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

However, by the date of the memorandum, no improvement had been noted and although, in Patterson's opinion, it was too late to help students who had been in Jackson's classes in previous years with respect to a denial of learning, it hopefully was not too late to help children who "have the misfortune to be assigned to her class for this school year" (Exhibit P-6). On October 19, 1984, Patterson submitted a follow-up memorandum in which she again requested issuance of a 90-day notice because of Jackson's unsatisfactory performance in the many areas previously mentioned (Exhibit P-7). This was ultimately done in August 1985.

On May 7, 1985, an incident occurred in Jackson's classroom involving her alleged striking of a student, R.Y. In respect to that incident, Patterson identified two incident report forms (Exhibit P-8 and P-9) which contained a description of the alleged incident from information received from a vice principal, Norman Greenberg. Greenberg, himself, later testified specifically about the incident. Although Patterson was not present at the time of the incident, she was present when Jackson later was interviewed by an investigator. According to Patterson, Jackson admitted that she had, "in some manner," touched a child. According to an initial incident report prepared by Patterson, Greenberg had gone to respondent's room at approximately 2:25 p.m. in order to speak to respondent after he was informed that R.Y. had been hit a few moments earlier by the teacher. Greenberg said he escorted R.Y. to the nurse's office. The student had welts on her left forearm, which required application of an ice pack by the nurse (Exhibit P-8). The second incident report prepared by Patterson set forth that respondent "readily admitted hitting [R.Y.] with the rulers. She indicated that the child had hit her and that was why she hit the student" (Exhibit P-9).

On May 10, 1985, Patterson went to respondent's classroom because she heard noise coming from it. She saw respondent shouting at a student because the child would not sit down. Six children were in the front of the room with their reading books, but no lesson had started. At that point, according to an observation report prepared by Patterson, respondent became involved with several students who were without pencils. Jackson accused one of them of emptying her closet and destroying all the pencils which she had bought. According to this observation report, the bickering continued for a few

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

minutes and respondent began to shout at the student. Patterson had to ask Jackson to begin her reading lesson, but before she could begin she first had to make sure that the students received all of their materials. Some students then were ignored completely, while some began to work and some simply sat at their seats and did nothing. With regard to other observations made by Patterson at that time, the following is related in her observation report:

> Seat Work Assignment
>
> 1. Some students were told to copy eighteen "A" words from the reading text glossary. Students' response to why this type of assignment "I don't know." "Ms. Jackson said to do it." "She told me to copy the words." "I have to do work."
>
> 2. Some students were told to copy a page from the reading book. Some students were reading Macmillan and some were using Lippincott. Students' response to why this type of assignment "I don't know." "She told us to copy a page." "I have to copy this page."
>
> Group at front of room
>
> I want you to read page 37 with your eyes. "I want to read it out loud," a student shouted. "No—today we read silently." Ms. Jackson then proceded to write questions on the board. She had to continually insist students (group) read.
>
> No directions were give for the reading. No purpose was given for the reading. Ms. Jackson did not review the previous lesson nor did she set the goals and objectives.
>
> Ms. Jackson's room is bare! Two time-table charts, torn and tattered, were tacked up next to a commercial calendar. In front was her personally constructed calendar.
>
> There is no evidence of instruction in any discipline. Ms. Jackson has been reminded during each conference after an observation that her room should reflect the educational program.
>
> Needless to say, the constructive criticism and helpful hints are not followed although Ms. Jackson readily agrees. (Exhibit P-11.)

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

In memoranda sent to her superior in October 1984, Patterson had requested Jackson's immediate removal from the fourth grade at Spencer because of her lack of self-control, lack of control of her students, her inability to follow Board policy and her failure to perform at a satisfactory or professional manner. Patterson specifically listed a variety of areas of deficiency exhibited by Jackson since 1982 and commented that she believed Jackson was now exhibiting behavior that constituted a deviation from normal physical and mental health. Accordingly, she requested that Jackson be administered a psychiatric examination. Apparently, no action was taken with regard to the request, for no testimony or other evidence was offered at the hearing concerning it.

In August 1985, Jackson was served with another 90-day notice which became effective beginning in September of that year (Exhibit J-11). On December 12, 1985, Patterson dispatched another memorandum in which she reiterated her conclusions concerning Jackson's continuing inability to properly perform her duties, listed specific areas of deficiency and she concluded that her behavior constituted grounds for Jackson's termination of employment (Exhibit P-13).

During her direct examination, Patterson also testified about parental complaints regarding Jackson's allegedly striking children. She identified a memorandum which she had signed on February 18, 1983, which referred to a discussion with the mother of O.E., a male student in Jackson's class. The mother had a discussion with respondent about a complaint the boy had made, including Jackson's having hit him with her shoe, punched him in the chest, thrown him in his chair, and hit him in the face causing his nose to bleed. The parent requested that her son be transferred to another school (Exhibit P-17). An earlier memorandum, dated December 9, 1982, signed by the same parent, related that she was filing a formal complaint against Jackson because of the alleged abuse of her son. In that note, the parent maintained that Jackson had punched the boy in his mouth and chest, and had caused his left eye to redden and swell (Exhibit P-18).[2]

[2]This incident was the subject of further attention during the hearing as testimony later was received both from O.E. and his mother.

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

On cross-examination, Patterson noted that since several other administrators observed the respondent from time to time, she took into account their evaluations and negative findings when making her own. She did agree that one evaluation conducted by an assistant principal on January 27, 1982, concluded that Jackson's overall performance was satisfactory (Exhibit R-1). Patterson also conceded there are problems with student disruption at Spencer, and that other teachers besides Jackson experience the sort of difficulties which respondent had faced. Patterson also agreed that it is not always necessary for a teacher to follow the lesson plan; however, it is not acceptable if this becomes an ongoing pattern.

Insofar as the May 1985 striking incident was concerned, Patterson did not recall if she spoke to Jackson about it on the day it occurred. Her responsibility, she said, was to contact the Division of Youth and Family Services and let that agency take whatever action it felt was appropriate. She did not recall Jackson ever saying that she meant to hit her desk with the ruler and hit the child by accident. She agreed that from time to time respondent did complain to her about discipline problems in her class, and that this occurred every year. With respect to the allegation that Jackson did not follow Board policy because she used the wrong reading program, Patterson noted that Board instructions were to use the Macmillan series, not Lippincott, and that while it was not necessarily inappropriate to use books from another program, this was to be done only as an adjunct to, or an enhancement of, the prescribed course and should not have been part of the formal instruction.

The next Board witness, Norman Greenberg, has been a vice principal at Spencer for the past four years. He first met respondent in September 1982 but was not her grade-level supervisor until 1984-85. However, he did observe Jackson at other times during her teaching career at Spencer. Specifically, on April 27, 1983, he observed a third-grade reading class taught by her and found a lack of organization, a failure to plan, an absence of direction, and a general inability to maintain discipline and control. In a report of that classroom observation which he prepared on May 6, 1983 (Exhibit P-19), he noted that he found her unsatisfactory in nearly every category. In the "additional comment" section, Greenberg noted that although the lesson plan called for reading

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

instructions, during the 45-minute period when he was present no such instructions took place. Greenberg commented that based upon his observation Jackson was not following Board policy concerning reading instruction requirements. He also found an absence of "interest centers" related to reading, mathematics or science in the room. He specifically noted that:

> It was evident that classroom management and control of students was unsatisfactory. Your room appeared unkempt and disorganized, books, papers piled in various corners of the room. Your response to child when questions were asked were negative, e.g.: 'Get busy!' 'Do your work!' 'Don't you understand?' And then nothing. In some cases you were almost screaming at the students.

He concluded with the comment that, "I consider this lesson to be totally unsatisfactory."

On October 31, 1983, Greenberg again observed a sixth-grade class taught by Jackson. Although there were some minor areas where improvement was shown, he still made 17 unsatisfactory notations in the appropriate sections on the form. He again noted, in particular, the absence of centers of interest relating to various subject areas and concluded that it was not at all clear to him how the classroom time was being organized or utilized. Also, there was, in Greenberg's opinion, an "obviously tense" relationship between the teacher and her students. For example, one student's response to a direction to be quiet was to shout at respondent, "That wasn't me." Jackson took no action to correct that behavior. With regard to lesson implementation, Greenberg found no plan book available and that Jackson told him that she had been working on them at home. The lesson being "taught" that day was described by Greenberg as follows:

> The lesson began with direction from the teacher to recite in rote the seven times table. No purpose or motivations instruction was given to students. There was no evidence of group needs or group instruction as to individual needs of students. After the students recited the seven times table, Ms. Jackson wrote on the board fifteen multiplication examples, three digit multiplications one digit multiplier. At no time during the lesson did Ms. Jackson go over the examples on the board or the work the students were doing in their seats (Exhibit P-20).

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

Because of the unsatisfactory nature of the observation made by Greenberg on October 31, 1983, he conducted a follow-up conference with respondent in order to offer constructive suggestions to help her improve her unsatisfactory performance. To that end, he prepared a document which contained seven separate areas of such advice (Exhibit P-21).

On October 10, 1984, Greenberg conducted another observation of Jackson. This involved a fourth-grade reading class. Again, most of the items with regard to performance were rated unsatisfactory and Greenberg's comments comprised nearly three pages (Exhibit P-22). They generally note an absence of rules pertaining to classroom procedures, an inadequate control of student behavior, no centers of interest, a general lack of organization, an undue amount of time being spent disciplining and reprimanding students, a continuing demonstration of Jackson's failure to be aware of the Macmillan reading program's goals and objectives and a general lack of enthusiasm with regard to the teaching of the lesson. Again, no lesson plan was available for his review even though that is required. When he walked into the room at 9:15 a.m., there was no evidence that the class had been organized for instruction to begin.

Greenberg related that during the 1984-85 school year, he had to go to respondent's room three or four times a day and in October 1984 had actually moved Jackson to a room next to his own office to help her maintain control. It seemed that the children in her class were in the habit of leaving her room at will, and she did not even seem to know it. Also, fighting and noise constantly marked her classes and other teachers constantly had to go into her room to assist her. As Greenberg put it, "every day was almost chaos." He felt that respondent simply did not understand what was expected of her despite efforts by many persons to try to help her. For example, he did demonstration lessons for her and other teachers were brought in to assist her. Nevertheless, her teaching was "archaic" and on one occasion all of her children received A's in reading even though 24 of 26 students failed to meet Board standards.

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

On December 14, 1984, an incident involving Jackson occurred which Greenberg described at the hearing and which he had memorialized in an incident report form (Exhibit P-23). On that day, he heard screaming coming from her classroom and he had to remove her and bring her to his own office. He made arrangements for another teacher to cover the class and called the principal and the school nurse. Respondent was trembling and shaking and Greenberg tried to calm her down. The nurse took Jackson's pulse and suggested that she remain in Greenberg's office in order to "stablize" herself. However, Jackson decided to go home and took the rest of the day as a sick day. In the incident report form, Greenberg related the events as follows:

> I had visited Ms. Jackson's room several times this morning due to noises, students shouting and Ms. Jackson screaming at her students. At approximately 11:00 A.M. I was walking toward the third floor bookroom when I heard students shouting at Ms. Jackson and Ms. Jackson screaming at the children at such a pitch, I ran to the room to see what was happening. As I entered the room, Ms. Jackson was still screaming at the students almost uncontrollably. I immediately removed Ms. Jackson from her room and asked her to get in my office. The class was then covered by Mrs. Lebo, computer teacher. I notified Ms. Patterson, Principal, who came to my office with the school nurse, Mrs. McCormick. After some observations and discussions with Ms. Patterson, Mrs. McCormick, Ms. Jackson and me, Ms. Jackson decided to take a half-day sick day. (Exhibit P-23.)

On January 9, 1985, Greenberg dispatched a memorandum to respondent regarding the subject of classroom discipline. In that memorandum, he noted that on several occasions during the week he had to stop by her room because of the unusual amount of noise which was coming from it. The noise was disruptive to classrooms in the vicinity and demonstrated a continuing lack of ability on Jackson's part to manage her classroom and to direct students. He noted that he previously had discussed these problems with Jackson and had hoped that their discussions had assisted her in the matter. He directed that his suggestions be implemented immediately to resolve the problem (Exhibit P-24). As Greenberg put it at the hearing, the memorandum was sent to Jackson in order to reinforce his concerns about what he had observed, that it was "about time she better get with it." Later that month, on January 23, 1985, Greenberg sent a

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

memorandum to Jackson regarding the subject of student progress folders. The purpose of that memorandum was to see whether there was any evidence of student progress in reading and mathematics since there was no evidence that this was being done. In particular there was no demonstration by respondent that she was following the required McMillan reading program. In his memorandum Greenberg noted that when respondent was absent there was no substitute plan, nor was there any regular plan book available despite directions from the principal, as well as Greenberg himself, that such plans were supposed to be available in the office of the vice principal in charge of her grade level.

At the end of the 1984-85 school year, Greenberg prepared an annual evaluation report with respect to Jackson (Exhibit P-26). Under Section 1, entitled "Performance Report," he rated her unsatisfactory in nine out of ten areas. He noted in Section 2, the "Summary Evaluation," section, that she demonstrated no areas of strength and that there were many areas needing attention or improvement. Consequently, he rated her performance unsatisfactory and recommended that she be terminated. In an attachment to that annual evaluation report, Greenberg made the following specific observations, among others: (a) The subject areas for which respondent was responsible were, in general, never taught; (b) Jackson has difficulty maintaining discipline and implementing classroom management techniques to control students for instruction and the presence or use of effective instructional techniques were almost nonexistent; (c) Busy work is given rather than a properly constructed lesson; (d) In none of his observations did Greenberg ever see Jackson use teaching methods which were appropriate to plan-book objectives; (e) There was no evidence of Jackson's using a variety of instructional resources other than books, pencils and paper; (f) Although suggestions to improve were given to Jackson after every observation, implementation of those suggestions was almost never done; (g) Ongoing record of student achievements are poorly assessed; (h) Respondent possessed little ability to control, establish or maintain effective classroom discipline and management; (i) As of May 1985, only two students out of 26 were considered eligible for promotion per Board policy; (j) Report cards, student folders, handwriting samples, plan book and other noninstructional materials are usually never handed in on time and requests for them usually have to be made several times before

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

there is compliance; (k) Despite having been transferred to a room next to Greenberg's office in order to help her maintain classroom discipline, respondent had continued to fail to demonstrate any ability to control student behavior. As Greenberg put it in the annual report:

> She has continually yelled, screamed and at times physically removed children from her class. When questioned about this, her response is usually, "They hit me first" or "They threw a book at me." When I requested her to fill out an incident report regarding the above, she never completes them.

The third administrator to testify was Martha Washington who has been principal of an elementary school in Newark for 12 years and an employee for 32 years. On November 27, 1985, she conducted a classroom observation of Jackson at the request of Patterson. Washington rated respondent unsatisfactory because of a poorly organized lesson, a lack of consistency, the children appeared disinterested in what was going on and were noisy and restless and, in general, no learning was taking place. Although on the teacher observation report (Exhibit P-28) Washington did rate respondent satisfactory in nine areas, she found her to have performed unsatisfactorily in 11 other areas, thereby leading her to an unsatisfactory overall rating for Jackson. At the hearing Washington added that while she was in the classroom the children were "entertaining themselves" because Jackson simply had not commanded their interest in the lesson being taught.

Washington said she had been asked to observe respondent's class by Patterson because the teacher was having many problems and an outside observer's suggestions were sought. Shortly after the lesson began, the students became restless and only one child was asked to do the entire times table. All the others just sat there. As Washington put it, they began to, "sort of tune it out." In the witness's view, Jackson should have taken immediate steps to have the entire class participate in order to hold their interest since it was an extremely long math lesson for fourth graders.

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

Another senior administrator who observed respondent was Mr. Burt Berry, principal of the 13th Avenue School. He observed Jackson on January 24, 1984, at the request of Patterson. Berry had known Jackson previously since she had taught in the same school as his wife. He rated her performance that day as unsatisfactory because her teaching appeared to him to be "subpar." A number of things were wrong with her technique, as documented by him in the observation report (Exhibit P-29). In general, her class appeared to him to be totally disorganized and she seemed to have lost all control of the students. Pupils shouted out or simply walked around and talked without any direction or control from the teacher. Neither did Berry see any relationship between the subject being taught and any items in the classroom. As Berry put it, the respondent seemed to be teaching "by rote" and there was no apparent object to her lesson. In his report, Berry commented that the classroom was unattractive, control was totally lacking, centers of interest were not maintained and teacher-student rapport in terms of positive communication appeared to be nonexistent. Although Berry felt that Jackson did make an effort to attempt to regain control, she was unsuccessful since after two or three minutes the pupils would simply go back to whatever they were doing before. Berry met with respondent following the class in order to discuss what he had seen and Jackson appeared to him to be quite receptive to his constructive comments. Nevertheless, during his observation the majority of students were not learning and the teacher failed to establish any control of the class.

The last senior administrator to testify for the Board was William Demetroulakos, a vice principal at Spencer. During the school years that Jackson taught at Spencer it was necessary, he said, for senior administrators to visit her classes with increasing frequency because of the many problems that were developing there. Despite constant efforts to help her improve, she never did so. Although she always seemed cooperative when counseled, there never seemed to be any progress thereafter. Indeed, her ability to manage the classroom and to impose discipline became progressively worse as time went on.

On February 3, 1983, Demetroulakos observed one of Jackson's third-grade reading classes and rated her unsatisfactory (Exhibit P-30). In particular, he found that

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

students were walking in and out of the room without passes. There was poor lesson preparation and no board work and she continuously had to interrupt one group lesson to quiet another group. He strongly recommended a conference as soon as possible in order to work on these problems (Exhibit P-30). Demetroulakos was particularly perturbed by the fact that Jackson did not appear to have properly prepared her reading lessons (he was a reading consultant) and had demonstrated difficulty teaching the subject. Although help was offered to respondent, the problems persisted. Moreover, a pattern of students constantly interrupting her and having nothing to do when they were finished with their own work was also developing and Jackson was spending much of her time yelling at one or two students while others were out of control.

On September 30, 1983, Demetroulakos observed a sixth-grade class taught by Jackson which again resulted in a rating of unsatisfactory. Many of the same deficiencies were noted by him in the observation report (Exhibit P-31). Here again, respondent's use of the plan book was extremely poor. As he put it in a comment section on the report, "as I noted in your book on 9/27/83 . . . this was too much to cover [times table material], yet, I fail to see any changes made to your plans after I corrected them on the 27th. Planning for test procedures was unsatisfactory. The test was not planned in your plan book." At the hearing Demetroulakos recalled the observation and noted, in addition, that the class was so disruptive that no learning could take place.

On January 24, 1985, Demetroulakos observed Jackson teaching a fourth-grade math class. Again, he rated her unsatisfactory and on this occasion, found her to have been unsatisfactory in each of the 22 separate areas to be checked off (Exhibit P-32). He also recalled this visit and said that students were scattered all over the room and there was no leadership exhibited by the teacher. By this point respondent, in his opinion, was quite aware that her career was in jeopardy and he was surprised by her response to this situation. Again, he observed poor planning and very little rapport with students who exhibited a total disregard of, or respect for, the teacher. He even had to interrupt the class in order to regain control for her. As part of the observation report, Demetroulakos made observations between 9:40 a.m. and 11:00 a.m. The contents of those observations are set forth verbatim below:

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

9:40 A.M.
Entrance to room: loud shouting from 4 - 5 girls in rear of room; students had coats on, others out of chairs. Teacher yelling at one boy while rest of class talked and played constantly, disregarding teacher's presence. Class still noisy even with administrator sitting in back of room. Students unresponsive to teacher's directions. Twenty students present.

Physical condition of room: Poor. Floors dirty, paper, candy wrappers and nut shells throughout room. Room was cleaned the night before by custodians. No student work posted on display boards. Desks situated haphazardly around room. Books on top of heater and on floor in corner.

9:55 A.M.
Lesson: Took almost 15 minutes to prepare class for math lesson introduction. Teacher began by asking class to recite from memory the 7 times table - even though the entire times table with answers was written on front board. While reciting, no two students were on same problem. Chaotic condition with no teacher input. Appears that teacher has lost all major controls over this class. Lesson attempt was very poor, no introduction or objectives established. Students just told to do work on board. Still loud talking, arguing and walking around by students. Two students began fighting and teacher began screaming. The fight stopped only when they again realized that I was sitting in back of the room. Teacher did nothing after telling them to stop. Tells one student to hang up coat and ignores 10 other students sitting at desks with coats on.

Formica desk top ripped off and jagged edges of formica exposed. Teacher has not reported this, it happened in early December 1984. Pencil sharpener broken and shavings all over counter. Room is untidy and messy.

10:20 A.M.
Twenty minutes into math and still no viable lesson or teaching has begun. Teacher running around room chasing individuals for the last 15 minutes. Students openly defy teacher and answer her back with shouts and screams. No review or direction given to lesson.

10:30 A.M.
Class out of control of teacher. She threatens class with my presence a number of times and gains momentary control. Only when I was forced into talking to class did they respond for a short period of time.

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

> It appears from students comments to me and each other that this is an unhappy and negative educational environment - not unlike my evaluations of same teacher in sixth grade last year.
>
> She has refused or has been unable to include ideas, recommendations and strategies offered her in numerous meetings with administrators. Teacher lifting and moving students' desks and chairs to separate them. Another fight (pushing and shoving) erupts in front of room. Teacher did not acknowledge incident at all. Students now using Math Texts without direction, page numbers or teacher's instructions. Back display board consists of full pages torn from magazines with stories pertaining to pictures. However, the story is not continued beyond page with picture - the text is incomplete which indicates board was put up without too much thought.
>
> 11:00 A.M.
> Students again shouting at teacher. Total lack of respect for her by students. Students constantly out of seats, others leaving classroom at will with no pass.
>
> Over one hour into math lesson, nothing has been accomplished educationally. Constant student/teacher bickering and harassment. Teacher only adds to negative situation rather then attempt to remedy it.

On October 7, 1985, Demetroulakos conducted another observation of Jackson's teaching performance. This was subsequent to her having received the 90-day notice during the previous month. He again evaluated her as totally unsatisfactory in every area and concluded that she had not not shown any noticeable progress or improvement. The classroom was noisy, students were talking and shouting at each other without any control being exerted by the teacher, study plans were not being followed, and, in general, the situation was extremely bad. Demetroulakos set forth as "additional comments" the following observation:

> Over the last year you have been observed on numerous occasions with the consensus mark of unsatisfactory. The administrative team at Spencer has spent much time with you in reference to your areas of deficiency.
>
> We have supplied you with the necessary tools, the resource personnel and administrative assistance to help you overcome some of the problems we have observed.

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

> In reviewing some previous observations (as you were advised would be done at our pre-evaluation conference in September, 1985) I noticed many, if not all, of the same concerns expressed by each evaluator. This is a clear indication of your lack of professional committment to reverse this unsatisfactory trend even though extensive assistance, demonstrations, in-service, and materials were given to you.
>
> During my most recent observation, I find the same negative situations still exist after all this time and effort expended in your behalf. Therefore, I have no alternative than to give you another unsatisfactory at this time. However, my offer, made frequently to you, still applies that I along with the administrative team still stand ready to assist and help you for the improvement of your in-class instructional program (Exhibit P-33).

In late October 1985, Demetroulakos had a conference with Jackson in order to review her continuing unsatisfactory performance. He said he took extra time with her to be sure that all areas were covered and that appropriate suggestions were again made so that she understood clearly that the administration was frustrated by her lack of response to suggestions. In a subsequent memorandum to the assistant executive superintendent for elementary programs, Demetroulakos noted that Jackson's performance continued to be deficient, that many areas of concern previously cited to her had still not been effectively addressed, that she had no comments or questions about these observations and that she should be aware that this was a crucial time in her career (Exhibit P-34). Thereafter, Demetroulakos and others continued to observe Jackson's performance and found no changes of a favorable nature. Although he did not observe her formally, he did see her on an informal basis without any noticeable progress being demonstrated with regard to her correcting the many problems she had. Indeed, by that time she carried a lighter class load in order to help her, but this did not seem to be successful either. While Demetroulakos agreed that it is difficult in the Newark school system to maintain discipline at all times, in Jackson's case the instances of her inability to control her class continued to increase. Beyond that, her total lack of response to the many areas rated in which she had been unsatisfactory was particularly disturbing.

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

In addition to the senior administrators whose testimony is summarized above, the Board also presented testimony from two of respondent's former students, and the mother of one of them, with regard to the corporal punishment allegation. The first witness was R.Y. She is presently 11 years old and in the sixth grade. She was in Jackson's class in May 1985 and recalled that on one occasion Jackson tried to hit a boy in the class, but she hit her instead with her fist by accident. R.Y. said that she was not hurt when she was struck. Also, R.Y. recalled that Jackson hit another student (F.) in the mouth with her hand because F. and another child were fighting. However, on direct examination, R.Y. could not at first recall if she was ever hit with a ruler by Jackson.

Nonetheless, on continued questioning by counsel for the Board, R.Y. ultimately recalled that on one occasion when she had gone to throw some papers in a trash basket in the classroom, respondent hit her on the left arm with a ruler. As a result, R.Y. had to go to the nurse's office and ice was put on it. She also told Greenberg about it. After respondent hit her with the rulers,[3] she did not say anything. R.Y. repeated that she was merely going to throw some papers into the garbage can when respondent said to her, "I told you to sit down" and then hit her. Two other children went to get Greenberg, who then took the child to the nurse. R.Y. was sure that she was hit while going to the garbage can—she was not sitting at her desk. As a result of being struck, she had a bruise on the top of her forearm between her wrist and her elbow.

The other student witness against respondent was O.E., whose mother had complained to Patterson in 1982 and 1983 about alleged incidents of physical abuse against her son by Jackson (Exhibits P-17 and P-18). O.E. is presently in the seventh grade

---

[3]It would appear that respondent had more than one ruler in her hand at the time she allegedly struck R.Y.

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

at Spencer and Jackson was his teacher in the second half of the third and the first half of the fourth grade. O.E. claimed that on one occasion Jackson hit him on the nose with her fist because he was giggling while other boys were running around the class. After she hit him, she said that he should be quiet and not talk. As a result, he got a bloody nose and his lip bled as well. However, respondent told him she was sorry and sent O.E. to the nurse. O.E. said that respondent also hit him on other occasions while he was in the third grade and that she also once grabbed him so tightly that nailmarks were left on him. While in her fourth grade class, O.E. said he was punched by respondent in the chest although he does not remember the specifics of the incident. On yet another occasion, he said that Jackson hit him and gave him a black eye when he was talking. He immediately left the class, called his mother and went home. His mother kept him out of the class for a few months and refused to let him return to Jackson's class.

On cross-examination, O.E. was rather vague concerning the time of the alleged incidents and the specifics surrounding his transfer to another class. However, he insisted that he was punched by respondent without his ever having hit her, and that when she saw his nose was bleeding she gave him some tissues to stop the blood. On the occasion when she tightly grabbed him, he was simply walking toward her desk to ask permission to go the bathroom. She grabbed him, he said, and pulled him over to his chair.

The Board's last witness was R.E., the mother of O.E. On several occasions she had to go to school to see Jackson to complain about her son's "busted lip" and the presence of nailmarks on him. Also, his clothes had been ripped and once he had a black eye. According to R.E. her son told her that Jackson hit him on three or four occasions, once because he was laughing in class. R.E. also claimed that when she confronted Jackson about the corporal punishment incidents, the teacher denied them, except for one incident when she said that she hit the boy on the nose by mistake.

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

As previously noted, a substantial portion of the Board's case concerned events which took place prior to March 1984, when the previous Board was presented by its then executive superintendent with a recommendation that tenure charges be certified against respondent, but no action was taken. Thus, counsel for respondent moved to strike this testimony and any other evidence related to those events. I reserved decision on that motion pending receipt of posthearing briefs. A discussion of this motion appears at page 30 to 33, infra.

TESTIMONY FOR RESPONDENT

Mary Jackson testified at length on her own behalf. She began teaching on a regular basis in Newark in 1968 and until 1981 taught mostly second grade. She identified several of her annual evaluations and/or observation reports for the period between 1970 and 1981, all of which rated her satisfactory (Exhibits R-2 through R-23). She also identified an observation report of January 27, 1982, prepared by Ms. Sullivan, a vice principal at Spencer, which gave respondent an overall rating of satisfactory, although four of the 22 specific areas were checked off as unsatisfactory (Exhibit R-1).

According to Jackson, at no time prior to her being transferred to Spencer was she ever the subject of criticism for lack of classroom management, student control or the like. During 1980-1981, she taught at the Avon Avenue School and was unhappy over the fact that she was transferred to Spencer. She was doing quite well at Avon and did not want to move. In fact, she claimed that she was the teacher to whom problem children were assigned because she always maintained good classroom discipline. On her second day at Spencer, Jackson had to go to the office to get supplies and she testified that Patterson was inexplicably rude to her on that occasion. As a result, Jackson had to obtain books from another school where her sister taught, and thereafter was afraid to ask Patterson for anything.

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

With regard to the incident involving R.Y. in May 1985, Jackson said that she went to bang on a desk with some rulers in order to get the class's attention and accidentally hit R.Y. on the hand. She immediately apologized to the child and sent R.Y. to the nurse. According to Jackson, she spoke to Greenberg the following day and to an investigator from DYFS as well. She denied ever hitting R.Y. or any other child except for that incident. With regard to the claims by O.E., respondent categorically denied ever having deliberately hit him either. She did remember that on one occasion he was disturbing a reading group and she told him to go back to his seat. As he turned around, his nose accidentally came into contact with her elbow and she sent him to the nurse. She did recall trying to speak to O.E.'s mother. She described O.E. as a student who is a disciplinary problem and that he liked to get out of his seat and go over to talk to other children.

Jackson also complained that many of the children in her class in 1981-82 had been left back two or three times previously and were reading at a lower grade level. In 1982-83 and 1983-84, her students, she said, continued to function at a very low level in reading and math and most of them had been left back before. It was her job to attempt to bring them up to higher standards.

Jackson said she was unhappy at Spencer because the principal never talked to her and that Greenberg, Demetroulakos and Sullivan sometimes were rude and harsh to her. She said they continually gave her unsatisfactory ratings without reason and she tried to be transferred to another school. In particular, a request to be tranferred in 1983 was turned down (Exhibit R-24), as well as an additional request in 1984 (Exhibit R-25). On August 28, 1984, Peter C. Vitanza, Esq., an attorney for Jackson, wrote to the board attorney at the time pointing out that he had represented Jackson at the Board meeting concerning pending tenure charges which had failed for lack of a vote. According to the attorney, Jackson's problems at Spencer stemmed from a personality conflict with certain members of the school administration. In his letter, Vitanzo also pointed out that Jackson had been required to teach sixth-grade students, even though the bulk of her experience had been with lower grades, and that these older students presented severe disciplinary problems with which Jackson had no experience.

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

In reply to the tenure charges certified against her in 1986, Jackson insisted that she always maintained a neat and attractive classroom and bulletin boards, charts, etc., were all kept up to date. Indeed, when she received the latest 90-day notice, she took photographs in her class which showed, according to Jackson, the appropriate nature of the rooms (Exhibits R-35 through R-49). In particular, Jackson maintained "centers of interest" in reading and science, and every year had additional centers in health and writing. She even went to the trouble of buying materials herself and would make sure that all of it was updated. She also insisted that her classes always began on time because she arrived early and even did work at home the night before.

With respect to the claim that she failed to follow Board policy to use the McMillan series, she said that while she was aware of this directive she believed Lippincott was a better program since McMillan was harder for slow learners to handle. However, she did start using McMillan and the one time she used Lippincott happened to be when Patterson visited the room. She also said she would occasionally use Lippincott for extra reading, but only as a supplement.

Jackson recalled the classroom observation visit by Berry, in particular. When he came into the room the children were taking a mathematics test and she simply told them to put it away to be finished later that day. She absolutely denied that her class was noisy on that occasion. She agreed that she faced disciplinary problems with some of the students at times, but was able to handle them by talking to parents if necessary. She also denied that students ever walked around in her classroom or left the room without permission. She insisted she always effectively managed her classes, that children listened to her and that they did their work.

Unfortunately, there were a few occasions when Jackson was the victim of assaults by students, both in and out of schools. These occurred in 1984 and 1985. Once she was hit on the back with a rock. On another occasion she was bitten on the chest, and on still another occasion a student closed a door on her finger (Exhibits R-31 through R-34).

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

Jackson went on to deny all of the allegations of inefficiency, unbecoming conduct or other just cause and said that she always had a good relationship with students and spoke to them in a pleasant voice. She felt that she had the respect of the students in her classes and that she always responded to their needs. She also insisted that she promptly prepared and utilized lesson plans, and that they were submitted to her vice principal in a timely fashion and that she did consider the differentiated abilities of students. As far as she was concerned, children did learn in her class and she did motivate them.

With respect to the incident when Greenberg took her out of class and into his office, and then called the nurse, she recalled that a student had gone into a closet where she kept her materials and she had told him to sit down. When he persisted in this behavior, she yelled loudly at him. This is when Greenberg came in and took her to his office. She went home because, as she claimed, Greenberg and the nurse insisted that she do so even though there was nothing wrong with her.

On cross-examination, Jackson repeated her denials regarding her alleged unsatisfactory performance. She again insisted that with respect to R.Y., she had attempted to hit a desk to quiet the children and that she had two or three rulers in her hand which she had intended to put away in her closet. She accidentally struck R.Y. because she happened to be standing near R.Y.'s desk at the time. She also denied ever touching O.E., except when she accidentally hit him in the nose with her elbow. She felt that the administration at Spencer was trying to get her because she wanted to be transferred, and that she was performing properly despite the negative evaluations. She specifically denied Greenberg's claim that she lost control of her class and disputed that he came into her room as often as he said he did. She also said she had no idea why he moved her class closer to his office in October 1984.

FINDINGS OF FACT

Based upon my review and consideration of the testimony and other evidence in this case, I herewith make the following FINDINGS OF FACT:

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

1. Respondent was employed as a regular teaching staff member by the Newark Board of Education on or about May 1, 1968, and became tenured thereafter.

2. At the beginning of the 1981-82 school year, respondent was transferred to a teaching position at the Louise A. Spencer Elementary School. For the school years prior thereto, her performance had always been rated satisfactory and no increment had ever been withheld from her.

3. Respondent was unhappy about the transfer to Spencer because she enjoyed teaching at the Avon Avenue School and wanted to remain there.

4. Soon after commencing her teaching at Spencer in September 1981, respondent began to have problems. On November 18, 1981, respondent was observed teaching a fourth-grade spelling class by the principal, Maude F. Patterson, who rated Jackson unsatisfactory as a result of that observation.

5. On April 27, 1982, respondent was again observed by Patterson while teaching a fourth-grade reading class, and her rating was unsatisfactory for a variety of reasons.

6. On November 29, 1982 and February 3, 1983, respondent was again observed by Patterson while teaching a third-grade class and was rated unsatisfactory in a variety of areas on both occasions.

7. In May 1983, Patterson recommended to the assistant executive superintendent for elementary education that because of Jackson's poor performance, she should be given a 90-day notice under N.J.S.A. 18A:6-14.

8. On September 23, 1983, tenure charges were brought against Jackson alleging that she had been inefficient in the performance of her assigned

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

duties. She was issued a 90-day notice to correct and overcome the inefficiencies.

9. On January 27, 1984, the tenure charges were filed and on January 30, 1984, Jackson was notified of the same and given 15 days to respond.

10 At its meeting on March 13, 1984, the Newark Board of Education failed to take any action in respect to a recommendation made to it by its then executive superintendent to certify the tenure charges against Jackson to the Commissioner. No further action was taken against her with respect to those tenure charges at that time.

11. In both 1983 and 1984, Jackson sought to transfer out of Spencer, to no avail.

12. In October 1984, the principal of Spencer School recommended that because of Jackson's continuing failure to perform in an adequate fashion, and because of her commission of acts of corporal punishment upon students, respondent should again be made the subject of tenure charges.

13. Between October 1984 and May 1985, several observations of respondent's classroom teaching performance were made by various administrators at Spencer, all of whom rated her unsatisfactory in a variety of areas. Because of problems in her classroom, it was moved to a location next to the vice principal's office.

14. In January 1985, Vice Principal Norman Greenberg dispatched two separate memoranda to Jackson about her inability to maintain classroom discipline and her failure to follow directions with respect to student progress.

15. In June 1985, an annual evaluation report was prepared by Greenberg with respect to Jackson in which he rated her performance unsatisfactory for the 1984-85 school year in a variety of areas.

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

16. On August 28, 1985, respondent was served with tenure charges and notified that she had 90 days to correct her inefficiencies, beginning on September 20, 1985.

17. On October 7, 1985, respondent was observed teaching a fourth-grade reading class by William Demetroulakos, a vice president at Spencer. He rated her unsatisfactory in every area and concluded that although she had been observed on numerous occasions over the past year and efforts had been made to attempt to help her overcome the deficiencies, she had failed to demonstrate any progress in that regard.

18. On October 22, 1985, a conference was conducted by Demetroulakos with Jackson, at which time the areas of deficiency which had been observed in her performance were noted and ideas and suggestions for corrections were given to her. At no time during that conference did Jackson make any comments or ask any questions.

19. On November 27, 1985, respondent was observed teaching a fourth-grade math class by Martha Washington, the principal of another elementary school in Newark. Washington had been specifically requested as an outside administrator to make this observation. As a result of her observation of the respondent's classroom teaching performance on that date, it was Washington's view that Jackson was performing in an unsatisfactory manner in a variety of areas.

20. In December 1985, the executive superintendent advised the Board that the 90-day corrective period had expired and that Jackson's inefficiencies were not cured. Accordingly, in January 1986, the executive superintendent recommended that there was probable cause to proceed with the filing of tenure charges of inefficiency, corporal punishment, unbecoming conduct and other just cause against respondent.

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

21. On January 16, 1986, respondent was notified that the Board had voted to proceed with the filing of tenure charges and that she had 15 days to respond. She did not respond in a timely manner.

22. On February 25, 1986, the Board voted to certify tenure charges against Jackson and to suspend her without pay pending final determination regarding same.

DISCUSSION

The threshold issue in this case is the propriety of considering any allegations against Jackson which concern conduct in which she engaged prior to March 13, 1984, when the Board in office at that time chose not to take any action in response to a recommendation by the then executive superintendent that charges be certified against her. There are two aspects to the issue—the inefficiency charges which predate March 1984, and corporal punishment allegations which allegedly took place during 1982 and 1983.

With respect to the allegations of corporal punishment, there were generalized claims leveled by Patterson during the course of her testimony in this case that Jackson had hit children from time to time in 1982 and 1983. Other witnesses also made passing reference to this. However, the only specific allegation of such misconduct was offered by O.E. and his mother. Although these incidents took place prior to March 1984, the first time that they surfaced with respect to inclusion in tenure charges was in August 1985, when the present charges were made. Accordingly, respondent maintains that due process requires that these charges be dismissed because of the delay which took place, and the Board's failure to have certified them in March 1984.[4]

[4]I should note that neither in her answer nor at the prehearing conference did respondent raise any specific issue respecting a due-process bar to any pre-March 1984 charges.

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

While I am not unsympathetic to a contention by a tenured teaching staff member that he or she should not constantly have to be in fear of the certification of charges stemming from past conduct, I am unaware of any decision of the Commissioner which would bar the Board from pursuing the 1982 or 1983 corporal punishment claims in this case. Defenses in the nature of laches, waiver, and/or estoppel can certainly be raised, and if it is demonstrated that the delay or inaction is unexplained or inexcusable, and that prejudice would result if the teacher were now made to defend against the charges, they certainly can be rejected on those grounds. However, mere delay, absent a showing of prejudice and an interference with the ability to defend, is simply not enough.

Accordingly, I find no ground upon which to preclude the Board from pursuing all of the corporal punishment charges, even though all but one relate to incidents which were alleged to have occurred before March 1984. Although there was a generalized claim by respondent that the lapse of time had interferred with her ability properly to defend against these claims, this was never buttressed by any specifics. Recently, in the case of In the Matter of the Tenure of Hearing of Jean Hamilton-Moore, School District of the Town of Montclair, Essex County, OAL DKT. EDU 1604-85 (Feb. 13, 1986), charges of corporal punishment against a tenured teacher were considered by me even though in some cases they predated the actual certification by several years. In particular, the Board in that case certified charges in March 1985 after a particularly egregious incident had occurred in late October 1984. The charges, when filed, also included allegations regarding corporal punishment which had taken place as early as the 1978-79 school year. They, too, were considered by the Commissioner along with the most recent charges.

Thus, I find no constitutional, statutory or other bar to the certification of charges of corporal punishment against the tenured teacher in this case, even though most relate to incidents that occurred two or three years earlier and predated an aborted effort in March 1984 to certify other charges against respondent. If Jackson did allegedly commit corporal punishment, she should be required to defend against the charges, unless she can demonstrate some undue prejudice. In this case, she has not.

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

The second aspect of the motion to strike is compounded by the fact that the present inefficiency allegations repeat and incorporate the same exact conduct, and time period, which had been addressed in the recommendation to the Board two and one-half years earlier. Respondent contends that since a 90-day notice had been served on her in 1983 and the Board thereafter reviewed the allegations and determined not to act on them, this constituted a "dismissal" of those charges which now bars their being raised again.

The Board, in reply, claims that the same conduct can be considered now since the earlier action or inaction cannot be binding upon the present board which certified the charges and, in any event, a "dismissal," by inaction or otherwise, is "without prejudice" unless specifically noted to be to the contrary. In this regard the Board refers to the decision in Manalapan Englishtown Education Assoc. v. Bd. of Ed. of Manalapan-Englishtown, 187 N.J. Super. 426 (1981), which held that local boards of education have a great deal of discretion with respect to whether there is probable cause to credit allegations against a tenured teacher which would be sufficient to warrant dismissal or a reduction in salary. Given that broad discretion, it is the contention of the Board in this case that it was under no obligation in 1983 to certify charges, and was perfectly free to wait a period of time before deciding to certify any charge. In short, unless the tenured employee can show prejudice, the mere fact that charges were not processed on an earlier occasion is not significant. The Board does concede, however, that the failure to move on the charges in March 1984 technically resulted in a dismissal under N.J.S.A. 18A:6-13, but the dismissal must be considered to have been without prejudice. See, In the Matter of the Tenure Hearing of William H. Levine, 1977 S.L.D. 1129 (Oct. 27, 1977); Cf. In the Matter of the Tenure Hearing of Nicholas Kagdis, 1980 S.L.D. 888, In the Matter of the Tenure Hearing of Carolyn Edwards, 1980 S.L.D. ___ (March 9, 1980).

On balance, I believe that the "resurrection" in 1985 of the 1981-84 inefficiency charges ultimately certified in February 1986, is not a fatal defect and they can be considered in this case. I agree with the Board that there is no constitutional, statutory or case law which would preclude such reconsideration, absent laches, estoppel and the

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

like. I do agree that a tenured teacher who has been provided notice of potential charges of inefficiency, who is not then proceeded against any further, as occurred in this case in 1984, arguably is entitled to breathe a sigh of relief and should not have to worry about a sword constantly hanging over his or her head. However, adequate protection against any alleged unfairness is afforded through the Tenure Hearing Act itself, and through the teacher's right to raise various separate defenses. The mere fact that the Board failed to act in March 1984 with respect to performance deficiencies that allegedly took place before that time does not bar a subsequent board from certifying as part of inefficiency charges the same alleged misconduct. The Board still must prove those charges, and the employee is entitled to raise any defense he or she wishes, including prejudice resulting from the delay.

Accordingly, having determined that all four counts of the charges certified in 1986 can be considered by me in this case, including allegations which were raised but not pursued in 1984, the remaining issue is whether any one or more of those charges have been proved and, if so, what sanction is appropriate. In this respect, I entertain not the slightest doubt that the allegations respecting Jackson's deplorable inefficiencies and unbecoming conduct were established. I am convinced from the testimony of Patterson, Greenberg, Washington, Berry and Demetroulkos that respondent's inadequacies as a teacher were legion, and to hold otherwise would border on malfeasance. This teacher, albeit perhaps well-intentioned, proved herself incapable of effectively pursuing her chosen career. In almost every area of teacher responsibility, respondent was a disaster. I shudder to imagine the negative impact she must have had on any child who came into her class wanting to learn. The overwhelming evidence against Jackson in this case was hardly disputed, other than by her generalized self-serving and unpersuasive denials. Even disregarding the pre-March 1984 charges, and considering only those which related to events on or after that date, the evidence against this teacher is simply overwhelming.

With respect to the corporal punishment count, although I have permitted it to be pursued in all of its aspects in this case, I must reject the Board's proofs as to O.E.'s

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

allegations. None were independently corroborated, other than by his mother's somewhat nonspecific references to the times and places of the events. The preponderance of the evidence in regard to O.E.'s charges simply did not rise to a level sufficient to credit his allegations.

On the other hand, the incident involving R.Y in May 1985 is quite a different matter. Although the witness needed some prompting by counsel in order to recall the event, R.Y. was noticeably nervous and naturally reticent at first. However, once she focused on the event, R.Y. was clear and firm in her recollection. In her case, of course, corroboration of the striking of her arm and its consequence came from Greenberg, Patterson and the nurse's report. Thus, having had an opportunity to observe R.Y., Greenberg, Patterson, and respondent testify about the incident, I must reject Jackson's version of it. Accordingly, as to the corporal punishment charge, I additionally **FIND** as follows:

23. In May 1985, Jackson taught a fourth-grade class in which R.Y., then nine years old, was a student.

24. On or about May 7, 1985, R.Y. left her desk in order to throw some papers into a trash basket.

25. At that point, without provocation from R.Y., Jackson struck the child on the top of her forearm between her elbow and her wrist with two or three rulers that Jackson was holding in her hand.

26. Just before she struck R.Y., Jackson said to her, "I told you to sit down."

27. Two other children in the class reported the striking to Norman Greenberg, who took R.Y. to the nurse who applied ice to R.Y.'s arm.

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

28. The striking of R.Y. by respondent caused red welts and a bruise to appear on the child's arm.

29. On the following day, the principal of Spencer, Maude Patterson, was present when Jackson said that she hit R.Y. with the ruler because the child had hit her.

Thus, based upon my review of all of the evidence in this case, I have determined that except for the allegations concerning acts of corporal punishment committed by respondent against O.E. and/or any student other than R.Y., the Board has established by a preponderance of the credible evidence the truth of the charges certified against Jackson. This teacher did perform in a woefully inefficient manner, she did conduct herself in an unbecoming manner and she did commit corporal punishment upon R.Y. The consequences of her ineptitude and misconduct, precisely as the Board had alleged were ". . . so staggering as to create a demand for her dismissal as a teaching staff member."

PENALTY

Given the findings I have made, even excluding any pre-March 1984 conduct, it is clear, of course, that respondent, by virtue of her abysmal performance, must be dismissed from her employment by the Board. Even a cursory review of the many observation reports reveals a seriously flawed teacher. Sadly, the criticisms of her performance were made by persons who, I believe, were sincerely interested in helping her overcome problems and who harbored no grudges against her. Unfortunately, Jackson apparently paid mere lip service, if at all, to their constructive advice and proceeded to perform even more poorly, if that were possible. As noted, even if I exclude from consideration any evidence of inefficiency, etc., prior to March 1984, her conduct after that date, quite aside from the R.Y. incident, amply justifies her dismissal. See, e.g., Exhibits P-7, P-11, P-12, P-13, P-22, P-23, P-25, P-26, P-28, P-32, and P-33. It is almost inconceivable to me that in January 1985, for example, having taught since 1968 and being midway through her fourth year at Spencer, and after having been severely criticized time and again about her deficiencies and urged to improve, Jackson conducted a class as

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

poorly as Demetroulkos described in his observation report (Exhibit P-32). His chronology of what he saw in that classroom between 9:40 and 11:00 a.m. on January 24, 1985, is almost tragic. What is particularly astonishing about this and other observations is that senior administrators were in the room while classes simply careened out of Jackson's control, with no sign that she could avoid, no less cure, the problems.

Similarly revealing, and equally damning, is Greenberg's annual evaluation at the close of the 1984-85 school year (Exhibit P-26). Jackson plainly was not teaching and her failures as a teacher were creating failing students. When the R.Y. striking incident is added to the mix, a dismissal is demanded. For too many of her former students, the sanction is too late. At least future students will be protected.

CONCLUSIONS

I therefore **CONCLUDE** that, except as noted above with respect to the corporal punishment count, all of the allegations of the tenure charges certified to the Commissioner in this case were proven by the Board, and respondent should be **DISMISSED** forthwith from her employment.

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

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

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

December 17, 1986
DATE

STEPHEN G. WEISS, ALJ

DEC 22 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 24 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

md/e

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

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY JACKSON, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

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

Respondent's exceptions in essence reiterate the legal arguments advanced and considered during the hearing and which are embodied in her post-hearing brief. Firstly, she contends that any events occurring before March 13, 1984 which relate to the tenure charges and notice of inefficiency initiated against her in 1983 should not be allowed to be considered and avows that the ALJ erred in allowing consideration of events prior to that date as this flies in the face of New Jersey school law and her due process rights.

Upon review of the record and consideration of respondent's arguments with respect to this issue, the Commissioner is unpersuaded that the ALJ erred in permitting consideration of events related to the prior tenure charges filed against respondent which the Board in March 1984 failed to act upon due to a lack of mover. Nor does he find that the ALJ callously rejected respondent's position on this issue without any real analysis as alleged in her exceptions. He finds the ALJ's analysis more than adequate and overall correct.

N.J.S.A. 18A:6-13 mandates that if a board does not make a determination to certify tenure charges "***within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon." There is nothing within this requirement that would preclude a subsequent board from acting anew at a future time to certify tenure charges based upon events occurring after the "dismissal" occasioned by N.J.S.A. 18A:6-13 but which also draw upon events in the teacher's performance history associated with the prior uncertified charges as evidence in support of the new charges.

As such, the Commissioner agrees with the ALJ that no constitutional, statutory or other bar exists to the 1985 charges which, in addition to post-March 1984 events, include events from the 1981-84 period. Further, he finds the following statement of the ALJ well-reasoned and relevant to the due process violation

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

alleged by respondent even though it speaks only to the inefficiency aspect of the matter. It reads:

> "***I do agree that a tenured teacher who has been provided notice of potential charges of inefficiency, who is not then proceeded against any further, as occurred in this case in 1984, arguably is entitled to breathe a sigh of relief and should not have to worry about a sword constantly hanging over his or her head. However, adequate protection against any alleged unfairness is afforded through the Tenure Hearing Act itself, and through the teacher's right to raise various separate defenses. The mere fact that the Board failed to act in March 1984 with respect to performance deficiencies that allegedly took place before that time does not bar a subsequent board from certifying as part of inefficiency charges the same alleged misconduct. The Board still must prove those charges, and the employee is entitled to raise any defense he or she wishes, including prejudice resulting from the delay.
>
> (Initial Decision, ante)

Moreover, the Commissioner also agrees with the ALJ's conclusion that, "Even disregarding the pre-March 1984 charges and considering only those which related to events on or after that date, the evidence against this teacher is simply overwhelming." (emphasis in text) (Initial Decision, ante) He strongly disagrees with respondent's exceptions which urge that the tenure charges be dismissed due to the Board's failure to bear its burden of proof. He finds as preposterous the allegation that the ALJ blindly accepted every position advanced by the Board and that the initial decision lacks reason and logic. (Respondent's Exceptions, at p. 23) He likewise finds as meritless any suggestion that a conspiracy was at play in this matter among the Spencer School administrators.

Upon review of the record and a thorough consideration of the exceptions, the Commissioner fully concurs with the ALJ that the Board proved by a preponderance of the credible evidence the charges certified against respondent, except for the corporal punishment allegations dealing with students other than R.Y. He therefore adopts the initial decision as his own for the reasons expressed therein. Notwithstanding how satisfactory respondent's performance may have been in the years prior to 1981, the record is replete with evidence that "this teacher did perform in a woefully inefficient manner, she did conduct herself in an unbecoming manner and she did commit corporal punishment upon R.Y.***" (Initial Decision, ante)

Moreover, the Commissioner fully concurs with the recommendation that her inefficiency, ineptitude and misconduct are unquestionably worthy of dismissal as determined by the ALJ.

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

Accordingly, respondent is dismissed from her tenured teaching position as of the date of this decision, a sanction which the Commissioner agrees is too late for her former students but will at least protect future students.

It is further ordered that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 3, 1987

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

IN THE MATTER OF THE TENURE :
HEARING OF MARY JACKSON, SCHOOL :
DISTRICT OF THE CITY OF NEWARK, :
ESSEX COUNTY. :
:

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 3, 1987

For the Petitioner-Respondent, Marvin L. Cormick, Esq., General Counsel

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

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

June 3, 1987

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

DAM JIN KOH AND HONG JUN KIM,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For the Petitioners, Soriano and Gross
(Daniel C. Soriano, Jr., Esq., of Counsel)

For the Respondent, Sterns, Herbert, Weinroth & Petrino
(Michael J. Herbert, Esq., of Counsel)

This matter was opened before the Commissioner upon the filing of a Petition of Appeal and Motion for Summary Judgment. Petitioners, two Korean citizens, are appealing the determination of the Eligibility Appeals Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) dated December 11, 1986, which determined that they were ineligible to participate in ice hockey competition because of transfer to Millburn High School primarily for athletic advantage. Petitioners contend that the Committee was arbitrary, capricious and unreasonable in its application of the Association's transfer rule.

The December 11, 1986 letter of ineligibility reads in pertinent part:

> It is provided by pages 102 through 107 of the NJSIAA Handbook, that foreign born students transferring to NJSIAA member schools must comply with the basic eligibility standards set forth by the Association. The Eligibility Appeals Committee found that these students transferred primarily for athletic advantage and therefore ruled that their participation in ice hockey would violate Article V, Section 4K(6), which prohibits transfers for athletic advantage. The Committee took special note that the stated reason for the transfer in the senior year by these students was primarily to play ice hockey; that there was testimony that they sought better facilities; that they were on the national championship team in Korea and that they attended a curriculum in Korea which emphasized their ice hockey skills. The Committee is not

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

> unsympathetic with the stated desire of these students to gain a strong education in the United States and of your own sincere desire that they become part of your "family". However, the Committee believed that the evidence was overwhelming that the principle (sic) reason for their transfer at this time in their academic careers was to advance their skills in ice hockey which is clearly proscribed by the rules.
>
> (Committee's Letter, at p. 2)

Although the Committee denied petitioners' eligibility to compete interscholastically in ice hockey, it did allow them to participate with the team or to engage in any other winter sport on an interscholastic basis terminating on March 3, 1987, the date upon which they would have completed their secondary schooling in Korea.

Based upon a thorough review of the record, other essential facts of the matter are as follows:

1. Petitioners are 18 years of age and are citizens of the Republic of Korea.

2. In Korea, high school students, in addition to their academic training, have a major/specialty such as a sport or music.

3. Petitioners were midway through their senior year in a Korean high school where their specialty/major was ice hockey for two years (since October 1984).

4. They entered the United States in late August 1986 on two-year student visas and reside with June M. Dean in Millburn Township.

5. They enrolled at Millburn High School on September 3, 1986.

6. The unchallenged testimony of all witnesses is that in order to secure the approval of the Korean government to study in the United States, petitioners were required to state that the reason for leaving the country was to pursue their specialty of ice hockey since permission to leave the country is granted only for study in one's specialization.

7. If petitioners were to secure approval to leave Korea, the principal of Millburn High School had to "make certain statements about sports to get them out if they wanted to take advantage of the education offered at Millburn." (Tr. 107)

8. The principal of the Korean high school, when asked by NJSIAA why petitioners came to the United States, responded to the effect that they were interested in becoming good hockey players but they were unable to do so in Korea because of a shortage of facilities and teams.

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

9. Petitioners' transcripts from the Korean secondary school indicate a full academic course of study such as Ethics, Korean, National History, Physics, English, German, Chinese Sciences, in addition to physical education (hockey) which comprised their specialty.

Positions of Parties

Petitioners aver that although participation in ice hockey was a condition of 'the Korean government's approval of their application to come to the United States, ice hockey was not their motivation or their families'. They point to the testimony of Millburn's principal as an astute summation of the true reason for wanting to leave Korea as opposed to the stated reason, namely improved educational opportunity rather than participation in ice hockey.

In arguing that NJSIAA's action was arbitrary, petitioners consider "questionable" the nature of the waiver procedure contained in the Association's interpretive guidelines for foreign students (Handbook, at p. 106), namely, is it a waiver of the 30-day waiting period or a waiver signed by the principal and athletic director or a total exception to the transfer rule, Article V, Section 4K(2), including the provisos dealing with recruitment and athletic advantage.

Petitioners avow that it was arbitrary for the Eligibility Committee to have found from the evidence presented that participation in ice hockey was the particular or primary reason for their transfer from Korea to Millburn. They stress that ice hockey was the means by which they were able to come to the United States to study and point out that in any event their eligibility to participate in any interscholastic competition in any sport would terminate at the end of the winter season.

Respondent NJSIAA argues that under all the circumstances of the matter it had an adequate basis to conclude that petitioners' transfer to Millburn was primarily for an athletic advantage which violates Article V, Section 4K(6) of the Association's rules. It points, inter alia, to the testimony of Mrs. Dean that in order to come here, petitioners had to play hockey (Tr. 101) and that they had to attend a school with an ice hockey program (Tr. 104). NJSIAA perceives this to be pertinent because ninety percent of the 360 public school members of NJSIAA do not have such programs. Thus, it reasons, had Millburn not had an ice hockey program, petitioners apparently would not have transferred to Millburn. Likewise, it points to the testimony of Wuijun, petitioners' brother/cousin, concerning the nature of the school they attended in Korea, namely, winners of national hockey competition, world travel/competition and major in hockey.

NJSIAA also avers that although testimony was heard that the real purpose for transfer was for academic reasons, "the essential statement" in the confirmation letter from the Korean

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

principal was that petitioners could not develop their specialties in Korea because of the shortage of facilities and teams.

Given the above, NJSIAA argues that its action was neither arbitrary nor unreasonable and points to the standard of review for cases of this nature, namely, that the Commissioner will not substitute his judgment for that of the Association absent such a showing. Moreover, it avows that Article V, Section 4K is intended to prevent students from transferring from one school to another for athletic reasons and that the rule has been upheld by the Commissioner and courts in a variety of cases (cites omitted).

Analysis and Conclusions

Article V, Section 4K establishes the rules for transfers. The clarification statement for provision 1 of that section informs that a transfer waiver form must be processed whenever a student transfers from one secondary school to another without a change of parental/guardian residence (Handbook, at p. 43). Section 4K(2) reads:

> A student transferring from one secondary school to another, except for the cases provided for in Paragraph (1) of these transfer provisions shall be eligible after the expiration of 30 calendar days during the school year provided that both principals and athletic directors sign an appropriate waiver form indicating that there has been no recruitment or transfer for athletic advantage. (emphasis supplied) (Id., at p. 44)

According to the procedures for processing applications for eligibility of foreign students found on page 106 of the Handbook, all foreign students whose parent/guardian has not moved into the member district must apply for interscholastic eligibility which is a request for a waiver as required in 4K(2) above.

Article V, Section 4K(6), the rule upon which petitioners' eligibility was founded, reads:

> (6) Any evidence of a transfer for athletic advantage shall subject the athlete to a prompt determination of eligibility by the Eligibility Committee and may subject the school and the athlete to appropriate disciplinary proceedings as set forth in Article X herein. A transfer for athletic advantage is defined as, but not limited to,
>
> (a) seeking a superior athletic team;
>
> (b) seeking relief due to a conflict with the philosophy or action of an administrator, teacher or coach relating to sports;

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

(c) seeking a team consistent with the student's athletic abilities; or

(d) seeking a means to nullify punitive action by the previous school.
(Id., at p. 44)

The Interpretive Guidelines for transfers inform in pertinent part that:

> Subsections (5) and (6) of the transfer rule became effective during the 1982-83 school year and are aimed at preventing athletic recruitment or transfers by students for athletic advantage.
>
> Subsection (6) sets forth specific examples of transfers for athletic advantage such as seeking a superior team or one consistent with the student's abilities, (a) and (c); or as an attempt to obtain relief from conflicts with the former school and its staff or punitive action taken by that school, (b) and (d). Any evidence of these factors will subject the transfer to the scrutiny of either the Eligibility or Eligibility Appeals Committee. The Association recognizes that a desire to participate in interscholastic sports may be one of a number of considerations involved in a transfer, in addition to factors such as finances, academic, religious training, social and transportation. However, if after a hearing, either Committee determines that the primary reason for the transfer was for athletic reasons, then a violation of Subsection (6) will be found. (emphasis supplied) (Id., at pp. 60-61)

Upon a thorough examination of the record in this matter and being fully cognizant of the fact that it is not the role of the Commissioner to substitute his judgment for that of NJSIAA, the Commissioner concludes that the record does not establish that the Association was arbitrary in determining that petitioners transferred from the Republic of South Korea to Millburn High School for athletic advantage, thus, NJSIAA's application of Article V, Section 4K(6) is deemed appropriate.

While it is clear from the record that petitioners and their families were unquestionably motivated to have them obtain educational advantage through attending school in the United States, the fact is indisputable that they would not have enrolled in Millburn High School if that school did not have an ice hockey program. The record is abundantly clear that unless petitioners enrolled in a school which could improve their hockey skills, the Korean government would not have permitted them to leave that country.

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

That NJSIAA construed petitioners' transfer to Millburn to be for athletic advantage/reasons pursuant to Article V, Section 4K(6) cannot be deemed unreasonable notwithstanding how strong an educational motivation existed or even if education were the "true" or "real" reason. This is due to the fact that petitioners' attendance at a given high school rested squarely on the availability of an ice hockey program.

Consequently, the Commissioner is in agreement with NJSIAA that an adequate basis existed to apply Section 4K(6) in this matter, thus barring petitioners' participation in interscholastic ice hockey competition.

Accordingly, the decision of NJSIAA is affirmed. Any appeal to this determination shall be made to the New Jersey Superior Court pursuant to N.J.S.A. 18A:11-3.

COMMISSIONER OF EDUCATION

February 3, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7149-86
AGENCY DKT. NO. 36-2/85

BOARD OF EDUCATION OF WOODSTOWN-PILESGROVE REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
LYNN P. WARE,
Respondent.

John D. Jordan, Esq., for petitioner (Jordan & Jordan, attorneys)

Sheldon Lee Cohen, Esq., for respondent (Schneider, Cohen, Solomon, Leder & Montalbano, attorneys)

Record Closed: December 16, 1986 Decided: December 31, 1986

BEFORE **NAOMI DOWER-LA BASTILLE**, ALJ:

The Board of Education of Woodstown-Pilesgrove Regional School District (Board) certified tenure charges of conduct unbecoming a teaching staff member against Lynn P. Ware (respondent) on February 21, 1985 and respondent was granted a stay of the proceeding by the Commissioner on March 15, 1985. The Commissioner transmitted the matter to the Office of Administrative Law on October 22, 1985 for a contested case determination under N.J.S.A. 2C:51-2, pursuant to N.J.S.A. 52:14F-1 et seq.

After a telephone prehearing conference on November 24, 1986, the Board filed a summary disposition motion on December 12, 1986. On December 8, 1986, respondent filed

New Jersey Is An Equal Opportunity Employer

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

a sworn statement that he did "not wish to contest the application of the Woodstown-Pilesgrove School District to revoke my teaching certificate and thereby forfeit my employment." (R-1).

The evidence of the Board consists of an affidavit of Walter J. Simpkins, Chief of Police (P-1), a sworn statement of Richard William McDonald (P-2), a certified judgment of conviction (P-3) and a copy of the indictment (P-4). Since the evidence is undisputed, I **FIND:**

1. Lynn P. Ware was indicted on February 5, 1985 and suspended without pay from that date.

2. Ware was tried by jury and found guilty of criminal attempt/sexual assault (N.J.S.A. 2C:5-1/2C:14-2(c)1); of criminal sexual contact (N.J.S.A. 2C:14-3(b)) and of endangering the welfare of a child (N.J.S.A. 2C:24-4(a)).

3. Ware was sentenced on October 9, 1986 to concurrent terms of incarceration on each count and the court set forth as an aggravating factor that the defendant took advantage of the youthful victim, who was then a 17 year old school student of the defendant, which circumstances were also set forth in Exhibits P-1 and P-2.

I **CONCLUDE** that respondent was convicted of a second degree offense, N.J.S.A. 2C:5-1/2C:14-2c(1). This offense also touches his official position of employment within the meaning of N.J.S.A. 2C:51-2a(2) since the conviction was for a sexual assault on one of respondent's students. I **CONCLUDE** that respondent has forfeited his position as a teaching staff member as of the date of sentencing and that, in addition, he is forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions, pursuant to N.J.S.A. 2C:51-2c.

This decision should be forwarded to the State Board of Examiners so that his teaching certification will stand revoked simultaneously in accordance with statute and with respondent's expressed understanding of the forfeiture.

It is so **ORDERED.**

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

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

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

December 31, 1986
DATE

Naomi Dower-La Bastille
NAOMI DOWER-LA BASTILLE, ALJ

JAN 2 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 6 1987
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

sc

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

IN THE MATTER OF THE TENURE	:	
HEARING OF LYNN P. WARE, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF WOODSTOWN-PILESGROVE	:	DECISION
REGIONAL, SALEM COUNTY.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

Upon review of the record herein, the Commissioner concurs with the finding and determination of the ALJ that, as a result of his conviction of a second degree offense, criminal attempt/sexual assault (N.J.S.A. 2C:5-1 and 2C:14-2(c)1) and his conviction of criminal sexual contact (N.J.S.A. 2C:14-3(b)) and of endangering the welfare of a child (N.J.S.A. 2C:24-4(a)), respondent has forfeited his position as a teaching staff member as of the date of sentencing, October 9, 1986. Therefore, he is disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions, pursuant to N.J.S.A. 2C:51-2(c).

Further, the Commissioner orders that this matter, forthwith, be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action pursuant to statute and regulation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 4, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7666-85
AGENCY DKT. NO. 394-11/85

CHARLES SMITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CITY OF JERSEY CITY, HUDSON COUNTY
Respondent.

Robert M. Schwartz, Esq., for petitioner

William A. Massa, Esq., for respondent

Record Closed: November 17, 1986 Decided: December 19, 1986

BEFORE **ARNOLD SAMUELS**, ALJ:

PROCEDURAL HISTORY

On November 20, 1985, petitioner, Charles Smith, a tenured Principal in the respondent school district, filed a petition with the Commissioner of Education claiming that the respondent's failure to appoint him to the newly created position of Assistant Superintendent in Charge of Instruction and Learning violated his tenure and seniority rights pursuant to N.J.S.A. 18A:28-5 et seq. and N.J.S.A. 18A:28-9 et seq.

New Jersey Is An Equal Opportunity Employer

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

The respondent filed an answer to the petition on December 2, 1985. On December 9, 1985, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. and assigned to Leon S. Wilson, ALJ. A prehearing conference was held on January 24, 1986, and a Prehearing Order was filed, fixing the issues to be decided, scheduling hearing dates and regulating other procedural aspects of the forthcoming hearing.

The hearing began on May 20, 1986 before Judge Wilson. At the beginning of the hearing, the petitioner moved for judgment on the pleadings (summary decision) based on admissions made by the respondent in its answer and in discovery. The Judge granted summary decision to the petitioner orally. It was his opinion that the respondent's pleadings and discovery conceded the petitioner's claims to the extent that the contested issues were effectively disposed of. However, a written order was delayed for ten days to give respondent an opportunity to proffer allegations contrary to the admissions in the answer and to move to amend the pleading. On March 26, 1986, counsel for respondent wrote a letter to the Judge which accomplished that purpose. An amended answer to the petition was filed by respondent on April 29, 1986, and on May 9, 1986 Judge Wilson accepted the amended answer and ordered the summary decision in favor of petitioner vacated. The matter was scheduled for plenary hearing.

In June 1986, the matter was transferred to this Judge because Judge Wilson was about to retire from the Office of Administrative Law. A status conference was held on June 20, 1986, and the hearing was rescheduled to October 1986. Hearings were held on October 14, 15 and 16, 1986 at the Office of Administrative Law in Newark, New Jersey. The petitioner testified in his own behalf, and he called three witnesses. Three additional witnesses also testified for the respondent. Thirteen exhibits were marked in evidence and are described in the Appendix attached hereto. Written evaluations offered by respondent were not accepted in evidence because they were not disclosed to the petitioner in pretrial discovery. Post-hearing briefs were filed by both parties, and the

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

record closed on November 17, 1986, the date on which the last post-hearing submission was filed.

THE ISSUES

The issues were stated in the Prehearing Order as follows:

1. Did petitioner achieve tenure in the position?

2. Were petitioner's duties in the several titles held sufficiently similar to constitute more than two years' plus one day's service in the position within a four-year period?

3. Should petitioner prevail, shall the remedy include prejudgment interest on back pay and allowances?

(No testimony, evidence or argument was presented on Issue 3 above. Therefore, that question will not be discussed or decided.)

The parties agreed that the petitioner's assignments since 1980 have been as follows:

Assistant Superintendent, Instruction and Learning Position abolished - July 21, 1981	1980-81 school year
Principal - P.S. No. 16	1981-82 school year
Principal - on assignment to Curriculum and Instruction Central (Superintendent's) Office	1982-83 school year

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

Principal - on assignment to Curriculum and Instruction Central (Superintendent's) Office; and P.S. No. 16	1983-84 school year
Principal - on assignment to Curriculum and Instruction Central (Superintendent's) Office	1984-85 school year
Principal - P.S. No. 29	1985-86 school year to date

The petitioner claims that in all three years, 1982-83, 1983-84 and 1984-85, he actually performed the duties of an Assistant Superintendent, regardless of the lack of official title and that he has tenure as an Assistant Superintendent. The respondent denies this, alleging that the petitioner did not perform substantially all the duties of an Assistant Superintendent during those years.

The applicable statute, N.J.S.A. 18A:28-5(c), provides that tenure is attained after employment for the equivalent of more than three academic years within a period of any four consecutive academic years. Therefore, if in fact the petitioner functioned as an Assistant Superintendent in 1982-83 and 1983-84 and then immediately resumed the same duties at the beginning of the 1984-85 school year, he would have attained tenure in the position because he would have completed more than three years out of four consecutive academic years as an Assistant Superintendent. (There is no dispute about the fact that he served as Assistant Superintendent in 1980-81.)

TESTIMONY

The petitioner, Charles Smith, testified that he spent one year in the title of Assistant Superintendent in charge of Instruction and Learning during the 1980-81 school year. Following abolition of the position in July 1981, Dr. Smith served as principal of P.S. No. 16 for one year, 1981-82. He said that for three consecutive years thereafter, beginning in September 1982 and ending in September 1985, he was assigned to the Central Office where he had the position and duties entitled Principal on assignment to

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

Curriculum and Instruction. During the 1983-84 year, Dr. Smith was additionally assigned as supervisory head of P.S. No. 16. He explained that he visited P.S. No. 16 only once or twice in two weeks and that another person was in daily charge of the school. Dr. Smith stated that he spent practically all of his time at the Central Office performing the duties of Principal on assignment to Curriculum and Instruction in 1983-84 and that he was only statutorily in charge of P.S. No. 16.

Dr. Smith detailed the duties he performed as Principal on assignment to Curriculum and Instruction. He insisted that the duties were essentially the same as those he performed in 1980-81 in the title of Assistant Superintendent for Instruction and Learning. To reinforce this contention, Dr. Smith pointed to the respective job descriptions. Exhibit P-4 is the job description used by Dr. Smith in 1980-81 in the title of Assistant Superintendent for Instruction and Learning. Exhibit P-5 is the job description used by Dr. Smith in 1982 through 1985 in the position of Principal/Chief Administrator for Instruction and Learning. The job descriptions are virtually identical. (The descriptive terms Instruction and Learning and Curriculum and Instruction were used interchangeably throughout the hearing and are deemed to be the same.)

Dr. Smith testified that in the position of Principal on assignment to Curriculum and Instruction he planned and implemented the Effective Schools Program, developed a computer program in the elementary schools, was the administrator for curriculum, rendered progress reports to the Superintendent, supervised appropriate personnel and generally performed the duties set forth in the job description as required by the Superintendent, to whom he reported. He also was in charge of the Acceleration and Enrichment Program, the Drug Abuse Program, the Bilingual Program and the Gifted and Talented Program.

The petitioner was questioned closely about whether or not he performed personnel evaluations during the years in question. It was conceded that when he worked in the title of Assistant Superintendent in 1980-81 he evaluated supervisory staff. In the years 1982-1985, Dr. Smith stipulated that he did not perform these evaluations. Dr. Smith

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

explained that evaluation is not a responsibility included on either job description, but he did it in 1980-81 because the Superintendent wanted him to. In the years 1982-1985, another Superintendent preferred that the function be performed instead by the Deputy Superintendent. Dr. Smith said that the evaluation work he did in 1980-81 was minimal, taking approximately one percent of his time. He also said that different superintendents prefer that staff evaluations be done by different people. The theory in the later years was that line supervisors would be best evaluated by line people. He was considered to be performing a staff function.

The respondent emphasized the fact that the petitioner had an additional assignment, in 1983-84, as supervisory head of P.S. No. 16. Dr. Smith insisted that it was purely an added function that took very little time, and that the duties he performed as Principal on assignment to Curriculum and Instruction were not reduced in any way during that year. For the most part, he maintained telephone contact with the person in actual charge of P.S. No. 16. Dr. Smith mentioned that it was not unusual for Assistant Superintendents to be given double assignments in the Jersey City school system. He found the extra work involving P.S. No. 16 exasperating and a heavy burden, but he did not complain about it.

In the 1985-86 year, Dr. Smith was relieved of his Central Office function and reassigned as Principal of P.S. No. 29, where he remains today, performing those duties only. Other people have recently been appointed to newly established or revived positions as Assistant Superintendents, without regard to any rights the petitioner may have by virtue of tenure and seniority. The respondent claims that the petitioner is not tenured as an Assistant Superintendent and hence has no seniority rights to appointment to that position.

The petitioner testified that the Assistant Superintendent in charge of Curriculum and Instruction position requires a principal's certificate. The petitioner has that certificate. The Assistant Superintendent in charge of Instruction and Learning and the Principal/Chief Administrator for Instruction and Learning positions also require a principal's certificate.

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

Dr. Michael Ross was Superintendent of Schools in Jersey City and the petitioner's superior during most of the years in question, until July 1, 1984. He testified that the Board removed seven assistant superintendents for efficiency and economy reasons at the end of the 1980-81 school year. Only a Deputy Superintendent and a First Assistant Superintendent in charge of personnel remained. He testified that in 1981-82, when petitioner served only as Principal of P.S. No. 16, the curriculum and instructional work he previously performed as Assistant Superintendent was done by various school principals and some of the supervisors. Dr. Ross said that in 1982-83, Dr. Smith was brought back to the Central Office to perform the same work he previously did in 1980-81 as Assistant Superintendent. According to Dr. Ross, the only difference was that he was denied the Assistant Superintendent's title and he was called Principal/Chief Administrator for Instruction and Learning instead. Dr. Ross reviewed the Assistant Superintendent job description, Exhibit P-4, and he testified that in the 1982-83 and 1983-84 school years, Dr. Smith essentially performed all of those duties. Dr. Ross also stated that the P.S. No. 16 supervisory assignment given to the petitioner in 1983-84 was an extra duty and did not diminish petitioner's responsibilities in the Central Office.

Dr. Ross testified that he was the Superintendent who decided that the responsibility for evaluations should be shifted away from Dr. Smith's duties in 1982-83 and 1983-84. It was an optional task and Dr. Ross preferred to have the petitioner available for his primary work.

Dr. Ross also testified that the abolition of the seven assistant superintendent positions in 1981 was an action taken by the Board against his will. He stated that those functions were vital and had to be continued. Therefore, despite the abolition of the title, Dr. Ross got the job done anyway, with the petitioner (and presumably others). He and the Board just avoided using the title. Dr. Ross' testimony was straightforward and believable.

Terence S. Matthews was an Assistant Superintendent in charge of Secondary Education in 1980-81. He testified that during that year, while serving in the official title

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

of Assistant Superintendent, he also was assigned an additional duty as Principal of an elementary school, but not on a daily basis. Matthews' situation in 1980-81 was directly parallel to petitioner's situation in 1983-84.

Like Dr. Smith's, Mr. Matthews' position as Assistant Superintendent was abolished in 1981. In 1984-85, he was given the title of Chief Administrator in charge of Personnel. Today, that position is called Assistant Superintendent in charge of Personnel, but according to Mr. Matthews, the job is the same. He was also denied reappointment to the Assistant Superintendent's position and today he is a high school principal. (Unlike the petitioner, Mr. Matthews did not testify that he might have tenure in the position because his testimony indicated that he had the chief administrator's title for only one year.)

Mr. Matthews is familiar with Dr. Smith's prior job functions and responsibilities. He stated that the duties previously performed by the petitioner as Principal on assignment to Instruction and Learning are today substantially performed by a newly appointed Assistant Superintendent in charge of Curriculum and Instruction. Mr. Matthews insisted that the two positions were and are the same. The sum and substance of his testimony was that only the titles changed; the functions remained the same. He also explained that the title of Assistant Superintendent was a title to be avoided after litigation and a grand jury presentment in 1980-81. Thereafter, the people previously doing the work of Assistant Superintendents essentially continued doing so, but with the titles of Principals called Chief Administrators.

Mr. Matthews stated that his primary responsibility in the years between 1980 and 1985 was Principal of the academic high school, except in 1980-81 and 1984-85 when his assignment to the Central Office as a Chief Administrator was primary.

Henry Przystup's testimony was similar to Mr. Matthews'. Today, Dr. Przystup is a Principal in Jersey City. He was Superintendent of Schools for 14 months in 1984-85, when the petitioner was Principal/Chief Administrator for Instruction and Learning. Dr. Przystup testified that today the same functions performed by the petitioner when he was Principal/Chief Administrator are performed by an Assistant Superintendent. He said the

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

job is the same, just the name has changed. In Dr. Przystup's opinion, the 1980 litigation prevented use of the Assistant Superintendent title, but the duties had to be performed anyway. He said that in 1984 and 1985 he was compelled to give Dr. Smith the same vital duties to perform, but he could not call him an Assistant Superintendent. Instead, he had to refer to him as a Principal/Chief Administrator. He knows that Dr. Ross was compelled to do the same thing during the two previous years. Unlike Dr. Ross, Dr. Przystup asked the petitioner to perform staff evaluations.

Franklin L. Williams, presently Superintendent of Schools of Jersey City, testified on behalf of the respondent. Mr. Williams has been Superintendent since August 1985. He was Deputy Superintendent from 1978 through 1985 and an Assistant Superintendent from 1968 to 1978. Mr. Williams recalled some of the details of the petitioner's assignments during the years in question. He said that in 1982-83 Dr. Smith was assigned to help him, but he was not put in charge of curriculum and instruction. Mr. Williams indicated that the petitioner had few supervisory responsibilities, except for the support he gave to the Deputy Superintendent.

Mr. Williams stated that an Assistant Superintendent's function must include evaluation and supervision, responsibilities he claimed Dr. Smith did not perform when he reported to him. Mr. Williams also could not recall new programs that were begun or maintained by the petitioner. In addition, the Superintendent testified that a July 22, 1982 Board resolution, Exhibit P-2, transferring the petitioner from School No. 16 to the Central Office, does not contain the words "curriculum and instruction" in its authentic version. The implication is that those words were added later or that P-2 is an inaccurate early draft.

Mr. Williams testified that after the seven Assistant Superintendent positions were abolished in 1980-81, only three top-level administrators remained: Dr. Ross, Superintendent of Schools; Mr. Jencarelli, First Assistant Superintendent; and himself, Deputy Superintendent. Mr. Williams testified that they had to do all of their own work plus the work of the seven former assistant superintendents whose jobs were abolished.

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

He stated that he personally completed his own assignments and also the jobs of four assistant superintendents. Mr. Williams said that he worked ten hours a day in order to complete that work load. In addition, he was also responsible for physical education and the Bilingual Instruction Program.

Referring to the testimony of Dr. Ross, who was Superintendent during the years prior to July 1984, Mr. Williams said that a Mayor's aide came into the school system during those years and dictated assignments to the Board which resulted in daily assignments emanating directly from the Board and bypassing Dr. Ross.

Mr. Williams testified that the current Assistant Superintendent's duties are much greater than the duties of the Assistant Superintendents before abolition of the title in 1981. He said that no one ever had the breadth of responsibility that today's Assistant Superintendents have. Referring to evaluations of supervisory personnel, Mr. Williams said that he did most of the evaluations from 1981 through July 1984.

However, the testimony indicated that Mr. Williams' best recollections are of the period of time following his appointment as Superintendent in 1985. He was extremely busy and overworked between 1981 and 1985, and he did not in fact recall too many details relating to the actual duties performed by the petitioner as Principal on assignment to Curriculum and Instruction in those years. He also did not recall many of the programs Dr. Smith worked on or his supervisory duties.

Mr. Williams testified that in 1980-81, before abolition of the seven positions, there were 11 Assistant Superintendents in the system, each working in a different area. Today, there are nine Assistant Superintendents, plus a Superintendent and one Deputy. A woman presently in the position of Assistant Superintendent in charge of Curriculum and Learning is one of the nine assistants.

James J. Jencarelli, presently Deputy Superintendent of Schools in Jersey City, also testified for the respondent. Mr. Jencarelli was the First Assistant Superintendent in

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

charge of Personnel between September 1973 and June 1984, except for two years in the late 1970s when he was an Assistant Superintendent in charge of certain elementary schools. The main thrust of Mr. Jencarelli's testimony dealt with the petitioner's transfer in 1982-83 from P.S. No. 16 as Principal to the Central Office, as indicated by the resolution in Exhibit P-2. Mr. Jencarelli testified that Exhibit P-2 is not accurate, but a draft changed before passage. He stated he was present at the Board meeting on July 22, 1982 when the president of the Board requested that the words "curriculum and instruction" be deleted from the resolution. According to Mr. Jencarelli, Superintendent Ross agreed and it was done. An inference was drawn from the testimony that the deletion may have been caused by the Board president's desire to avoid any suggestion that an Assistant Superintendent position was being created.

Mr. Jencarelli also testified about his awareness of the petitioner's assignments during the years between 1982 and 1985. He knew that Dr. Smith was a Principal assigned to the Central Office in 1982-83. He also knew that this assignment continued in 1983-84, with the additional responsibility of P.S. No. 16. Mr. Jencarelli did not know how much time the petitioner spent at P.S. No. 16 during that year. He also had no knowledge of Dr. Smith's assignment during the 1984-85 school year. Additionally, Mr. Jencarelli had little knowledge of any of the duties performed by the petitioner during the years in question. He recalled, however, that after abolition of the seven assistant superintendent positions in 1981, Dr. Ross indicated to him that he wanted to try to recreate the titles, but could not do so.

Dorothy Cosgrove, Coordinator of Curriculum, testified that she worked with Dr. Smith in 1980 and 1981, when he was Assistant Superintendent. She resumed working with him in 1984-85, but had little contact with him in between. When questioned by petitioner's attorney, Ms. Cosgrove stated that she consulted with the petitioner in 1982-83 and 1984-85 with regard to many items and programs that Dr. Smith was involved in, such as Teacher Academy, reading programs, Middle States evaluation, Gifted and Talented Program, the Drug Abuse Program, the T & E (thorough and efficient) requirements, AET (accelerated enrichment program), staff and ITEP (instructional theory

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

into practice). This testimony indicated that Dr. Smith was indeed dealing with a large variety of curriculum and instructional programs during the two years stated above.

FINDINGS OF FACT

Having heard the testimony and observed the witnesses, and having reviewed the exhibits and considered the arguments and briefs of counsel, I **FIND** the following **FACTS**, by a preponderance of the credible evidence:

1. The facts set forth in the procedural history above are incorporated herein by reference.

2. For and during the 1982-83 school year, the petitioner retained the tenured title of Principal, under which he worked during the 1981-82 year, after his one year of service as Assistant Superintendent in 1980-81.

3. In 1982-83, while retaining the title of Principal, the petitioner was assigned to, and performed duties in, the Central Office where he was in charge of curriculum and instruction.

4. The petitioner continued his assignment to, and performance of, the above duties for and during both the 1983-84 and 1984-85 school years.

5. The assignments described above for the 1982-83 and 1983-84 school years were made by the Superintendent serving at the time, Dr. Ross, with the concurrence of the Board. In 1984-85, the same assignment was performed under a new Superintendent, Dr. Przystup.

6. During each of the three years mentioned above, the petitioner performed substantially all of the same duties in the area of curriculum and instruction as he had during 1980-81 when he held the title of Assistant

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

Superintendent. His duties included responsibility for the Effective Schools Program, an elementary school computer program, the Acceleration and Enrichment Program, the Drug Abuse Program, the Bilingual Program, the Gifted and Talented Program and supervisory duties set forth in the job description. Dr. Smith reported directly to the Superintendent.

7. Removal of evaluation duties in 1982-83 and 1983-84 was an optional and discretionary change exercised by the Superintendent at the time that did not substantially alter the nature of petitioner's job duties and performance. Evaluation is not part of the Assistant Superintendent's job description.

8. In the 1983-84 year, the petitioner was assigned statutory responsibility for P.S. No. 16. in addition to his basic duties relating to curriculum and instruction. Performance of that additional assignment did not diminish petitioner's performance of his curriculum and instructional duties in any way. Another individual was in daily charge of P.S. No. 16 during that year, and he reported to the petitioner.

9. The job description for Assistant Superintendent for Instruction and Learning (the title occupied by petitioner in 1980-81) is identical to the job description for Principal/Chief Administrator for Instruction and Learning. Both descriptions contain the same duties and responsibilities. (The words "Curriculum and Instruction" are used interchangeably.)

10. The true reason for the abolition in 1981 of the Assistant Superintendent positions en masse is unclear, but it happened after litigation and grand jury proceedings. The duties of the Assistant Superintendents still needed to be performed by staff members capable of doing so. Dr. Smith was one of them.

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

11. After a hiatus of one year, 1981-82, the Superintendent and the Board decided that it was necessary for people to perform the Assistant Superintendent functions. The petitioner was one of the people assigned for that purpose, but he was not given the title. He therefore resumed substantially the same duties as he previously performed in 1980-81 as Assistant Superintendent, but without the title. Instead, he was referred to as a Principal on assignment to Curriculum and Instruction. The Board was aware of and approved that assignment.

LEGAL DISCUSSION

N.J.S.A. 18A:28-5

Tenure of teaching staff members

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause. . . after employment in such district or by such board for:
>
> (a) three consecutive calendar years or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years; . . . .

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

The petitioner claims he has attained tenure as an Assistant Superintendent under section (c) above because he has served as such for the equivalent of more than three academic years within a period of any four consecutive academic years.

In order to attain tenure, a person (1) must be employed in the position which requires the possession of an appropriate certificate, (2) must possess that certificate and (3) must serve the appropriate time for the acquisition of tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982).

There is no question that the petitioner possessed the appropriate certificate during all the years in dispute. He was actually employed as an Assistant Superintendent in 1980-81, and it has been found as a fact that in 1982-83, 1983-84 and 1984-85 he actually performed duties substantially the same as those he performed as an Assistant Superintendent in 1980-81, but without the official title, which was abolished in 1981. At the time of the abolition of his position, petitioner was reduced to his tenured principal's position in which he served for one year, 1981-82. However, beginning in the 1982-83 school year, he was designated as Principal on assignment to Curriculum and Instruction (or similarly, Principal/Chief Administrator for Instruction and Learning). The similarity of the two positions is reinforced by the identical nature of the two job descriptions. See Exhibits P-4 and P-5.

Both parties rely on and agree with the Commissioner's decision in Boeshore v. Bd. of Ed. of the Township of North Bergen, 1974 S.L.D. 805, which held that the duties performed, rather than the title of the position, are controlling in determining whether tenure is allowed in a given position. See also, Constance Vieland v. Bd. of Education of the Princeton Regional School District, 1976 S.L.D. 892; Arthur L. Page v. Bd. of Education of the City of Trenton, et al., 1975 S.L.D. 644.

While the parties agree on the controlling law, the central issue is their disagreement as to whether or not the petitioner's duties in 1982-83, 1983-84 and 1984-85 were substantially similar to the position and responsibilities of an Assistant Superintendent.

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

Because the petitioner claims tenure in the position of Assistant Superintendent, he also claims the calculable seniority rights or credits in the case of tenured employees whose positions were previously abolished and then later reestablished. N.J.A.C. 6:3-1.10 et seq.

N.J.S.A. 18A:28-12 provides that teaching staff members who are dismissed as the result of a reduction in force shall be on a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified, and he shall be reemployed if and when such vacancy occurs.

An Assistant Superintendent in charge of Instruction and Learning position, was recreated in August 1985, and the petitioner was not considered for it, because the Board denies that he had tenure and accompanying seniority rights.

It is well recognized that nontenured employees do not accrue seniority rights. N.J.S.A. 18A:28-10; Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983); Union County Regional High School Bd. of Ed. v. Union County Regional High School Teachers' Ass'n, Inc., 145 N.J. Super. 435 (App. Div. 1976). There was no testimony to indicate whether or not the person who filled the new Assistant Superintendent position was tenured and had calculable seniority rights.

FACTUAL CONCLUSIONS

The petitioner served for more than three academic years within a period of four consecutive academic years substantially performing the duties of Assistant Superintendent—Instruction and Learning. The Board appointed him to that position and title for the 1980-81 school year, and the Board appointed him to perform the same duties, for and during 1982-83, 1983-84 and 1984-85 (but without the official title). He did perform those duties.

The position in which the petitioner was employed, Assistant Superintendent, required the possession of a principal's certificate. The petitioner possessed that

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

certificate, and he served for the appropriate statutory time and performed the duties of the position in order to acquire tenure in the position. He therefore acquired tenure in September 1985 as an Assistant Superintendent in the respondent school district.

Because of the foregoing acquisition of tenure, the petitioner was and is entitled to appropriate seniority rights, credits and preferences in accordance with the statutes and regulations mentioned above and, more particularly, in connection with the recreation or establishment of the Assistant Superintendent—Instruction and Learning title and position.

ORDER

It is therefore **ORDERED** that the respondent shall provide the petitioner with all emoluments due him in the respondent school district as a tenured Assistant Superintendent, in accordance with the foregoing conclusions, retroactive to the date he attained tenure at the beginning of the 1984-85 school year.

It is further **ORDERED** that the petitioner shall be granted recognition of his seniority rights and credits as a tenured Assistant Superintendent pursuant to pertinent statutes and regulations, which rights and credits shall be calculated and considered in connection with the recreation of the Assistant Superintendent title and position in the respondent school district.

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

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

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

December 19, 1986
DATE

ARNOLD SAMUELS, ALJ

DEC 22 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 24 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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

CHARLES SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

It is observed that the Board's exceptions to the initial decision and petitioner's reply to those exceptions have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board, by way of its exceptions, maintains that the ALJ misapplied the provisions of N.J.S.A. 18A:28-5(c) in concluding that petitioner had functioned as Assistant Superintendent for a period of more than three academic years within four consecutive academic years. In support of its reasoning the Board avers that in order for such a finding of fact and conclusion to have been reached by the ALJ, petitioner would have had to function as an Assistant Superintendent during the 1982-83, 1983-84, 1984-85 academic school years in addition to having served at least one day during the 1985-86 school year. The Board maintains that the facts of this matter clearly establish that all petitioner's employment service during the 1985-86 school year was rendered in the capacity of Principal of Public School No. 29.

The Board denies, however, that any of the duties performed by petitioner during the school years in question (1982-83 through 1984-85) are related to the functions of an Assistant Superintendent, but rather were similar to those duties performed by a coordinator.

In distinguishing between the duties of an Assistant Superintendent and those duties performed by petitioner, the Board specifically argues as follows:

> The respondent reiterates that an essential function of an Assistant Superintendent is the responsibility of supervision and evaluation. Significantly, these functions were omitted from the job specifications and as admitted by the petitioner were not performed by him during the school years 1982-85.

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

> Irrespective of whether or not the Board action in abolishing the positions of Assistant Superintendent in 1981 was with or without the then Superintendent, Dr. Ross' acquiescence, the fact is that there is no record of any formal protest by the said Superintendent with respect to the Board action or any attempt on the part of the said Superintendent to request that the Board reconsider its action.
>
> It should be noted that the vital functions of supervision and evaluation were removed from job specifications with the approval and acquiescence of the Superintendent. This clearly demonstrates the Superintendent's compliance with the Board action.
>
> It should be noted that the function of a Board is to establish a policy and not to act administratively. The development of job specifications is an administrative function beyond the ken of the Board. The belated attempt to achieve tenure in a statutory position such as Assistant Superintendent while performing certain functions not peculiar or unique to an Assistant Superintendent dilutes and effectively vitiates the statutory requirements.
>
> ***
>
> N.J.S.A. 18A:17-6 requires that appointments to the position of Assistant Superintendent be made upon nomination by the Superintendent and by a majority vote of the Board. The language of the statute has been held to be mandatory. Ross v. Board of Education of the City of Jersey City, 1981 S.L.D. 307. Such a construction is based on the legislative intent to provide a means of selection which is responsive to the interests of both the Board and the Superintendent. id at 313. Thus, in Ross v. Board of Education, appointments made by the Board, absent prior nomination by the Superintendent, were held violative of the mandatory language of the statute. (Board's Exceptions, at pp. 1-2)

In the Board's view, the initial decision attempts to circumvent statutory prescription by holding that petitioner performed the duties of Assistant Superintendent during the 1982-83, 1983-84 and 1984-85 academic school years, notwithstanding the fact that the Board had legally abolished seven positions of Assistant Superintendent at the end of the 1980-81 school year. One of those positions was that of Assistant Superintendent of Curriculum and Instruction held by petitioner.

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

According to the Board it approved and reestablished nine new positions of Assistant Superintendent upon recommendation by its Superintendent. It argues that the duties of one of the newly created positions of Assistant Superintendent in charge of Curriculum and Instruction are currently greater than the former duties performed by petitioner during the 1980-81 school year under that title which had been abolished at the end of that year. Additionally, the Board claims that during the 1981-82 school year the responsibilities for supervising curriculum and instruction were not solely assumed by petitioner but rather by various principals and supervisors in the Jersey City School District.

Petitioner rejects those arguments advanced by the Board and urges the Commissioner to affirm the ALJ's findings and conclusions for the reasons set forth in the initial decision.

Notwithstanding the Board's claim that petitioner's duties during the 1982-83, 1983-84 and 1984-85 school years were unrelated to those he performed during the 1980-81 school year as Assistant Superintendent, petitioner maintains that all the relevant testimony adduced from two of the Board's former Superintendents, Dr. Ross and Dr. Przystup, clearly establishes that the duties he performed throughout the periods of time controverted herein were substantially those of an Assistant Superintendent. In this regard petitioner maintains that the prescribed qualifications and duties set forth in the Board approved job description for the title of Assistant Superintendent for Instruction and Learning (P-4), under which he served during the 1980-81 school year, are virtually identical to the qualifications and duties he performed during the 1982-83, 1983-84 and 1984-85 school years under the Board approved title of Principal/Chief School Administrator for Instruction and Learning (P-5). Petitioner claims that all the pertinent findings of fact and conclusions contained in the initial decision support his contention that the assigned duties he performed under either of these positions was that of an Assistant Superintendent, regardless of the Board's claims to the contrary.

According to petitioner, his claim to tenure as Assistant Superintendent given the pertinent findings of facts related to such claim is supported by the case law enunciated in Spiewak, supra, and Boeshore, supra.

Finally, petitioner rejects any attempt by the Board to deny him tenure as Assistant Superintendent pursuant to N.J.S.A. 18A:28-5(c) by contending that his initial period of employment service as Assistant Superintendent during the 1980-81 calendar year does not attach to the 1982-83 and 1983-84 academic years of employment in that capacity. Petitioner maintains that said periods of employment service are sufficient to satisfy the specific provisions of N.J.S.A. 18A:28-5(c) which read in pertinent part as follows:

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

> ***after employment by such district or by such board for: *** the equivalent of more than three academic years within a period of any four consecutive academic years***. (emphasis supplied)

Moreover, petitioner further contends that his periods of employment in the capacity of Assistant Superintendent, albeit without assigned title by the Board, for the 1982-83, 1983-84 and 1984-85 academic years also satisfy the provisions of N.J.S.A. 18A:28-6(c) thereby granting him tenure in said position. In applying the provisions of N.J.S.A. 18A:28-6(c) to the findings of fact in this matter petitioner reasons as follows:

> N.J.S.A. 18A:28-6(C) states that a teaching staff member shall obtain tenure after being employed "in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years." Based on the testimony and documentary evidence presented, Petitioner actualy (sic) acquired tenure in the position of Assistant Superintendent for Curriculum and Instruction in or about October of 1983. October, 1983 marked the third consecutive year from the date on which Petitioner first assumed the position of Assistant Superintendent.*** By the end of October of 1983, Petitioner had already performed those functions for more than two academic years.
>
> (Petitioner's Reply, at p. 2)

The Commissioner has reviewed the respective arguments advanced by the parties to the findings and conclusions set forth in the initial decision.

In the Commissioner's judgment the relevant testimony and documentary evidence contained in the record of these proceedings support the ALJ's conclusion that petitioner's employment service from 1980-81 through 1984-85, with the exception of the 1981-82 school year when he was assigned the duties of principal in P.S. No. 16, was rendered in the capacity of Assistant Superintendent.

However, the Commissioner upon further review of the record of petitioner's employment service for the periods in question cannot agree with the ALJ's conclusion that petitioner acquired a tenure status as Assistant Superintendent under the provisions of N.J.S.A. 18A:28-5(c) which read in pertinent part as follows:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing

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

> school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title*** after employment in such district or by such board for:
>
> ***
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years***. (emphasis supplied)

Based upon the provisions of the foregoing statute the Commissioner observes that the logic applied by the ALJ in the initial decision, ante, is in error. His statement to that effect reads in pertinent part as follows:

> The applicable statute, N.J.S.A. 18A:28-5(c), provides that tenure is attained after employment for the equivalent of more than three academic years within a period of any four consecutive academic years. Therefore, if in fact the petitioner functioned as an Assistant Superintendent in 1982-83 and 1983-84 and then immediately resumed the same duties at the beginning of the 1984-85 school year, he would have attained tenure in the position because he would have completed more than three years out of four consecutive academic years as an Assistant Superintendent. (There is no dispute about the fact that he served as Assistant Superintendent in 1980-81.) (Initial Decision, ante)

The reason for such error in the interpretation of the above-cited statute appears to be twofold. Initially, it is reported in part in the initial decision, ante, that

> The parties agreed that the petitioner's assignments since 1980 have been as follows:
>
> Assistant Superintendent, Instruction and Learning - 1980-81 school year

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

Position abolished - July 21, 1981

While it is true in fact that petitioner was employed for the 1980-81 school year as Assistant Superintendent on a 12-month basis, he actually served in that capacity for 8 months and 21 days which is less than an academic year. The basis for this finding by the Commissioner is obtained from petitioner's own testimony at the hearing conducted on October 14, 1986. At that time he testified in response to his attorney's questions as follows:

> Q. When were you appointed as Assistant Superintendent in Charge of Instruction and Learning?
>
> A. October of 1980*** (Tr. I-4)

Given this testimony by petitioner together with the undisputed fact that the Board abolished his Assistant Superintendency on July 21, 1981, it is evident that petitioner served in that position for a period of 8 months 21 days during the 1980-81 school year which is less than an academic year.

Consequently, when viewing petitioner's record of employment service from 1980-81 through 1984-85 it then becomes clear that he could not satisfy the provisions of N.J.S.A. 18A:28-5(c) in order to acquire tenure as Assistant Superintendent because at no time did he render service in that position for "the equivalent of more than three academic years within a period of any four consecutive academic years." (emphasis supplied) This is so because petitioner served as Principal in Public School No. 16 for the entire 1981-82 school year.

The following chart of petitioner's employment service for the periods in question illustrates this finding:

1980-81 Assistant Superintendent October 1980 through July 21, 1981	8 months, 21 days (less than 1 academic year)
1981-82 Principal P.S. No. 16 September 1, 1981 through June 30, 1982	10 months (1 academic year)
1982-83 Principal on Assignment to Curriculum and Instruction Central Office (Supt.) September 1, 1982 to June 30, 1983	10 months (1 academic year)
1983-84 Principal on Assignment to Curriculum and Instruction Central Office (Supt.) September 1, 1983 to June 30, 1984	10 months (1 academic year)

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

1984-85 Principal on Assignment to Curriculum and
Instruction Central Office (Supt.) 10 months
September 1, 1984 to June 30, 1985 (1 academic year)

Thus, it can be seen that the findings and determination with regard to the duties petitioner performed as Assistant Superintendent albeit without that title for the 1982-83, 1983-84 and 1984-85 school years, must by necessity exclude his employment as Principal of P.S. No. 16 for the 1981-82 school year. Consequently, there is no period of petitioner's service as Assistant Superintendent equivalent to more than three academic years within a period of four consecutive academic years which satisfies the tenure provisions of N.J.S.A. 18A:28-5(c) since a consideration of the four consecutive academic years from 1980-81 through 1983-84 reveals service in the position of Assistant Superintendent for a period of 2 academic years plus an additional 8 months and 21 days and the consideration of the four consecutive academic years from 1981-82 through 1984-85 reveals service in such position for three academic years but not more than three academic years.

Accordingly, the ALJ's finding and conclusion which grants petitioner tenure under the above-cited statute is hereby set aside.

The Commissioner cannot ignore, however, the alternative argument advanced by petitioner in his exceptions that his periods of employment service in the capacity of Assistant Superintendent during the 1982-83, 1983-84 and 1984-85 school years also qualify him for tenure pursuant to the provisions of N.J.S.A. 18A:28-6(c). The record reveals that when the Board abolished his position of Assistant Superintendent at the conclusion of the 1980-81 school year, it then reassigned him to the position of principal for the 1981-82 school year. As of the commencement of the 1982-83 school year the Board then transferred him back to the duties he formerly performed as Assistant Superintendent (without title). Petitioner was thereafter employed in the same capacity for the 1983-84 and 1984-85 school years. Consequently, his employment service during these years in question satisfies the tenure requirements under the provisions of N.J.S.A. 18A:28-6(b) or (c) which reads in pertinent part:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> ***
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

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

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

The Commissioner concurs with this legal argument offered by petitioner relying upon the provisions of N.J.S.A. 18A:28-6(c). However, for the purpose of determining that he has acquired tenure status in the position of Assistant Superintendent by virtue of the duties he performed in that capacity during the 1982-83, 1983-84 and 1984-85 school years, the Commissioner finds and determines that petitioner acquired tenure in said position pursuant to N.J.S.A. 18A:28-6(b).

It is undisputed that petitioner enjoyed a tenure status in the Board's employ prior to the commencement of the 1982-83 school year at the time the Board transferred him to the central office and reassigned him to Curriculum and Instruction (P-1). It is also evident that the Board retained petitioner in this capacity for the 1983-84 and 1984-85 school years. In the Commissioner's judgment the Board's attempt to differentiate between the duties petitioner performed as Assistant Superintendent during the 1980-81 school year and those duties he subsequently performed during the 1982-83, 1983-84 and 1984-85 school years is without merit. Such attempt by the Board amounts to an effort to create a distinction between these positions without a difference in the duties actually performed by petitioner.

An examination of the job descriptions of Assistant Superintendent for Instruction and Learning (P-4) and of Principal/Chief Administrator for Instruction and Learning (P-5) attests to this finding by virtue of the fact that they are substantially the same duties performed by petitioner.

Therefore the Commissioner finds and determines that petitioner has, in fact, acquired a tenure status as Assistant Superintendent pursuant to the provisions of N.J.S.A. 18A:28-6(b) inasmuch as he has served in that capacity for the prerequisite time prescribed by law under a valid certificate which qualifies him for the position of Assistant Superintendent for Instruction and Learning (Curriculum and Instruction).

Accordingly, for the reasons set forth herein the Commissioner hereby reverses that portion of the ALJ's determination that petitioner acquired a tenure status under the provisions of N.J.S.A. 18A:28-5(c).

In place of such determination, the Commissioner finds and determines that petitioner acquired tenure as Assistant Superintendent for Instruction and Learning (Curriculum and Instruction) in accordance with the provisions of N.J.S.A. 18A:28-6(b).

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

It is therefore ordered that the Board shall provide petitioner with all emoluments due him as a tenured Assistant Superintendent for Curriculum and Instruction, in accordance with the foregoing conclusions, retroactive to the date he attained tenure at the beginning of the 1984-85 school year.

It is further ordered that petitioner shall be granted recognition of his seniority rights and credits as a tenured Assistant Superintendent for Curriculum and Instruction pursuant to pertinent statutes and regulations, which rights and credits shall be calculated and considered in connection with the recreation of the Assistant Superintendent for Curriculum and Instruction title and position in the school district.

COMMISSIONER OF EDUCATION

February 4, 1987

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

CHARLES SMITH,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 4, 1987

Decision on Motion by the State Board of Education, June 3, 1987

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

For the Respondent-Appellant, William A. Massa, Esq.

This is yet another case involving the tenure rights of teaching staff members employed in administrative positions in the district of Jersey City. In this case, Petitioner Charles Smith had served as Assistant Superintendent, Instruction and Learning during the 1980-81 school year, at the end of which the Board abolished all assistant superintendent positions in the District except Deputy Superintendent and First Assistant Superintendent in Charge of Personnel. During 1981-82, Petitioner Smith served as Principal - P.S. No. 16. However, for 1982-83, he was transferred by the Board to the position of Principal on Assignment to Curriculum and Instruction Central Office (Supt.). Petitioner Smith served in that assignment during 1983-84, during which he had additional responsibility for P.S. No. 16, and during 1984-85. For 1985-86, Dr. Smith was relieved of his Central Office function and reassigned as principal of P.S. No. 29. On November 20, 1985, while continuing to serve as principal of P.S. No. 29, Dr. Smith challenged by Petition of Appeal to the Commissioner the Board's failure to appoint him to the position of Assistant Superintendent for Curriculum and Instruction, which had newly been established by the Board, claiming that he was entitled to the position by virtue of his tenure and seniority rights.

The Commissioner found that Dr. Smith had achieved tenure as an Assistant Superintendent pursuant to N.J.S.A. 18A:28-6(c) by virtue of the duties he had performed during 1982-83, 1983-84 and 1984-85 under the title of Principal on Assignment to Curriculum and Instruction Central Office (Supt.). In arriving at this conclusion, the Commissioner, adopting the Administrative Law Judge's findings, determined that the duties performed by Dr. Smith under the title of

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

Assistant Superintendent and those that he had performed under the title of Principal on Assignment to Curriculum and Instruction Central Office were substantially the same. The Commissioner emphasized that, in addition to the testimony of the witnesses, the job descriptions of the two positions supported this finding. The Commissioner, therefore, ordered that the Board provide Dr. Smith with all emoluments due him as a tenured Assistant Superintendent retroactive to the beginning of the 1984-85 school year when he achieved tenure. Although not directing Dr. Smith's reinstatement to the newly established position of Assistant Superintendent, the Commissioner directed that recognition of Dr. Smith's seniority rights be granted and his seniority credit calculated and considered in connection with the recreation of the position of Assistant Superintendent for Curriculum and Instruction.

In its appeal to the State Board, the Board of Education of the City of Jersey City contends that the Commissioner incorrectly included Dr. Smith's service during 1982-83 in calculating Dr. Smith's tenure for the position of Assistant Superintendent, arguing that during 1982-83, Dr. Smith's responsibility included duties as principal of School No. 16 so as to make that assignment distinct for tenure purposes.[1] The Board further contends that the Commissioner erred in finding that Dr. Smith had acquired tenure as an Assistant Superintendent because the Board did not act to assign him that title and did not delegate the duties of that position to him. In this respect, the Board argues that Dr. Smith's performance of duties was not pursuant to nomination of the Superintendent or with Board approval for the position of Assistant Superintendent, and that the job description for the position in which he served was not originated until 1984-85. It further argues that there is no evidence in the record that the job description, originated by the then Superintendent, Henry R. Przystup, was approved by Board resolution.

Initially, we affirm that the Commissioner properly included Dr. Smith's service during 1982-83 in calculating his length of service under the title of Principal on Assignment to Curriculum and Instruction for tenure purposes. As found by the ALJ, during that year Dr. Smith was assigned to and performed the duties related to curriculum and instruction that are the basis for the conclusion that the duties Dr. Smith performed under the title of Principal on Assignment to Curriculum and Instruction were substantially the same as those he performed under the title of Assistant Superintendent. As further found by the ALJ, assignment of statutory responsibility for P.S. No. 16 during 1983-84 was in addition to Dr. Smith's basic duties relating to curriculum and instruction, and performing the additional assignment associated with P.S. No. 16 did not diminish his performance of those duties.

---

1 We note that Dr. Smith had responsibilities relating to P.S. No. 16 during 1983-84, not during 1982-83 as stated in the Board's brief.

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

Further, although we recognize that tenure in a particular position is not acquired where an individual takes on performance of duties associated with that position while employed in a different position without being so assigned and without knowledge of the Board, we find that this is not such a case. Rather, in choosing to eliminate the position title of Assistant Superintendent from its administrative structure, and in establishing an administrative position title not recognized in the administrative code, the Board here had an obligation to develop a job description for the position. N.J.A.C. 6:11-3.6. e.g., Morra v. Board of Education of the Township of Jackson, 1979 S.L.D. 81, aff'd, 1979 S.L.D. 89. The record here shows that without fulfilling its regulatory responsibilities, the Board acted to transfer Petitioner to serve as Principal assigned to the Central Office for 1982-83 and renewed his assignment as Principal on Assignment to Curriculum and Instruction for 1983-84 and 1984-85. The record further shows that Dr. Smith performed in that capacity duties substantially the same as those performed by him when serving under the title of Assistant Superintendent, and that a job description reflecting those duties was developed. Under these circumstances, the Board, even if truly ignorant of the duties performed by Dr. Smith pursuant to his assignment by the Board, can not now deny the rights Petitioner acquired on the basis of ignorance resulting from its own failure to fulfill its responsibilities. Therefore, for the reason expressed by the Commissioner, as well as those set forth here, we affirm the Commissioner's determination that Charles Smith acquired tenure as Assistant Superintendent and is entitled to all emoluments from the beginning of 1984-85 when he acquired tenure. Consequently, we also affirm that the Board must recognize the rights conferred by that status in connection with the existing position of Assistant Superintendent for Curriculum and Instruction.

We however recognize that the Commissioner did not direct that Petitioner be reinstated to the existing position of Assistant Superintendent for Curriculum and Instruction. Nor does the record permit such determination without further proceedings. We therefore remand this matter to the Commissioner for determination of whether, based on his tenure status and seniority, Dr. Smith is entitled to reinstatement to that position.

We reiterate that in affirming the Commissioner's determination that Petitioner acquired tenure as an Assistant Superintendent, we reject the notion that the Board of Education of the City of Jersey City can abrogate its responsibilities relating to the administration of the public school system in that district by failing to fulfill those responsibilities. Similarly, in exercising our quasi-judicial powers, the State Board of Education can not ignore its responsibility for the supervision of public education in the state by sanctioning the denial of rights conferred on teaching staff members resulting from a district's failures to fulfill its responsibilities.

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

Nor, in deciding this case, can we ignore the continuing litigation involving the administrative and supervisory positions in Jersey City. See, e.g., Figurelli v. Board of Education of the City of Jersey City, decided by the Commissioner, December 11, 1986, aff'd by the State Board, appeal pending, Appellate Division, transferred to the State Board for clarification by the Chancery Division, July 30, 1987; Przystup v. Board of Education of the City of Jersey City, and cases cited therein, decided by the Commissioner, June 23, 1986, aff'd in part, rev'd in part by the State Board, September 2, 1987, appeal pending, Appellate Division. As a result of this litigation, we joined the Commissioner in the concerns he expressed in his decision in Przystup v. Board of Education of the City of Jersey City, supra, relating to the Jersey City Board's use of administrative and supervisory titles, and concurred with the Commissioner's specific directive for comprehensive review of all such titles in the District by the County Superintendent so as to insure compliance with relevant statutes and regulations.

The case now before us demonstrates that litigation surrounding the District's administrative positions has not abated despite the Commissioner's directive. We can not ignore the reality that continued and ongoing controversy that is of such nature as to implicate the entire administrative structure of a district inevitably impacts the provision of a thorough and efficient education of the students of the district. Indeed, if we were to do so, we would deny our own responsibility for the supervision of public education in this state.

The State Board of Education is mindful of the efforts being made aimed at insuring the compliance of the district of Jersey City with the requirements of the education laws. We however conclude that the continuing litigation implicating the District's entire administrative structure despite the Commissioner's prior directive calls for the direct intervention of the State Board of Education. We therefore entrust to the Commissioner of Education the task of undertaking a comprehensive review of all administrative and supervisory positions in the District with particular attention to the impact of the District's use of administrative and supervisory titles on the rights of teaching staff members and the right of students in the District to a thorough and efficient education. We direct that the Commissioner report to the State Board of Education the results of his review within three months of the date of this decision, including his recommended orders as to those actions that may be necessary to insure the conformity of District's administrative structure with the statutory and regulatory requirements of the education laws.

November 4, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6810-86
AGENCY DKT. NO. 305-9/86

BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT,
Petitioner

v.

ROYCE M. PRIDE,
Respondent.

Casper P. Boehm, Esq., for petitioner

No appearance for respondent

Record Closed: December 26, 1986 Decided: December 30, 1986

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

Petitioner, the Board of Education of Scotch Plains-Fanwood, seeks tuition payment of $1,540.33 for the education of respondent's child, D. B., for the period from January 1, 1986 to April 16, 1986, during which respondent resided out-of-district at 223 East 6th Street.

The Petition of Appeal was filed with the Commissioner of Education on September 4, 1986. No answer was filed by respondent and the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

New Jersey Is An Equal Opportunity Employer

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

on October 10, 1986, and was set down for plenary hearing on December 1, 1986 by the undersigned upon review of the pleadings as incorporated in a Prehearing Order entered on November 14, 1986.

The parties were noticed of the proceedings by the Clerk and Assistant Director of Judicial Management at the Office of Administrative Law under dates of October 17, 1986 and October 30, 1986, and the scheduled December 1 hearing by the Acting Director of the Office of Administrative Law under date of November 19, 1986. The Prehearing Order was transmitted to respondent by certified mail return receipt requested at both 365 Hunter Avenue, Scotch Plains and 223 East 6th Street, Plainfield. Both notices were returned to the Office of Administrative Law undelivered and marked "Moved, left no address" and "Unclaimed," respectively.

Respondent did not appear at the December 1, 1986 hearing, and petitioner filed a Notice of Motion for entry of a Judgment against respondent in the amount of $1,540.33. The record in this matter is deemed closed on December 26, 1986.

Pursuant to N.J.A.C. 1:1-3.5(a)3 and N.J.A.C. 1:1-3.5(b)1, petitioner's Motion for Judgment is hereby **GRANTED**.

Respondent is hereby **ORDERED** to remit $1,540.33 to the Board of Education of Scotch Plains-Fanwood for the education of her child, D. B., in petitioner's school district for the period from January 1, 1986 to April 16, 1986.

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

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

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

30 December 1986
DATE

Ward R. Young
WARD R. YOUNG, ALJ

JAN - 5 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 7 1987
DATE

Ronald L. Parks/as
FOR OFFICE OF ADMINISTRATIVE LAW

g

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

OAL DKT. NO. EDU 6810-86

BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
ROYCE M. PRIDE,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed.

The Commissioner adopts the initial decision as the final decision in this matter. Therefore, default judgment is granted to petitioner as dictated in the initial decision.

COMMISSIONER OF EDUCATION

FEBRUARY 4, 1987

DATE OF MAILING - FEBRUARY 4, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8140-86
AGENCY DKT. NO. 357-10/86

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT,
Petitioner,

v.

JAMES CAMISA,
Respondent.

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

Robert M. Schwartz, Esq., for respondent

Record Closed: December 19, 1986 Decided: December 24, 1986

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

The Board of Education of the Bergen County Vocational School District (Board) having served James Camisa, a tenured principal in its employ, with charges of conduct unbecoming and a statement of evidence on October 3, 1986; and

James Camisa having chosen not to respond with a written statement of position on such charges; and

New Jersey Is An Equal Opportunity Employer

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

The Board having certified said charges by resolution on October 21, 1986, suspended respondent without pay, and having filed same with the Commissioner of Education on October 24, 1986; and

James Camisa having been noticed by the Director of the Bureau of Controversies and Disputes (Director) under date of October 27, 1986 of said filing; and

James Camisa having chosen not to file an answer to such charges pursuant to N.J.A.C. 6:24-1.4; and having submitted his resignation as an employee of petitioner under date of October 19, 1986, effective October 21, 1986; and

Counsel for respondent having advised the Director by letter under date of November 20, 1986 that "Mr. Camisa has decided not to answer the charges filed on behalf of the Board of Education"; and having transmitted a letter to the Office of Administrative Law under date of December 15, 1986 stating the instant matter is uncontested; and

The matter having been transmitted to the Office of Administrative Law as a contested case on November 26, 1986 pursuant to N.J.S.A. 52:14F-1 et seq. and set down for prehearing on January 12, 1987; and

Philip Scalo, Esq., counsel for the Board having communicated with the undersigned by letter under date of December 10, 1986 with a query, as well as requested documentation, that under the circumstances, including a transcript of Camisa's voluntary admission of guilt of unbecoming conduct, as to whether the instant matter is a contested case; now, therefore,

I FIND that, notwithstanding the statutory requirement for a hearing under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., respondent James Camisa has

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

declared his intention not to defend against the certified charges, and further **FIND** that the transmitted case is deemed herein not to be a contested case pursuant to N.J.A.C. 1:1-1.1 et seq.

I **CONCLUDE** therefore, that James Camisa shall be dismissed from his position as a tenured principal in the Bergen County Vocational School District, effective as of October 21, 1986, the date of certification of charges by the Board as well as the effective date of his resignation. **IT IS SO ORDERED.**

It is further recommended that the matter be referred to the State Board of Examiners for consideration of possible revocation or suspension of respondent's certificates pursuant to N.J.S.A. 18A:6-38.

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

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

24 December 1986
DATE

Ward R. Young
WARD R. YOUNG, ALJ

DEC 29 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DEC 30 1986
DATE

Mailed To Parties:
Ronald L. Parks/gs
FOR OFFICE OF ADMINISTRATIVE LAW

g

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

OAL DKT. NO. EDU 8140-86

IN THE MATTER OF THE TENURE HEARING OF JAMES CAMISA, SCHOOL DISTRICT OF BERGEN COUNTY VOCATIONAL SCHOOLS, BERGEN COUNTY.

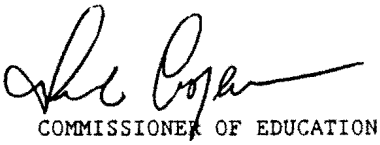
COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered in this uncontested matter have been reviewed. The Commissioner finds that this matter is no longer a contested case inasmuch as respondent herein has admitted to engaging in conduct unbecoming a teaching staff member, has determined not to defend against the instant tenure charges and has voluntarily resigned from his tenured employment with the Board of Education of the Bergen County Vocational School District.

However, given the gravity of the circumstances involved, the Commissioner directs that this matter forthwith be referred to the State Board of Examiners for consideration of possible revocation or suspension of respondent's certificates pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 4, 1987

DATE OF MAILING - FEBRUARY 4, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 3951-86

AGENCY DKT. NO. 199-6/86

OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

TOWNSHIP OF OLD BRIDGE,

Respondent.

Harold G. Smith, Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Michael A. Noto, Esq., for respondent

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

The Old Bridge Township Board of Education (Board) appeals from an action taken by the Old Bridge Township Committee (governing body) under N.J.S.A. 18A:22-37 by which the governing body certified to the Middlesex County Board of Taxation a lesser amount of appropriations for current expense for the 1986-87 school year than the amount proposed in its budget and rejected by the voters on April 15, 1986. The Board contends the budget that was certified by the governing body is inadequate to provide a thorough and efficient system of schools in the district.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law on June 17, 1986. On July 18, 1986, a prehearing conference was held at which issues were defined and the matter was set down for hearing. For good cause shown, the original hearing date was adjourned to November 5, 1986. On October 28, the Board filed a motion to strike written testimony and for partial summary judgment. Upon receipt of the motion, I conducted a conference of counsel by telephone. After hearing counsel, I advised the parties that I would hear oral argument on

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

the motion on November 5, the day originally set down for commencement of hearing, and would schedule further hearing dates as necessary after rendering decision on the motion. Counsel appeared and were heard on November 5.

I

The Board asks that the written testimony of Gene Dunlop, President of the Township Counsel, be stricken because Mr. Dunlop does not possess the requisite qualifications to form the opinions regarding the Board's budget that he sets forth in his written statement. Even if Mr. Dunlop possessed the requisite expertise to present his opinions, those portions of the written testimony that purport to provide additional reasons for the governing body's action beyond those reasons contained in its May 8, 1986 resolution reducing the budget must be stricken. A governing body must set forth the specific line item reductions and adequate supporting reasons for each at the time of its decision and will not be permitted to add either additional reductions or additional supporting reasons at a later date. Board of Education of the Township of Union v. Township Committee of the Township of Union, OAL DKT. EDU 2788-81 (June 5, 1981), adopted Comm'r of Ed. (July 9, 1981). In his affirmance, the Commissioner stated:

> In the opinion of the Commissioner, . . . the law set forth in E. Brunswick, supra, [requires] the municipal government to recommend to the Board the supporting reasons for the reduction or elimination of specific line items which it believes necessary to total budgetary reduction. The Commissioner deems it proper that such decisions be made at the time of the reduction and not on a contingency basis only, if and when the budget reduction is appealed by the Board of the Commissioner.

In the Initial Decision, adopted by the Commissioner, the administrative law judge explained:

> The failure of the governing body to know, identify and set forth the specific line items of the budget and to enunciate supporting reasons therefor at the time of the reduction becomes an arbitrary, capricious and unreasonable act. The submission of such information at a later date does not cure this defect. The governing body must have the rationale for its reductions at the time it acts and shall not be permitted subsequently to construct one in a "boot-strap" manner.

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

Notwithstanding a similar dispute between these parties in 1985, Board of Education of the Township of Old Bridge v. Mayor and Council of the Township of Old Bridge, OAL DKT. EDU 4026-85 (Sep. 9, 1985), adopted Comm'r of Ed. (Oct. 28, 1985), the governing body again attempts to construct a boot-strap rationale by including reasons in its written testimony that were not contained in the original resolution of May 8 that reduced the proposed budget.

In that resolution, the only reason provided for the reduction in accounts 130B, 130F, 130I, 130J, 130M, 130N and 250C is that there were unencumbered funds in those accounts as of April 17, 1986. The written testimony submitted by the governing body purports to provide additional reasons for its reduction in these line items. Based on the holdings of Union and other cases on point, it is clear that this attempt to introduce reasons after the fact is inappropriate and must be rejected.

The "reasons" supplied by the governing body with regard to certain accounts are insufficient as a matter of law and, therefore, summary judgment restoring the amount of reductions should be granted. In Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966), the Supreme Court held that any significant reduction in a school budget must be "accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons." Id. at 105-106. The underlying determinations and supporting reasons required by the Court must indicate, with regard to each particular line item to be reduced, precisely how and why the governing determined that a reduction was warranted.

The mere statement that there were unencumbered funds in certain accounts, standing alone, is insufficient as a matter of law to justify the reductions. There is no explanation offered as to the relationship between the amount of unencumbered funds at the time of review and the decision to reduce or the amount of reduction. Merely looking at the amount of unencumbered funds at an arbitrary point and deciding to base a reduction thereon, without any explanation, is arbitrary, capricious and unreasonable. This is evident in the proffered written testimony with regard to line item 130B. Mr. Dunlop states:

> If the "unencumbered" balance was expended by year end, the Council did not have the benefit of this hindsight nor did the board offer any evidence of this result no[r] does it mention

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

which account was able to fund the year end deficit in account 130B.

In the Board's view, Mr. Dunlop admits that it is impossible to determine, at an arbitrary point in the school year, how much money will be spent by year's end. This is the point the Board wishes to underscore. Since, by year's end, the Board's expenditures in account 130B exceeded the budgeted amount by approximately $800, the amount of unencumbered funds at a particular point during the school year is absolutely irrelevant to the actual budgetary requirements. This is true of all accounts for which the only reason supplied by the governing body is the existence of unencumbered funds on April 17, 1986.

Furthermore, the conclusary reasons offered by the governing body in regard to accounts 120D, 130C, 250B, 520B, 520C, 550C, 660B, 660D, 730B, 740C and 820F are insufficient as a matter of law to justify the reductions. The governing body in its May 8, 1986 resolutions offered the following reasons for its reductions in these accounts:

120D - No increase in this line item justified for 1986-1987.

130L - Proposed decrease indicated not sufficient.

250B - Cut back in travel expenses warranted.

520B - Proposed increase too high; Township council projects only 10% increase.

520C - Unencumbered; Council can see no reason to increase this item.

660B - Unencumbered; no justification for increase.

660D - Percentage increase much to high to justify; would double the account without justification.

730B - Unencumbered; this is a[n] "as needed" account and the increase is not justified.

740C - No indication of basis for increase.

820F - No basis for increase.

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

The reasons supplied by the governing body are merely conclusary statements of the type consistently rejected by the Commissioner. Since the governing body cannot now adduce additional reasons, summary judgment restoring the fulf amount of the reductions in these accounts is warranted.

Finally, summary judgment restoring the reductions in line items 550A (gasoline), 630A (gas heat) and 630B (oil heat) should similarly be granted. The only reason offered for the reduction in these accounts is the governing body's proported knowledge of the current oil market. The Board, in the written testimony of Louis Iannicello, has explained in detail the bases for budgeting the particular amounts in these accounts. The governing body's testimony states that the cuts are based solely on the governing body's knowledge of the international oil market, but provides no evidence of any expertise in this area. Therefore, there are no facts upon which this tribunal can sustain the governing body's reduction.

II

The governing body maintains that the testimony of Mr. Dunlop should be considered because the reductions to the Board's budget by the governing body are explained in greater detail. Mr. Dunlop's testimony raised questions concerning deliberate underfunding of line items in the hope that others would be overfunded. This tribunal must consider whether a line item budget was arbitrarily set to begin with in order to consider whether reductions were arbitrary.

Mr. Dunlop "has had some experience with the spot market." Respondent's brief at p. 2. To strike his testimony would restrict this tribunal's ability to reach an informed opinion concerning three major areas of the governing body's reduction. Consideration of differing opinions concerning $86,750 of a $151,006 reduction cannot be undue consumption of time. The written testimony of Mr. Dunlop has probative value and therefore should be considered. This tribunal can test the weight to be given to the testimony but cannot say that it is not probative and thus inadmissable.

The governing body is allowed to provide additional reasons for its actions beyond those contained in the May 8, 1986 resolution reducing the budget. The Supreme

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

Court of New Jersey established and outlined the procedure to be followed in East Brunswick, above:

> Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. This is particularly important since, on the Board of Education's appeal under R.S. 13:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found. 48 N.J. at 105.

The governing body maintains the Commissioner has interpreted the demands of East Brunswick, to allow the governing body to set forth its reasons for deductions after its resolution to reduce the Board's budget. In Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon, 1970 S.L.D. 70, the hearing examiner stated at 72:

> The hearing examiner finds, in the first place, the Council has failed to fulfill the obligation imposed upon it under the mandate of the Supreme Court in the East Brunswick case, supra, to submit either to the petitioner, or later for the guidance and consideration of the Commissioner in the appeal herein a "detailed statement setting forth the governing body's underlying determinations and supporting reasons." [Citation omitted.] The hearing examiner likewise finds nothing in the testimony and evidence offered at the hearing which fills the void.

Although some decisions allowed governing bodys to submit detailed explanations at later dates, the failure to submit any explanation at all has led to a partial or total restoration of reductions. Board of Education of the Borough of Mount Arlington v. Mayor and Council of the Borough of Mount Arlington, 1971 S.L.D. 368; Board of Education of the Borough of Union Beach v. Mayor and Council of Union Beach, 1970 S.L.D. 242. However, one decision found that no explanation at all of the governing body's line item cuts was not fatal, but only had a retarding effect on the hearing. Board of Education of the Township of Woodbridge v. Township Council of the Township of Woodbridge, 1970 S.L.D. 1. The governing body is allowed to expand its original explanation of its specific line item reductions. The written testimony of Mr. Dunlop, president of the Council, is

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

the further explanation that tribunals have allowed in the past. It should be considered by this tribunal.

The explanations supplied by the governing body are consistent with case law and raise genuine issues of material fact. Accordingly, the petitioner's motion for summary judgment must be denied. If the governing body lists the line items to be reduced and offers an explanation for each reduction, it will be allowed to offer additional explanation at a later date than the resolution date, provided the additional explanation is consistent with the earlier explanation.

The reduction in the present controversy is not a significant aggregate reduction and therefore the dictates of East Brunswick do not apply. Although the governing body has followed the dictates of East Brunswick by stating its reasons for each line item reduction, the miniscule reduction in this controversy, approximately 1/3 of one percent, does not approach the 3.3 percent reduction the Court considered in East Brunswick. The Board's motion to strike to testimony and for summary judgment must be denied since its motion rests clearly on East Brunswick, which is not directly applicable to this case.

An explanation for a line item reduction that is not simply a general conclusary statement is consistent with case law. The Commissioner has rejected blanket general statements of explanations for budget reductions. Board of Education of the Borough of Union Beach v. Mayor and Council of the Borough of Union Beach, 1973 S.L.D. 231; Haledon, above.

In Union Beach the examiner found:

> Council simply made statements with respect to individual line items indicating that it was of the "opinion" that a reduction could be made; that the Borough of Union Beach could not afford the proposed expenditure; that an account be reduced in the "interest of economy;" that "austerity is upon" the school district; that "items seemed to be inflated;" that it is of the "opinion" that a position is not needed; that a reduction "works no hardship," etc. 1973 S.L.D. at 232.

The governing body in the present case listed an explanation for each reduction. Where the explanation was "unencumbered" there was a significant amount of money in those accounts that was unspent as of April 17, 1986. At its meeting with the governing

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

body, the Board refused to discuss these sums of money or what was expected to be spent. The governing body did not conclude that there was too much money budgeted but explained that an increase was not necessary when last year's amount was not spent.

In Haledon, above, the Commissioner's decision to restore the governing body's reduction was affirmed by the State Board of Education, ". . . based on the fact that the Respondent-Appellant, Mayor and Council of the Borough of Haledon, Passaic County, have, despite their opportunity to do so, failed to submit either to petitioner or later for the guidance and consideration of the Commissioner in the appeal herein, a detailed statement setting forth the governing body's underlying determinations and supporting reasons which would justify their action." 1970 S.L.D. at 76.

The respondent submitted explanations of its reductions in its resolution and now offers a further detailed explanation of its determinations and supporting reasons. The governing body's submission of Mr. Dunlop's testimony is consistent with the holdings of Union Beach and Haledon and raises genuine issues of material fact. Therefore, the motion for summary judgment must be denied. The weight this tribunal accords the testimony is subject to consideration, but it admissability is not.

DETERMINATION AND ORDER

N.J.S.A. 18A:22-37 requires, in pertinent part, that if the voters reject any of the budget items submitted at the annual school election, the board of education must deliver the proposed school budget to the governing body of the municipality within two days thereafter. The statute further provides:

> The governing body of the municipality . . . shall, after consultation with the Board, and by April 28, determine the amount which, in the judgment of said body . . . is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount determined. . . .

The authority of the Commissioner, and hence the Office of Administrative Law, to hear school budget disputes derives generally from N.J.S.A. 18A:6-9 and specifically

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

from East Brunswick, above. The court's language in East Brunswick at 105 is illuminating:

> Though the law enables voter rejection, it does not stop there but turns the matter over to the local governing body. That body is not set adrift without guidance, for the statute specifically provides that it shall consult with the local board of education and shall thereafter fix an amount which it determines to be necessary to fulfill the standard of providing a thorough and efficient system of schools. Here, as in the original preparation of the budget, elements of discretion play a proper part. The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the make up of the community. Where its action entails a significant aggregate reduction in the budget and the resulting appealable dispute with the local board of educaiton, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. This is particularly important since, on the Board of Education's appeal under R.S. 18A:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could be properly eliminated or curbed and on what basis it so found. [Emphasis added.]

The Court's language takes on significantly greater meaning when the appropriate passage is read in its entirety rather than in snippets. The Court's clear direction, coupled with the several Commissioner decisions cited above, lead inexorably to the same point at which these two parties found themselves last year. And, as the Commissioner made clear in his Union Township decision of July 9, 1981, "The Commissioner deems it proper that such decisions be made at the time of the reduction and not on a contingency basis only, if and when the budget reduction is appealed by the Board to the Commissioner."

And, as in the prior matter, the respondent argues that summary judgment is not appropriate. It contends that there are genuine issues of fact that must be determined. Nevertheless, the case law discussed above indicates clearly that the failure of a governing body to specify each line item to be reduced or eliminated and the particular reasons for reduction or elimination, at the time of its action, is a fatal defect.

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

Having considered the arguments of counsel, I **FIND** and **CONCLUDE** that there are no issues of material fact concerning the budget line items that are the subject of this motion. I further **FIND** and **CONCLUDE** that the reasons put forth by the governing body for the reductions in the lines items enumerated above are untimely and/or insufficient as a matter of law and, therefore, must be set aside.

Partial summary judgment is **GRANTED** in favor of the Old Bridge Township Board of Education setting aside the reductions and restoring in full the amounts orginally budgeted in the following line items:

120D	-	$ 4,400
130A	-	1,000
130B	-	429
130F	-	2,000
130I	-	2,000
130J	-	500
130K	-	1,000
130L	-	250
130M	-	2,000
130N	-	1,000
250B	-	7,000
250C	-	6,500
420	-	5,000
520B	-	4,340
520C	-	2,000
550A	-	36,750
550B	-	1,000
550C	-	2,620
630A	-	24,000
630B	-	26,000
660B	-	500
660D	-	5,000
730B	-	9,500
740C	-	130
810C	-	5,000
820F	-	500
TOTAL		$150,419

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

It is **ORDERED.** It is further **ORDERED** that hearing on the remaining line items (240 and 250A) be scheduled for January 14, 1987, commencing at 9 a.m., at the Office of Administrative Law, Trenton.

This order may be reviewed by **SAUL COOPERMAN, COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case, pursuant to N.J.A.C. 1:1-16.5.

17 NOVEMBER 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

ds

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

OAL DKT. NO. EDU 3951-86

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner had been requested by the ALJ to review an Order for Partial Summary Decision rendered on November 17, 1986. The ALJ's request for review of his Order has been made pursuant to the provisions of N.J.A.C. 1:1-13.3(b).

It is observed that counsel for the parties join in the request for review of the Order of Partial Summary Decision and have filed copies of their trial briefs which set forth their respective positions presented to the ALJ prior to the issuance of his Order.

It is further noted that Board counsel has indicated in writing to the ALJ that in the event that the Commissioner affirms the ALJ's Order, the Board by letter of November 26, 1986, withdraws its challenge to the budget reductions imposed by the governing body in current expense line item accounts 240 and 250A, which in effect would permit the Commissioner's decision on the Order to constitute a final determination on all matters controverted herein. The

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

entire record of this matter was received by the Commissioner from the Office of Administrative Law on January 9, 1987.

It is observed that the ALJ in his Order of Partial Summary Decision granted the Board's motion to disallow, as being untimely, the written testimony of the President of the Township Council in order to supplement the governing body's original reasons for imposing line item reductions in the Board's current expense budget request for the 1986-87 school year to be raised in the local tax levy. The ALJ further concluded that the governing body's initial reasons for imposing its reduction upon the Board's 1986-87 line item current expense school budget request were insufficient as a matter of law to be considered in determining whether or not the governing body's reductions in all but two current expense line item appropriations (240 and 250A) should proceed to a plenary hearing. As a matter of partial summary decision, the ALJ therefore ordered that a total of $150,419 in current expense line item appropriations be restored to the local tax levy for school purposes for the 1986-87 school year.

The Commissioner observes that the ALJ's Order for Partial Summary Decision fully addresses the respective arguments of both parties and they are incorporated by reference herein.

In the Commissioner's judgment the ALJ's findings and conclusions in his Order are firmly grounded upon the provisions of N.J.S.A. 18A:22-37, as well as the Commissioner's prior decision in Union Township, supra, and the pertinent language of the New Jersey Supreme Court in East Brunswick, supra.

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

The requirement for a detailed statement of reasons for line item school budget reductions imposed by the local governing body are also specifically set forth in N.J.A.C. 6:24-7.5 related to the documentation required in the answer filed by a local governing body to a school budget appeal. This section of the State Board regulations reads as follows:

> (a) The governing body shall submit with its answer the following documents:
>
> 1. The amount certified for each of the major accounts;
>
> 2. Line item budget stating recommended specific economies together with supporting reasons.

The Commissioner has reviewed the resolution by the governing body dated May 8, 1986, as well as the answer it filed to the budget appeal on June 6, 1986. In the Commissioner's judgment the lack of sufficiency of the reasons for the line item budget reductions is evident from a review of the resolution. Also conspicuous by their absence from the answer to the budget appeal are the recommended specific line item economies with supporting reasons by the governing body.

Upon review of the written testimony of the Council President which was filed with the ALJ on October 22, 1986, the Commissioner concludes and determines that it may not be considered due to its untimeliness. It was filed four months after the Board's formal appeal in this matter. The governing body may not now accomplish by indirection that responsibility it had to comply with the provisions of N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.5 at the time of the commencement of these proceedings which was triggered by

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

the formal budget appeal filed with the Department of Education on June 6, 1986.

For all the foregoing reasons set forth in the Order herein as supplemented, the Commissioner finds and determines that the legal arguments advanced by the governing body in opposition to the Board's motion are totally without merit.

Accordingly, the Order of Partial Summary Decision rendered by the ALJ on November 17, 1986 is hereby affirmed.

It is further directed that the Commissioner's affirmance of this Order be deemed a final decision of the matters controverted herein inasmuch as the Board has withdrawn its challenge to the reductions in the 240 and 250A line items of its 1986-87 current expense budget request.

In conclusion, the Commissioner hereby directs the Middlesex County Board of Taxation to make the necessary adjustments in the 1986-87 local tax levy for school purposes in the School District of the Township of Old Bridge to reflect the restoration of $150,419 in current expense appropriations for the 1986-87 school year.

This amount when added to $23,768,992 previously certified in current expense tax levy by the Township Committee shall be $23,919,411.

IT IS SO ORDERED this 4th day of February 1987.

COMMISSIONER OF EDUCATION

FEBRUARY 4, 1987

DATE OF MAILING - FEBRUARY 4, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2302-86
AGENCY DKT. NO. 96-4/86

B. B. on behalf of her son, L.C.,
Petitioner,

v.

BOARD OF EDUCATION OF UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1

and

DONALD MERACHNIK, Superintendent of Schools,

Respondents.

Roger J. Weil, Esq., for petitioner

William Lane, Esq., for respondents
(Johnstone, Skok, Loughlin & Lane, attorneys)

Record Closed: December 12, 1986 Decided: December 22, 1986

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

B. B., petitioner and mother of L. C., filed a petition of appeal with the Commissioner of Education, wherein she seeks to have set aside a determination by respondents excluding her son from school because she, and he, were allegedly non-residents of the school district, and further seeks to be relieved of tuition charges during the period of alleged non-residency.

New Jersey Is An Equal Opportunity Employer

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

The matter was transmitted to the Office of Administrative Law as a contested case on April 4, 1986 pursuant to N.J.S.A. 52:14F-1 et seq., and assigned to an administrative law judge (ALJ) other than the undersigned. A telephone prehearing conference was held by the initial ALJ assigned on April 17, 1986, and the matter was set down for plenary hearing on June 5 and 6, 1986. The scheduled hearing dates, as well as subsequent hearing dates on September 19, October 17, and December 5 were adjourned for a variety of valid reasons. The matter was finally heard on December 12, 1986 at the Office of Administrative Law, Newark, and the record closed at the conclusion of hearing on that date. No post-hearing memoranda were requested or required.

Prior to the reassignment of this matter to the undersigned on November 17, 1986, a Motion for Emergent Relief was amicably resolved by a Stipulation of Settlement approved by the initial ALJ on April 21, 1986 and affirmed by the Commissioner on May 30, 1986, wherein L.C. was readmitted as a pupil in respondent's school district; B. B. agrees to accept responsibility for tuition costs of L. C. for the period from April 14, 1986 to June 30, 1986 as well as for the period from January 1, 1985 to February 28, 1986 if she does not prevail on the substantive domiciliary issue; and B. B. further "agrees to enter into a Consent Decree which shall be docketed in the Superior Court of New Jersey by the respondent, if a monetary award is granted to the respondent . . .".

The initial ALJ also determined in a letter to counsel for the parties dated November 10, 1986, that the burden of proof rests with petitioner pursuant to N.J.S.A. 18A:38-1.

A subsequent prehearing conference was held by the undersigned on December 5, 1986, at which counsel for petitioner challenged the burden of proof determination on the basis that L. C. was not an affidavit pupil and N.J.S.A. 18A:38-1 was therefore not applicable. The determination of the initial ALJ was undisturbed by the undersigned for failure of petitioner to comply with the interlocutory review procedure incorporated in

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

N.J.A.C. 1:1-9.7 and the lack of jurisdiction of the undersigned to rule on such an appeal. Nevertheless, even if one assumed the initial ALJ erred in determining with whom the burden of proof rests, I FIND such a determination to be irrelevant in light of the belief by the undersigned that a fair and full adjudication of this dispute shall be based on the preponderance of credible evidence and findings of fact.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

B. B. testified that she and L. C. were domiciled with her mother at 219 Cedar Street, Garwood, during the periods of time in question. Said address is within the boundaries of respondent's school district. She also stated she visited the apartment at 1364 North Ave., Elizabeth leased by her boyfriend of seven years, one Charles T. Arnone, aka Paul. The Elizabeth address is outside the boundaries of respondent's school district. B. B. was employed as a waitress.

Concerning visitations to the Elizabeth apartment, B. B. testified she would spend about four days a week there, including weekends. Such visitations included L. C. and overnights stays. She further stated that such visitations on school days amounted to about two days per week, three at the most.

B. B. also testified she never changed her address from Garwood to Elizabeth, but did occasionally have mail sent to her at the Elizabeth address. She further stated she had no furniture at Paul's, just a few clothes.

B. B. stated further that she moved to 19 Grove Street, Middlesex in September 1986.

On cross-examination, B. B. testified that Paul moved from his Elizabeth apartment to Roselle Park in May 1986, and her bedroom set was at her mother's home during the periods in question.

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

On redirect examination, B. B. stated vice-principal Ferrara (in respondent's school district) visited her mother's home in Garwood in April 1986 and was satisfied that B. B. lived there. Ferrara was not called to testify as a witness by petitioner or as a rebuttal witness by respondent.

Dorothy Swiatkowski, a neighbor of Paul's two apartments from the latter's, testified that she knew B. B. and L. C., but they did not live with Paul. She stated they only visited, and would see L. C. on weekends, but rarely during the week.

On cross-examination, Swiatkowski testified she signed an affidavit (P-1), but did not supply the contents in same and did not know who prepared it.

Petitioner rested her case.

Howard Thompson, a retired Springfield police officer, was employed by respondent as a part-time school bus driver and part-time investigator. He testified he was dispatched to surveillance duty at 219 Cedar Street, Garwood, by his supervisor, Transporation Director Glowacki.

Thompson testified as to a pattern he observed, whereby L. C. departed from public transit bus #49, which originated its run in Elizabeth, and walked to his grandmother's house at 219 Cedar Street after departure from the bus between the hours of 6:00 and 7:00 a.m., then left said house around 7:30 a.m. to board school bus #16 to attend school. This pattern was observed on January 8, 10, 11, 14, 15 and 16. Thompson submitted a surveillance report to his supervisor. See R-1. A review of the Thompson report reveals that L. C. boarded school bus #16 at 219 Cedar Street and returned to that address in the p.m. on January 3, 4, 7 and 9 with no observation or inference that L. C. stayed in Elizabeth on the nights of those days or preceding those days. L. C. was not sighted during Thompson's surveillance on January 2 and 18. Thompson did observe L. C. depart from transit bus #49 on January 17 and walk to "219", but school was cancelled that day due to inclement weather. Thompson's surveillance was for a period of 16 days, three of which (January 5, 12 and 13) were on weekends.

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

Nancy Cieslik, the school bus driver of #16 employed by respondent also testified, and a handwritten statement, unsigned and undated, which she submitted to supervisor Glowacki at the latter's request was admitted into evidence and marked as R-2. Cieslik stated she suspected L. C. was not living at the Garwood address based on her observation that his mother would be waiting in a car for him at 219 Cedar Street when bus #16 brought him to that address after school. Her suspicion was buttressed also by her testimony that L. C. told her that on occasion he would not ride school bus #16 because he would rather take public transit from Elizabeth to school.

Lina Schweitzer, L. C.'s teacher in 1984-85 and 1985-86, also testified as to her suspicion that L. C. did not reside at 219 Cedar Street due to her failure to find L. C.'s mother at that address on numerous occasions when she called by phone. B. B. did, however, return the calls. Her suspicion was also buttressed, she said, on comments made by other pupils in her class that L. C. lived in Elizabeth.

On cross-examination, Schweitzer testified she was told that B. B. was at work when she could not be reached at "219" by phone.

Eileen Glowacki, employed by responent as transportation director, also testified. She stated that she stopped at 219 Cedar Street in August 1984 in the process of establishing her bus routes for 1984-85, and was told by a workman (L.C.'s uncle) that L. C. didn't live there, but L. C.'s grandmother told her that L. C. was to be picked up at that address.

Glowacki also testified that the driver of school bus #16 asked her during the 1985-86 school year if she had to continue to stop at 219 Cedar Street as L. C. did not use her bus often. She further testified that she requested and received a note from B. B. that L. C. would rather use public transportation. Said note was not produced as an evidentiary document.

Glowacki submitted an unsigned memorandum dated October 28, 1985 to Superintendent Merachnik, R-3 in evidence, and testified as to its contents.

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

Glowacki stated that she observed L. C. taking public transit bus #8 from Elizabeth to school every morning for approximately four weeks preceding the date of her memo, and also testified she observed L. C. board public transit bus #49 to Elizabeth at about 5:00 p.m. on Friday, October 25, 1985.

The respondent Board engaged the services of R. K. Investigators, Inc. to investigate the matter of B. B.'s residence. Hugh G. Colville, a licensed investigator and president of R. K., testified as to the investigative findings which were incorporated in a series of reports marked as R-6 in evidence. The surveillance by R. K. occurred between November 6, 1985 and January 7, 1986.

According to the testimony of Colville and a review of R-6, L. C. was observed leaving the 1364 North Avenue, Elizabeth address and/or taking public transit bus #8 from Elizabeth to respondent's high school in Springfield on November 6, 13, 14, 18, 26, 27, December 9, 10 in 1985 and also on January 7 and 28, 1986. Colville's report also indicates the observation of a 1978 4-door blue Buick registered to B. B. at 219 Cedar Street, Garwood, being parked at the Elizabeth address during the morning hours on January 10, 15, 21, 22 and 23, 1986.

The Colville report also indicates that the postal mailwoman delivering mail at the Elizabeth address stated that mail for B. B. was placed in Arnone's mail receptacle.

Counsel for respondent received a response from the officer in charge at the Elizabeth post office under date of December 9, 1986 with a PS Form 3982 attached, which was admitted into evidence and marked as R-5. The letter document indicates that mail had been delivered to B. B. at the Elizabeth address during 1985 and 1986 until May of 1986, and that Arnone moved from 1364 North Avenue to 772 Westfield Avenue, both in Elizabeth, effective May 1, 1986, and that mail for him as well as for B. B. was being forwarded to the new address.

Sworn affidavits from Swiatkowski, Alfred Yanni (building superintendent at 1364 North Avenue, Elizabeth), and Arnone were admitted into evidence and marked as P-1,

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

P-2, and P-3, respectively. All were dated March 31, 1986 and state that B. B. and L. C. visit Arnone at his address in Elizabeth but reside in Garwood.

The record is void of any affidavit from B. B. or that one had ever been requested by the respondent.

FINDINGS OF FACT:

During the periods of time for which the respondent Board claims L. C. is not entitled to a free public education in its district, January 1, 1985 to February 28, 1986 and April 14, 1986 to June 30, 1986, the following FINDINGS OF FACT are adopted herein as the result of a review of testimonial and documentary evidence in the record of this matter:

1. L. C. remained overnight preceding the school days of January 8, 10, 11, 14, 15, 16 and 17, 1985 and boarded school bus #16 from 219 Cedar Street, Garwood on those dates.

2. L. C. was transported to school on public transit bus #8 from Elizabeth for approximately four weeks from late September 1985 to late October 1985.

3. L. C. was transported to school on public transit bus #8 from Elizabeth on November 6, 13, 14, 18, 26, 27 and December 9 and 10, 1985, as well as on January 7 and 28, 1986.

4. The automobile registered in the name of L. C.'s mother, B. B., was parked overnight in Elizabeth on the dates indicated in #3 above as well as on January 10, 15, 21, 22 and 23, 1986.

5. L. C. was not an "affidavit pupil" as referenced in N.J.S.A. 18A:38-1(b).

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

DISCUSSION

Petitioner contends she meets the requirements of N.J.S.A. 18A:38-1(a) for L. C.'s free education in respondent's school district as he is over five and under twenty years of age and both she and therefore he "is domiciled within the school district" at 219 Cedar Street, Garwood.

Since I have found that L. C. is not an affidavit pupil pursuant to N.J.A.C. 18A:38-1(b), the gravamen of this dispute is whether B. B., with whom L. C. has always resided during the time periods for which the Board claims tuition, was domiciled during those periods in the district at 219 Cedar Street, Garwood, or out of district at 1364 North Avenue, Elizabeth, the undisputed domicile of her boyfriend until May 1, 1986.

It appears appropriate to address a distinction between domicile and residence.

Blacks Law Dictionary, Fifth Edition (1979) defines domicile with reference to residence at 435 as follows:

> That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. Smith v. Smith, 206 Pa. Super. 310, 213 A.2d 94. The permanent residence of a person or the place to which he intends to return even though he may actually reside elsewhere. A person may have more than one residence but only one domicile. The legal domicile of a person is important since it, rather than the actual residence, often controls the jurisdiction of the taxing authorities and determines where a person may exercise the privilege of voting and other legal rights and privileges. The established, fixed, permanent, or ordinary dwelling place or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him.
> . . .

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

> "Residence" signifies living in particular locality while "domicile" means living in that locality with intent to make it a fixed and permanent home. Schreiner v. Schreiner, Tex. Civ. App., 502 S.W. 2d 840, 843.
> . . .

In K.C.K. and K.W.K., by their guardians, G.R.E. and A.C.E. v. Board of Education of Scotch Plains-Fanwood, 1985 S.L.D. ____ (decided October 21, 1985), a disputed N.J.S.A. 18A:38-1(b) matter, the Honorable James A. Ospenson, ALJ, stated in his initial decision at 11, 12:

> "Domicile" is the place where one has his true, fixed, permanent home and principal establishment, to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. Every person, in all circumstances and conditions, it is said, is deemed to have a domicile somewhere. A person may have several residences or places of abode but he can have only one domicile at a time. Domicile of choice is essentially a question of residence and intention; it involves an exercise of volition. To effect a change of domicile there must be a voluntary change of residence. Residence at the place chosen for domicile must be actual. To the fact of residence there must be added an intention to remain. The burden of proof to establish a change of domicile has occurred rests upon the party asserting it. See, generally, Cromwell v. Neeld, 15 N.J. Super. 296, 300-1 (App. Div. 1951). Normally, it is said, the domicile of unemancipated minors is that of their natural parents who have custody. Lea v. Lea, 18 N.J. 1, 11-12 (1955)(but the fact of domicile is still largely a matter of intent). See also Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Chan. 1970), aff'd 58 N.J. 112 (1971); and see Martinez v. Bynum, 461 U.S. 321, 75 L. Ed. 2d 879, 888-9, 102 S.Ct 1838 (1983).

The record in the instant matter is void of any affidavit from either B. B. or her mother, or any evidence that same was requested or demanded by the respondent Board. Since L. C. is not an "affidavit" pupil, N.J.S.A. 18A:38-1(b) is therefore not applicable, and the Board must therefore dispute the reliance of B. B. on N.J.S.A. 18A:38-1(a) in support of its tuition claim, which states that:

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

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> (a) Any prson who is domiciled within the school district; [4]
>
> . . .

It was stipulated that B. B.'s New Jersey driver's license, issued September 30, 1985 with an expiration date of July 31, 1987, indicates her address as 219 Cedar Street, Garwood.

B. B.'s testimony that her furniture was located at 219 Cedar Street, and that principal Ferrara inspected those premises with satisfaction that she lived at that address, was not rebutted by the Board.

The Board's claim for tuition is for approximately 14 months. It cannot be disputed that B. B. and L. C. resided at 1364 North Avenue, Elizabeth for at least seven weeks during that period. B. B.'s change of domicile occurred in September 1986, after the period in dispute, as per her testimony and the stipulated fact that her New Jersey automobile registration issued after that time indicates her address as 19 Grove Street, Middlesex.

It is recognized that B. B.'s temporary residence in Elizabeth may have resulted in a change of domicile to that of her boyfriend. It never materialized, however, as Arnone changed his domicile to 772 Westfield Avenue, Elizabeth effective May 1, 1986 (see R-5), and B. B. changed hers to Middlesex in September 1986.

I am satisfied that B. B. never forfeited her intention to return to 219 Cedar Street from her temporary residency at 1364 North Avenue during the periods indicated in the aforementioned FINDINGS, and the following supplemental FINDINGS OF FACT are adopted herein:

1. The domicile of L. C. is that of his mother, B. B.

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

2. B. B. resided both at 219 Cedar Street, Garwood, and 1364 North Avenue, Elizabeth, during the periods in which tuition is claimed.

3. B. B. was domiciled only at 219 Cedar Street, Garwood during the periods in which tuition is claimed.

I **FIND** and **DETERMINE** that L. C. was entitled to a free public education in the Union County Regional High School district for the periods from January 1, 1985 to February 28, 1986 and from April 14, 1986 to June 30, 1986 pursuant to N.J.S.A. 18A:38-1(a).

I **CONCLUDE**, therefore, that the respondent Board's tuition claim for the periods shall be and is hereby **DISMISSED**.

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

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

22 December 1986
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

DEC 23 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 26 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g

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

B.B., on behalf of her son, L.C., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1 AND DONALD MERACHNIK, SUPERINTENDENT OF SCHOOLS, UNION COUNTY, RESPONDENTS.	:	DECISION

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

Petitioner urges that the initial decision be accepted by the Commissioner but submits that it should be expanded so as to direct the Board herein to reimburse petitioner the sum of $5,000 for legal expenses and costs.

Upon review of the record before him which, it is noted, does not include transcripts of the proceedings below, the Commissioner adopts as his own the findings and determination of the ALJ as modified below.

In the initial decision, ante, the ALJ expounds on the burden of proof in N.J.S.A. 18A:38-1 cases concluding:

> The determination of the initial ALJ [determining that the burden of proof rests with petitioner pursuant to N.J.S.A. 18A:38-1] was undisturbed by the undersigned for failure of petitioner to comply with the interlocutory review procedure incorporated in N.J.A.C. 1:1-9.7 and the lack of jurisdiction of the undersigned to rule on such an appeal.
>
> Nevertheless, even if one assumed the initial ALJ erred in determining with whom the burden of proof rests, I FIND such a determination to be irrelevant in light of the belief by the undersigned that a fair and full adjudication of this dispute shall be based on the preponderance of credible evidence and findings of fact.
>
> (Initial Decision, ante)

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

The Commissioner notes for the record herein the language of ALJ Sybil Moses in her letter dated November 10, 1986 regarding the burden of proof in such cases:

> The Prehearing Order of April 18, 1986 raised the issue of which party has the burden of proof regarding whether B.B. was a legal resident of the Union County Regional High School District No. 1 between September 1984 through February 28, 1986. The retent amendment to N.J.S.A. 18A:38-1 places the burden of proving eligibility for a free public education upon the resident who files an affidavit in behalf of the student. Based on the foregoing statute, and in the absence of any case or statutory law to the contrary, it is hereby ordered that the petitioner has the burden of proof in this case.

It is further noted that ALJ Young concurred with this conclusion in his correspondence with the parties dated November 14, 1986.

The Commissioner agrees with Judge Young that failure to exhaust the interlocutory appeal process was fatal to petitioner's challenge to the burden of proof determination by Judge Moses. However, because Judge Young mentioned said matter in the initial decision, the Commissioner will address the issue herein.

The Commissioner finds and determines that the issue of the burden of proof herein is not predicated upon "whether a fair and full adjudication of this dispute shall be based on the preponderance of credible evidence and findings of fact." Such a posture is required in all administrative proceedings brought before the Commissioner. See Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 91 (1973). Similarly, in all administrative law cases, the burden of persuasion, unless otherwise established, as in N.J.S.A. 18A:38-1(b), rests with the petitioner. Quinlan v. Board of Education of the Township of North Bergen, 73 N.J. Super. 40 (App. Div. 1962) quoting Hughes v. Atlantic City & c., R.R. Co., 85 N.J.L. 212, 216 (E.&A. 1914) While N.J.S.A. 18A:38-1 contemplates that a petition of appeal to challenge domicile, be brought by the board in question, the Legislature has seen fit, at least as far as subsection (b) thereof is concerned, to shift the burden of proof to the resident. However, in the instant matter, it was the resident who brought the Petition of Appeal challenging the Board's action in exacting tuition for her son's attendance in the Union County High School District No. 1. Hence, petitioner herein is responsible for carrying the burden of convincing the trier of fact, by a preponderance of the credible evidence, of the merit of her case.

The Commissioner is in accord with the ALJ that petitioner has met this burden for the reasons expressed in the initial decision.

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

As to the issue of attorney fees and costs, the Commissioner declines to so direct. In Hogan v. Kearny Board of Education, 1982 S.L.D. 329, State Board 356, the State Board found that, except for indemnification for the costs of defending board employees or office holders pursuant to N.J.S.A. 18A:16-6, there is no statutory authority for the award of counsel fees for cases arising under the school laws. The State Board added:

> We wish to add that, since the underlying action for which legal fees were incurred did not arise out of the duties or in the course of the performance of duties of members of the Board pursuant to N.J.S.A. 18A:16-6, there is no authority to award reimbursement of legal fees and expenses.*** (at 356)

Thus, while the "***Supreme Court has repeatedly 'reaffirmed the great breadth of the Commissioner's powers,' recognizing that he has 'fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws, N.J.S.A. 18A:6-9***'" (Board of Education of the City of Newark v. Levitt, 197 N.J. Super. 239 (App. Div. 1984), quoting Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 525 (1978)), until such time as he is granted statutory authority or the imprimatur of the Courts of New Jersey to do so, the Commissioner declines to award counsel fees. See also Gibson v. Newark, rev'd/rem'd to State Board by Superior Court, Appellate Division, October 18, 1985, aff'd State Board May 7, 1986, aff'd N.J. Superior Court, Appellate Division, October 15, 1986.

Consequently, the Commissioner adopts, as modified herein, the determination of the ALJ below.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 4, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4909-86
AGENCY DKT. NO. 220-6/86

ELMER CORDA and MARTHA GUNNING,
Petitioners,
v.
WILLINGBORO BOARD OF EDUCATION,
and Individual Board Members,
MAUCIE MILLER, JOSEPH OLIVER,
MARGARET M. DAVIS, ROY PAIGE,
HILL PRESSLEY, JR.,
Respondents.

Elmer Corda, petitioner, pro se

Martha Gunning, petitioner, pro se

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

Robert D. Vetra, Esq., for individual Board member respondents

Ernest Gilbert, intervenor, pro se

Record Closed: November 14, 1986 Decided: December 26, 1986

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

Elmer Corda and Martha Gunning (petitioners) who presently are members of the Willingboro Board of Education (Board), challenge the legality of the Board's appointment of Maucie Miller to fill a vacancy created by another member's resignation. Petitioners contend that Miller was appointed at a meeting conducted by the Board without a quorum,

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

or an effective majority, of its membership in attendance. Ernest Gilbert (intervenor), a resident of Willingboro who was formerly employed by the Board as a teacher, was granted intervenor status by the Honorable Harold B. Wells, III, J.S.C., before whom this case was initially filed. Judge Wells transferred the matter to the Commissioner of Education who, in turn, transferred it on July 24, 1986 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. The prehearing conference scheduled for September 8, 1986 by the Clerk of the Office of Administrative Law was adjourned because intervenor was involved in an automobile accident that morning. Following the conduct of a prehearing on October 3, 1986, a plenary hearing was scheduled and conducted October 31, 1986 at the Willingboro Township Municipal Court, Willingboro. The record closed November 14, 1986 upon receipt of letter memoranda from the parties and a portion of minutes regarding public comment at a public meeting conducted by the Board May 19, 1986.

PROCEDURAL HISTORY

The procedural history of the case is revealed in the following background facts which are not in dispute. The Board, organized as a Type II under N.J.S.A. 18A:9-1 et seq., has nine members elected by the voters at annual school elections. N.J.S.A. 18A:14-2. The Board's regular meeting place is the Board Room in its Levitt Building. On or about April 28, 1986 Patricia Harper resigned her Board membership. Pursuant to statute, the Board is authorized to select a qualified applicant for appointment to the vacancy. In the event the Board fails to appoint within 65 days of the occurrence of the vacancy, the County Superintendent is obligated to make an appointment. N.J.S.A. 18A:12-15.

The Board determined to publicly advertise the resulting vacancy, solicit applications from qualified residents, interview all applicants and then meet publicly to select one applicant for appointment to the vacancy. After having received nine applications from interested persons, the Board interviewed each person June 2, 1986. The Board conducted a special meeting on June 12, 1986 at which time Maucie Miller, a named respondent herein, was appointed to fill the vacancy. Minutes (P-1) of that meeting disclose that at the time the appointment motion was made, seven of the eight members were present. After the motion to appoint Miller was seconded, the minutes show Board members Wisniewski and Gunning left the meeting room. The roll of the Board was called by the Board secretary and the proposed appointment received four affirmative votes

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

while Board member Corda upon being polled by the Board secretary whether he wished to vote responded "No, not yet, thank you." (P-1). The Board secretary then announced that four members voted in the affirmative. Board counsel advised the Board that because five members were present at the time of the roll call the motion to appoint Miller to the vacancy carried.

Petitioners then filed a civil action in lieu of prerogative writ on or about June 13, 1986 in New Jersey Superior Court following which the matter was transferred to the Commissioner under N.J.S.A. 18A:6-9.

At the prehearing conference conducted October 3, 1986, several motions were made and decided in written rulings on October 6, 1986 and attached hereto. Intervenor's motion for this administrative law judge to recuse himself was denied; the Board's motion for summary decision against intervenor's claim that Miller is not qualified to sit on the Board by virtue of an asserted conflict was granted; the Board's motion to strike interrogatories served by intervenor upon present and former Board members was granted; and, intervenor's motion to compel the Board to certify tenure charges against the superintendent was denied.

This concludes a recitation of the procedural history of the matter.

ISSUES

The issues to be decided in the case are these:

1. Whether five members of the Willingboro Board of Education were present on June 12, 1986 when Mr. Miller was purportedly elected by the Board to fill a vacancy created by the resignation of Pat Harper.

2. Whether, given the circumstances to be established by a preponderance of credible evidence by petitioners and intervenor at the time of hearing, the Board failed to exercise good faith in its selection of and appointment of Mr. Miller to the vacancy.

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

3. If petitioners, including intervenor, prevail on either one of the foregoing issues, to what relief are they entitled.

SUMMARY OF EVIDENCE

I find a preponderance of credible evidence of record establishes the following facts. The Willingboro Board is split into two factions. On the one side are Board president Oliver and Board members Pressley, Davis, and Paige. Oliver, Pressley and Davis had been reelected to the Board by the voters at the annual school election held in April 1986. On the other side are Board members Gunning, Corda, Wisniewski and Whitehurst. The vacancy created the obvious potential for a stalemate regarding any business to be brought before the Board.

Gunning, Corda and Wisniewski ran as a slate for the 1985 annual school election. Prior to the meeting conducted June 2, 1986 when the Board collectively interviewed the nine applicants for appointment to Harper's vacancy, the Board's regular monthly meeting was conducted May 19, 1986. At this regular May meeting under "New Business", Board member Gunning made a motion that Linda Good be appointed to fill the vacancy. Linda Good was defeated in her bid for Board membership during the April 1986 annual school election. Note that the motion to appoint Good was offered without the Board having interviewed her. After having been reminded by President Oliver that the Board had scheduled June 2 to interview all applicants, Board member Wisniewski seconded Gunning's motion and complained that the president and other "erstwhile" colleagues on the Board took action on prior occasions in a manner contrary to an agreed upon process. Board member Whitehurst, who joined Gunning and Wisniewski in the motion to appoint Linda Good that evening, stated his desire to fill the vacancy as soon as possible in order to prohibit the Burlington County superintendent of schools from making the appointment as had occurred the previous summer. Corda supported Gunning's motion to appoint Linda Good. President Oliver, Board members Pressley, Davis, and Paige voted in the negative thereby defeating Gunning's motion to appoint Linda Good to the vacancy. A stalemate between the two factions occurred.

The Board interviewed all candidates on June 2, 1986. The special meeting of the Board conducted June 12, 1986 during which Miller's controverted appointment was made was called to order at 7:30 p.m. Maucie Miller, it is noted, is identified by Board member

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

Paige as having been his treasurer during the campaign for election to Board membership in April 1986. Only three members were present in the Board's meeting room which is located in the Board's administration building. After a short recess and when seven Board members appeared in the meeting room, the meeting was called to order. Board member Whitehurst was absent. The Board president, having announced that the purpose of the special meeting was to select an applicant for the existing vacancy, asked for nominations from Board members. The following sequence of events is reproduced from the minutes (P-1) of that special meeting:

Mrs. Davis:	I would nominate Maucie Miller for the vacant Board member seat.
Mr. Oliver:	Do I have a second?
Mr. Pressley:	Second.
Mr. Oliver:	It's been moved and seconded. Mr. Wisniewski?
Mr. Wisniewski:	I request a 10 minute recess.
Mr. Oliver:	For what purpose?
Mr. Wisniewski:	For the purpose that I have to leave the room for 10 minutes.
Mr. Oliver:	Alright, any other nominations? Poll the Board, please.
Mr. Wisniewski:	Elmer [Corda].
Mr. Corda:	Poll the Board?
Mr. Oliver:	Yes, we have five members.
Mr. Corda:	What do you do, either vote for Mr. Maucie Miller or don't vote for Mr. Maucie Miller?
Mr. Oliver:	That's correct.

At this point in the meeting, Board members Wisniewski and Gunning physically left the meeting room. Board member Corda was still in the meeting room although he had left his chair at the dias where he is regularly seated for Board meetings. Wisniewski, who had left the meeting room, was calling into the meeting room for Board member Corda to join him and Gunning outside the meeting room. According to Wisniewski, his intent of calling to Corda to leave the meeting room was to break the quorum which then

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

existed. The minutes reflect the following sequence of events after President Oliver confirmed to Board member Corda that the motion was to either vote for or not vote for Maucie Miller.

A Roll Call Vote resulted in the following:

Mrs. Gunning	*	Mr. Paige	Yes
Mr. Pressely	Yes	Mr. Oliver	Yes***
Mrs. Davis	Yes**	Mr. Corda	****

*Mr. Paige: Mrs. Gunning's gone.

Mrs. Mueller [Board secretary]: Oh, I'm sorry.

(Mr. Corda: What do you want. Wait a minute.)

**Mrs. Mueller: We no longer * * *
Mr. Oliver: Call them.

***Mrs. Mueller: 4 voting ***

Mr. Paige: Call Mr. Corda.

****Mrs. Mueller: Mr. Corda, did you wish to vote?

Mr. Corda: No, not yet, thank you.

Mrs. Mueller: 4 voting, 4 voting in the affirmative.

Dr. Romanoli [superintendent]: You have five.

Mr. Oliver: Mr. Barbour, were there five here when the meeting was called?

Mr. Barbour: There were five here when the meeting was called. There was five here when the vote was taken.

Dr. Romanoli: He just refused to vote.

Mr. Oliver: What's the ruling then? Would it be that the vote counts?

Mr. Barbour: I would think the vote counted.

Mr. Oliver: Motion passes. Mr. Miller is the Board member. Any other further business?

Whitehurst, who was not in attendance, testified before me that had he attended the meeting he would have opposed Miller's nomination. Board member Corda testified he exited the Board meeting room after answering "No, not yet, thank you" to learn what

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

Wisniewski wanted. I am persuaded and so find as fact that Elmer Corda did not realize at that precise moment Wisniewski's intent of breaking the quorum which then existed.

The minutes reflect that Board counsel, as well as President Oliver and Board member Paige questioned whether under the circumstances the appointment of Miller was valid. Board counsel, while advising the Board he would research the law and give the Board a written opinion on the validity of the vote in the circumstances, also advised as follows:

> * * * When Mr. Corda's name was called, Mr. Corda responded "I don't care to vote at this time" before he left the room. And then he left the room. While the Roll Call was conducted, there were five people here.
>
> * * *
>
> When the roll call vote was taken, five Board members were in the room; five Board members were polled. Four voted, and one said, "I do not care to vote at this time," and left the room. * * *

The Board, upon advice of counsel, declared a ten minute recess to await the return of Gunning, Wisniewski and Corda. After the ten minutes expired and the three absent members did not return to the meeting room, the meeting was adjourned at 7:55 p.m. When a motion is made and seconded, Board President Oliver generally asks if any member wishes to discuss the matter presented. While Oliver did not follow that practice on the Miller motion, the evidence (C-1) (C-2) shows that had any member wished to discuss the matter that member, none of whom is reticent, would have done so.

The usual practice of the Board for at least the past 11 years while the Board secretary was so employed was to swear Board appointees who are filling vacancies into office at the next scheduled public meeting following their appointment. In this case, the next scheduled meeting following Miller's appointment on June 12 was the evening of June 16, 1986. Nevertheless, Board President Oliver directed the Board secretary to swear Miller in at her office during the morning of June 16 rather than at that evening's scheduled public meeting. Oliver explained that he directed the Board secretary in this manner because he learned of a possible boycott of the meeting by the faction of Gunning, Corda, Wisniewski, and Whitehurst. He also had knowledge that Gunning and Corda, petitioners in this case, had filed the civil action in New Jersey Superior Court on or about June 13. It is noted in this regard that on at least one prior occasion Board members

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

refused to attend meetings to take care of Board business during July 1985 which led the New Jersey Attorney General to secure an Order from the Honorable Martin L. Haines, A.J.S.C., ordering the members to hold and attend a special meeting to take necessary action to provide the district with various insurance. (C-2).

Miller was, in fact, sworn into office by the Board secretary during the morning of June 16, 1986.

Intervenor offered no independent evidence relevant to the issues in this case. Despite his efforts, he was prohibited from using this proceeding to collaterally attack his dismissal on charges from his tenure employment with the Board. See, In re Tenure Hearing of Ernest Gilbert, 1982 S.L.D. 274, aff'd State Bd. of Ed. 328.

This concludes a recitation of the relevant facts of the matter establihsed by a preponderance of credible evidence in the record.

ARGUMENTS

Petitioners contend that at the meeting of June 12 when Miller was appointed to the vacancy either a quorum of the Board was not present at the time of the roll call vote because Board member Corda left the dias and was in the process of making his exit from the meeting room or that Board member Corda's response to his name when it was called as part of the roll call 'I do not care to vote at this time' must be registered as a vote in opposition to the motion. In either case, petitioners contend the motion to appoint Miller failed and that Miller is illegally seated as a Board member. Petitioners see support for their position that a quorum did not exist in the minutes (P-1) of the June 12 meeting when the Board secretary announced "4 voting, 4 voting in the affirmative."

Petitioners contend the Board acted in bad faith because president Oliver did not provide the Board members with an opportunity to discuss the Miller motion, the Board president interrupted the Board secretary when she began to inform the Board it no longer had a quorum when she began 'we no longer * * * ', the Board president ignored Wisniewski's request for a ten minute recess after the nomination but before the vote, Miller was sworn into office the morning of June 16 rather than at the meeting scheduled for that evening, and because the Board president declared Miller to be the lawful

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

appointee of the Board without having a written legal opinion from Board counsel. Intervenor joins the arguments raised by petitioners.

The Board contends that as a matter of law and of fact there was a quorum of the Board present at the meeting conducted June 12, 1986 when Miller was appointed to fill the vacancy. The Board argues that Board member Corda, in responding to the Board secretary's request for his vote 'no, not yet, thank you' constitutes an abstention from voting but does not break the required quorum. Finally, the Board vigorously opposes petitioners' contention that it acted in bad faith particularly with the swearing in of Miller on the morning of June 16. The Board contends that because Miller was duly appointed by the Board on June 12 he had a legal right to Board membership and that on the morning of June 16 he merely took the oath of office as required at N.J.S.A. 18A:12-2.1.

LEGAL ANALYSIS

Under N.J.S.A. 18A:10-6 a quorum of the Board must be in attendance at a meeting for the Board to transact business. Indisputably, five members of the Board were required to be in attendance June 12, 1986 when the Miller appointment was made. When the June 12 meeting was called to order at 7:30 p.m., seven of the then existing eight members of the Board were present. After the motion to appoint Miller to the vacancy was made and seconded, Gunning and Wisniewski left the meeting room and attempted, unsuccessfully, to have Board member Corda join them. The obvious intent of Gunning and Wisniewski was to reduce the number of members present so as to prohibit, impede, and interfere with the proper transaction of Board business. Nevertheless, Board member Corda remained during the roll call vote on the motion to appoint Miller and participated in that vote by his presence in the meeting room.

It is of no moment that Corda left his regularly assigned chair at the dias and began walking towards the exit door. Corda made no mention to the Board members that he recused himself from voting on the pending motion because of interest, bias, or prejudice, or other good cause. Cf. King v. New Jersey Racing Commission, 103 N.J. 412 (1986). Rather, Corda was responding to Wisniewski's call to join him outside. The fact remains that despite the departure of Gunning and Wisniewski, a quorum of the Board remained in the presence of Corda, Board president Oliver, Pressley, Davis and Paige.

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

The vote tally is accurate as the Board secretary noted in the minutes, "4 voting, 4 voting in the affirmative". Corda refused, or abstained, from voting.

Furthermore, because a quorum existed at the time the motion was made and seconded to appoint Miller to the vacancy it is of no moment that the vote tally was only four in the affirmative. It is not necessary for the Board to have approved the motion by a majority vote of the full membership. Nothing at N.J.S.A. 18A:12-15 so requires. Rather, and as the Commissioner said in Polonsky v. Red Bank Bd. of Ed., 1967 S.L.D. 93, 96 quoting Corpus Juris Secundum 'In the absence of a statute or constitutional provision expressly requiring more, a plurality of votes is sufficient to elect.'

Miller's nomination receive four affirmative votes from four of the five members who were present and who comprised the quorum at the meeting June 12, 1986. Board member Corda, whose attendance made up the quorum necessary for the Board to conduct business, elected not to vote on the motion. Even if Corda's abstention can be seen to be a vote against the nomination, it still carried by a vote tally of four to one. A plurality of votes cast on the Miller nomination was achieved in that four affirmative votes of the five members present were cast.

Petitioners' contention that the Board and particularly Board president Oliver acted in bad faith in this matter is wholly rejected. While not in issue in this case, it is necessary I find to state that if bad faith has been demonstrated in this case, Board members Gunning and Wisniewski need only look to themselves for the source of the bad faith. Gunning and Wisniewski answered the roll call to commence the meeting of June 12, 1986. Each knew that the purpose of the June 12 meeting was to select a nominee to fill the then existing vacancy. The total evidence strongly suggests that when Wisniewski saw Whitehurst was absent from the meeting, he devised in his mind the plan of encouraging Gunning and Corda to leave the meeting room thereby breaking the quorum in order to frustrate the business of the Board. Wisniewski's departure from the meeting after the motion to appoint Miller to the vacancy was properly before the Board was intended by Wisniewski to prohibit the Board from transacting its business at that specially called meeting. Wisniewski departed the meeting and successfully encouraged Gunning to do likewise with the sole intention, I find, to prohibit, frustrate, and impede the Board from conducting its business. The conduct of Board member Gunning that evening is the conduct of Wisniewski. She, too, must be seen and I so find to have engaged in conduct with the sole intent of frustrating the official business of the Willingboro Board

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

of Education. Elmer Corda cannot on this record be found to have engaged in conduct to frustrate the business of the Board in the manner of Gunning and Wisniewski. He participated in the meeting for which it was called. While Corda is a co-petitioner in the legal challenge to the conduct of the Board on June 12, 1986, that conduct standing by itself does not constitute bad faith. Bad faith is not manifest when a Board member, here Corda, believes an action taken is illegal and seeks redress through appropriate legal means. Bad faith is manifest when Board members, here Gunning and Wisniewski, deliberately attempt to subvert the official business of the public body on which they sit without good cause.

CONCLUSION

I **CONCLUDE** that the appointment of Maucie Miller by the Willingboro Board of Education on June 12, 1986 to fill a vacancy created by the resignation by Patricia Harper is valid and lawful in that it was approved by the Board by four affirmative votes. I further **CONCLUDE** that the Board did not act in bad faith on June 12, 1986. I particularly **CONCLUDE** that Board president Oliver did not conduct himself nor the business of the Board in bad faith that evening. Finally, I **CONCLUDE** that petitioners have failed to prove the truth of their allegations by a preponderance of credible evidence.

The Petition of Appeal is **DISMISSED.**

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

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

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

December 26, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

DEC 29 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 31 1986
DATE

Mailed ~~To Parties~~:

Ronald L. Parks/k.s
OFFICE OF ADMINISTRATIVE LAW

sc

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

ELMER CORDA AND MARTHA GUNNING, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO AND individual board members, MAUCIE MILLER ET AL., BURLINGTON COUNTY, RESPONDENTS.	:	DECISION

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

Petitioner Gunning excepts to the ALJ's factual findings and proffers the following:

> 1. Oliver, Pressley, Davis and Paige ran as a slate and were elected to the Board by the voters at the annual school election held in April 1986. (Petitioner Gunning's Exceptions, at p. 1)
>
> 2. ***[I]t is not noted that during the first public comment portion [of the 5/19/86 meeting], members of the public requested that Linda Good be appointed that evening to fill the vacancy because she placed fifth in the election. (The next highest vote getter) The motion to appoint Linda Good was in response to the public's request. (Id., at pp. 1-2)
>
> 3. Maucie Miller was campaign treasurer for the slate, Oliver, Pressley, Davis and Paige. (Id., at p. 2)
>
> 4. ***Mrs. Gunning was not in the room when the Board president asked for nominations from Board members. Mrs. Gunning left the dias (sic) at the beginning of the public comment portion of the meeting. (emphasis in text) (Id., at p. 2)
>
> 5. ***(1) Mrs. [Muller], in accordance to Board practice was acknowledging that a quorum no longer existed at the time the fifth Board member, Mr. Corda left the dias (sic), when she was directed by Mr. Oliver to "call them."

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

> (2) Mrs. [Muller] only polled the four Board members seated at the dias (sic). (3) She had announced four voting when Mr. Paige told her to "Call Mr. Corda." (emphasis in text)
> (Id., at p. 2)

> 6. The petitioner was never informed that the Board, upon the advice of counsel, declared a ten minute recess to await the return of Gunning, Wisniewski and Corda. (Id., at p. 2)

> 7. ***(1) If a quorum was not needed to swear Mr. Miller in, the morning of June 16, 1986, why would a quorum be needed the evening of June 16, 1986? (2) Petitioner never knew of a possible boycott by any Board member. (3) Why weren't all of the Board members informed that Mr. Miller was being sworn in during the morning of June 16, 1986? (Id., at p. 3)

Petitioner Gunning posits the following exceptions/ corrections to what she avers is the ALJ's legal analysis:

> 1. Gunning and Wisniewski did not leave the meeting room after the motion to appoint Miller to the vacancy was made and seconded. Mrs. Gunning was not in the room when the motion was made and seconded. (Id., at p. 3)

Petitioner Gunning posits the following summary questions:

> 1. At what point during a meeting is a quorum broken?
>
> 2. How can "the total evidence strongly [suggest] that when Wisniewski saw Whitehurst was absent from the meeting, he devised in his mind the plan of encouraging Gunning and Corda to leave the meeting room thereby breaking the quorum in order to frustrate the business of the Borad (sic)" if there wasn't any communication between Gunning and Wisniewski?
>
> 3. How could Wisniewski "successfully [encourage] Gunning" to depart the meeting room if she was not there?
>
> 4. Was the transcript of the October 31, 1986 (sic) used as a reference when the Initial Decision was being written? (Id., at p. 4)

Finally, in summary, Petitioner Gunning requests that the issue of when a quorum is broken be reviewed and that the ruling that Gunning and Wisniewski acted in bad faith be wholly rejected.

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

Intervenor Gilbert's exceptions are noted wherein he expounds on his allegation that the tenure proceeding against him certified by the Willingboro Board was tainted because the Board therein also acted "without a quorum." (Intervenor Gilbert's Exceptions, ante) However, in reference to the exceptions submitted by Intervenor Gilbert, the Commissioner is in complete agreement with ALJ McKeown that Intervenor Gilbert "offered no independent evidence relevant to the issues in this case." (Initial Decision, ante) Moreover, the Commissioner finds that the ALJ fully explicated and correctly granted summary judgment against Intervenor Gilbert's motion averring that appointee Miller is not qualified to sit on the Board by virtue of an asserted conflict of interest, another matter raised in his exceptions. No other matter raised by Mr. Gilbert on motion or in his exceptions has bearing on this Petition of Appeal, but rather pertains to his tenure hearing, dating back to 1980. The Commissioner, therefore, adopts as his own those rulings made by ALJ McKeown on motion in this matter. Said matters again raised by way of exception are similarly found to be without merit and are not made part of the consideration of this Petition of Appeal.

Upon review of the record herein, which, it is noted, does not include a transcript of the proceedings below, the Commissioner is fully in accord with the ALJ that the appointment of Maucie Miller by the Willingboro Board of Education on June 12, 1986 to fill a vacancy created by the resignation of Patricia Harper is valid and lawful in that it was approved by the Board by four affirmative votes. Upon his careful reading of the record, including P-1 and C-1, the minutes of the Board meetings dated June 12, 1986 and May 19, 1986, respectively, the Commissioner is convinced, as was the ALJ below, that there were, in fact, five Board members present at the time the roll call vote was taken. Said roll call vote established that Maucie Miller be appointed to fill the vacancy with 4 members in favor, one member abstaining.

There is also ample evidence in the record for the Commissioner to find, as did the ALJ, that by leaving the room when it was plain that it was time to vote on the motion to appoint Maucie Miller, Board members Gunning and Wisniewski "deliberately attempt[ed] to subvert the official business of the public body on which they [sat]***." (Initial Decision, ante) None of Mrs. Gunning's allegations contained in her exceptions can suggest a contrary finding, since there was no substantiating evidence provided to bolster her assertions. Absent such evidence, the Commissioner will not substitute his judgment for that of the trier of fact. See Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976) wherein it is stated:

> We are mindful that the standard of judicial review of factual determination made by an administrative agency is rather narrow, i.e., whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole

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

> and with due regard to the opportunity of the one who heard the witnesses to judge their credibility. See, e.g., Jackson v. Concord Co., 54 N.J. 113, 117-118 (1969). (emphasis in text)

The Commissioner further notes that at any time when a poll of the membership of a board is taken and a quorum present, the public business may be conducted. See N.J.S.A. 18A:10-6. So long as the member is not disqualified from voting, his abstaining from so voting does not affect the quorum. See King v. New Jersey Racing Commission, 103 N.J. 412, 417 (1986), quoting Aurentz v. Planning Board of Township of Little Egg Harbor, 171 N.J. Super. 135, 141 (Law Div. 1979). Thus, as to the ultimate issue in this matter, namely, whether there was a quorum of the Board present on the evening of June 12, 1986 as contended by the Willingboro Board, the Commissioner affirms the finding of the ALJ who held that Board member Corda, by virtue of his presence in the room and his response to the Board president's query as to his vote, was indeed present, notwithstanding his refusal to vote. Thus, he did, in fact, constitute the fifth member necessary for the Board to conduct its business.

The Commissioner decries the machinations that underlie this Petition of Appeal. The appeal herein is a consequence that is a direct outgrowth of an action of petitioners' own authorship--that is, departing the room just before voting was to take place. The Commissioner agrees wholeheartedly with ALJ McKeown that "bad faith is manifest when Board members, here Gunning and Wisniewski, deliberately attempt to subvert the official business of the public body on which they sit***." (Initial Decision, ante)

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

COMMISSIONER OF EDUCATION

February 5, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4481-86
AGENCY DKT. NO. 224-6/86

DONALD CAIN,
Petitioner,
v.
LAKEWOOD TOWNSHIP BOARD OF EDUCATION,
Respondent.

James M. Blaney, Esq., for petitioner (Starkey, Kelly, Blaney & White, attorneys)

Richard K. Sacks, Esq., for respondent (Sharkey & Sacks, attorneys)

Record Closed: November 20, 1986 Decided: January 2, 1987

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

Donald Cain (petitioner) a teacher in the employ of the Lakewood Township Board of Education (Board) for the past 18 years, claims the action of the Board taken March 24, 1986 by which an adjustment salary increment for 1986-87 was withheld from him is arbitrary, capricious and unreasonable. Petitioner seeks an Order from the Commissioner of Education by which the Board would be directed to grant him the adjustment salary increment. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted September 4, 1986 and the matter was scheduled and heard October 30, 1986 at the Ocean County Administration Building, Toms River. The record closed November 20, 1986 upon the expiration of time within which the Board was to reply to petitioner's filed memorandum.

New Jersey Is An Equal Opportunity Employer

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

BACKGROUND FACTS

The background facts not in dispute between the parties and as established by a preponderance of credible evidence are these. The superintendent advised petitioner by letter (P-3) dated March 25, 1986 of the following:

> This is to inform you that the Lakewood Board of Education, at its public meeting on Monday, March 24, 1986, voted the withholding of your adjustment increment for the 1986-87 school year.
>
> The reason for this action is your deliberate refusal and delay in following proper administrative direction to provide homebound instruction in a timely manner.

Petitioner was noticed (P-2) on March 21, 1986 that the Board intended to discuss the withholding of an adjustment salary increment for 1986-87 on March 24, 1986 and that the meeting would be held in closed private session, unless petitioner wanted the matter discussed publicly. Petitioner denies that he deliberately refused or delayed in following proper administrative direction to provide homebound instruction in a timely manner and that the underlying reasons for the controverted Board action herein are not true in fact.

ISSUE

Teaching staff members are not automatically entitled to salary increments. The determination to withhold salary increments is a matter of managerial prerogative which has been delegated by the Legislature to local boards of education. Bernards Township Bd. of Ed. v. Bernards Township Education Association, 79 N.J. 311, 321 (1971). N.J.S.A. 18A:29-14 provides

> Any board of education may withhold, for inefficiency or other good cause, the employment increment or the adjustment increment, or both, of any member in any year by recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with reasons therefor, to the member concerned * * *

The determination of an employing board of education to withhold salary increments from a teaching staff member may not be reversed unless the action is found

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

to be arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). Therefore, the issues in this case and as agreed upon at the prehearing conference conducted September 4, 1986 are these:

1. Whether petitioner's salary adjustment increment for 1986-87 was withheld by the Board in violation of N.J.S.A. 18A:29-14 because of any one of the following reasons if proven to be true:

   a. The reason or reasons for such action is or are false in fact;

   b. The action taken is arbitrary, capricious, unreasonable or otherwise illegal under the circumstances; or

   c. The Board failed to afford petitioner prior notice of the asserted reason used to withhold the increment with an opportunity to correct same before it actually acted to withhold said increment.

Petitioner carries the ultimate burden of persuasion by a preponderance of credible evidence on each of the foregoing issues.

BASIS OF BOARD'S ACTION TO WITHHOLD THE ADJUSTMENT INCREMENT

The evidence of record establishes the following facts upon which the Board determined to withhold an adjustment increment from petitioner.

Petitioner has been a high school science teacher in the Board's employ for the past 18 years. The general duties and obligations of all teachers in the Board's employ, including petitioner, are set forth in the job description (R-4) for "teacher". Among the duties and obligations set forth therein is the following:

> 10. Shares in responsibilities which contribute to the depth and scope of the total school program, including providing for instruction of homebound students from the teacher's regularly assigned class when no voluntary teacher can be secured for the task.

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

At the beginning of the 1985-86 academic year, one of petitioner's pupils assigned him for ninth grade chemistry, or Chemistry I, was J.H. On or about September 13, 1985, J.H. became ill and, consequently, ceased regular school attendance. Eventually, J.H. was in need of homebound instruction.

The superintendent explained that in the Lakewood school district homebound instruction is handled by the Office of Pupil Personnel. Item 10 of the Teacher's job description is interpreted to mean that if the Office of Pupil Personnel cannot secure on a voluntary basis the services of a properly certificated person to provide homebound instruction in a specific subject area, the regularly assigned teacher in that subject area is obligated to provide the necessary instruction. By local Board policy, the Office of Pupil Personnel has five school days from the date a request for homebound instruction is received to the date it must ensure that a teacher is assigned to begin such instruction. The schedule of homebound instruction is arranged between the teacher and the parents of the pupil involved. Homebound instruction may be provided at any time the teacher has available, including weekends and holidays. While the superintendent expects each teacher to provide the pupil at least four hours of instruction each week, he acknowledges that his own administrative regulation allows a minimum of two hours instruction per week to a maximum of 10 hours per week.

There is some dispute regarding the date petitioner was notified of the need of homebound instruction for J.H. The secretary to the Director of the Office of Pupil Personnel, to whom the Director delegated the responsibility of securing necessary teachers for all homebound instruction needs, testified she notified in writing respective department chairpersons and regularly assigned subject area teachers on October 22, 1985 of J.H.'s need for homebound instruction. The evidence (R-6, pp. 3, 4, 5, 6, 7) of record supports the secretary's testimony in this regard for the teachers of J.H. in American History I and English III. Two documents (R-6, pp. 4 and 5) show J.H.'s need for homebound instruction was brought to the attention of her teachers for Intermediate Algebra and Spanish II on October 22, 1985. Nevertheless, the written notice to petitioner for Chemistry I and to his department chairperson is dated October 30, 1985 (R-6, p. 1) (P-1). The secretary could not explain the difference in dates between the notice sent to petitioner and all other subject areas teachers other than to surmise that the October 30 notice to petitioner was the second notice to him. The evidence of record simply does not support the secretary's contention in this regard. After the need for homebound instruction for J.H. passed and she returned to regular school attendance, the secretary

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

prepared a memorandum (R-5) for the Director on January 16, 1986 to the high school principal in which she states, among other things, "Mr. Cain [petitioner] was notified on October 30, 1985 that [J.H.] was to receive Homebound Instruction * * *" (R-5). The date of the notice is October 30. Petitioner received the notice October 31. Accordingly, the date petitioner was notified of J.H.'s need for homebound instruction was, I find, October 31, 1985 when he received the notice.

Although the high school principal did not testify before me, the superintendent testified that on the strength of the memorandum (R-5) the principal recommended to him that any salary increment otherwise due petitioner for 1986-87 be withheld. The superintendent testified that the Director of the Office of Pupil Personnel, who did not testify before me, told him that petitioner caused unnecessary delay in beginning homebound instruction for J.H. in Chemistry I. The superintendent, who did not speak with petitioner about the matter of homebound instruction for J.H. in Chemistry I, relied upon the statements of the high school principal and the Director in conjunction with the memorandum prepared by the secretary to conclude that petitioner deliberately refused and delayed in following proper administrative direction to provide homebound instruction to J.H. in a timely manner. The superintendent recommended to the Board that it withhold a salary adjustment increment from petitioner for 1986-87. The Board, of course, adopted the superintendent's recommendation on March 24, 1986.

The memorandum (R-5) prepared by the secretary for the Director was presented to the high school principal and read by the superintendent. There is no evidence to show the memorandum was shared with the Board. It provides in full as follows:

> As we have previously discussed, there have been concerns regarding the Homebound Instruction for [J.H.] in the subject of Chemistry I.
>
> Our records do not reflect the exact dates; however, I have attached a copy of the memo that was sent to the teacher and list the sequences (sic) of events.
>
> 1. Mr. Cain was notified on October 30, 1985 that [J.H.] was to receive Homebound Instruction.
>
> 2. He wanted to know what was wrong with her. It was explained that she had a virus, according to the doctor's note. He was not quite sure what was wrong with her but thought it was mono.
>
> 3. A few days later Mr. Cain came into Pupil Personnel Services wanting to see the doctor's note stating that AIDS is also a

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

virus and he would not go to the home. He was told that it was mono.

4. He asked if she was contagious. He indicated that he wanted a copy of the doctor's note and wanted to call the doctor and talk to him.

5. I [the Director] came out of my office and tried to talk to Mr. Cain quietly, explaining that we would have to get the parents' approval first before he could speak to the doctor because it was confidential. He was afforded the opportunity to read the note.

6. Mr. Cain was quite unwilling to tutor [J.H.].

7. I told him if there was a chance of him catching something we would not provide the service until the contagious stage has passed.

8. Mrs. DiGioia [the secretary] called the doctor and requested another note stating she was not contagious.

9. A month later Mr. Cain called Mrs. DiGioia and told her he would not tutor because he heard [J.H.] had strept throat. He heard it from another student.

10. A call was placed to the doctor plus [J.H.]. He was fine and didn't have strept throat.

11. Mrs. DiGioia called Mr. Cain back and told him [J.H.] didn't have any throat infection.

12. He just laughed and said OK.

My primary concern is for the student. At a time when she was not feeling well she also had to deal with the burden of being encouraged to drop a course that she knew she needed. As a result, she received a total of 3 hours for Chemistry I, which put her in a difficult situation upon her return to school.

While the evidence does not show the Board reviewed this memorandum, the memorandum was used by the superintendent to conclude petitioner not only caused a delay in affording J.H. homebound instruction but that the instruction he did provide was only 25 percent of what other instructors afforded her. The superintendent explained that the purpose of teachers is to serve pupils. In this case, the superintendent believed J.H. was suffering from mononucleosis, a debilitating affliction. In his view, J.H. was already depressed from that illness and she should not be discouraged by her teacher delaying homebound instruction. Nevertheless, the superintendent did not consult with the pupil's physician nor the school medical inspector at any time.

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

PETITIONER'S PROOFS

A review of the evidence submitted by petitioner reveals the following facts which I **FIND** to be facts established by a preponderance of credible evidence. Petitioner and his wife are the parents of two girls, ages 16 and 19. The 16 year old girl lives at home while the 19 year old is away at college. Petitioner's wife's parents also live with petitioner and his family.

Petitioner testified that sometime during the week of October 21, 1985 he inquired of the guidance counselor regarding the continuing absence of J.H. The guidance counselor reported he would look into the matter. On October 31, 1985, petitioner was advised by the notice (P-1) dated October 30, 1985 that "A medical request has been received in my office for homebound instruction for [J.H.] * * *". When petitioner contacted the Office of Pupil Personnel that day as directed to arrange to begin homebound instruction for J.H., he talked with Mrs. DiGioia, the secretary to the Director.

In the meantime, petitioner had learned J.H. was suffering from mononucleosis. While he was arranging to begin homebound instruction for J.H. with Ms. DiGioia, he inquired of her the present state of health of J.H. because of his prior knowledge of mononucleosis. That fact coupled with the fact teachers provide homebound instruction on a close one-to-one basis in the home of the ill pupil caused petitioner concern for his personal well being. Though Mrs. DiGioia initially said J.H. had a virus, she then explained J.H. had mononucleosis although not the infectious variety. Petitioner then wanted to see the physician's note on J.H., which request was initially refused by Mrs. DiGioia and by the Director. Petitioner persisted because of the concern he had for his personal health and safety regarding possible exposure to infectious mononucleosis and the result, should he be so infected, upon his own family members. Finally, he was allowed to examine the note (R-7) dated October 21, 1985 from J.H.'s physican and upon which the Director of Pupil Personnel determined homebound instruction was appropriate for J.H. That note reads as follows:

> Possible infectious mono [mononucleosis]. She [J.H.] should be excused from school until further notice.

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

In the bottom of the note is written in seeming different handwriting than the body "(not contag)". After having read the note, petitioner determine he should not enter J.H.'s home and so advised Ms. DiGioia. Petitioner then returned to his regularly scheduled class.

October 31, 1985, the day the foregoing events occurred, was a Thursday. Petitioner heard nothing more regarding homebound instruction for J.H. that day nor the following day, Friday, November 1, nor on the following Monday, November 4. On November 5, 1985, petitioner was advised by Ms. DiGioia in a telephone call that she, DiGioia, had another physician's note (R-8) which purportedly affords J.H. a "clean bill of health". No further contact was had that day nor the following day, November 6, by petitioner with Ms. DiGioia regarding homebound instruction for J.H. The New Jersey Education Association Teachers' Convention was held November 7 and 8, 1985 and, consequently, school was closed. The following Monday, November 11, school was also closed because of Veterans' Day. On November 12, 1985, petitioner reported to Ms. DiGioia at the Office of Pupil Personnel in order to arrange homebound instruction for J.H.

It is noted that the second physician's note (R-8) regarding J.H. states J.H. was suffering from "persistent viremia (not contagious)". Petitioner actually began providing J.H. homebound instruction at her home on November 14, 1985. During the course of this first session, petitioner recommended to J.H. that she drop the chemistry course. He made the same recommendation to J.H.'s counsellor after November 14, 1985. Petitioner explained that when he began homebound instruction with J.H. on November 14, she was extremely concerned because she was so far behind. She asked him what she could do. Petitioner afforded her three options: 1) do extra work in chemistry; 2) drop the course now and retake it later; or, 3) drop now and take the course at a community college in the summertime. On November 18, 1985 the science chairperson, who did not testify before me, gave petitioner a copy of six principles (R-2) upon which homebound instructin in the sciences is to be provided.

The next date following November 14, 1985 petitioner provided J.H. with homebound instruction was December 17, 1985. Petitioner explained that on at least four occasions during November and December 1985 he was unsuccessful in his attempts to arrange a suitable time to provide instruction to J.H. with her and her parents. Petitioner submitted one voucher for payment of homebound instruction he afforded J.H. in which he

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

claimed one and one-half hours on November 14 and one and one-half hours on December 17, a total of three hours instruction. (R-1). J.H.'s regularly assigned teacher for English III, Ms. Bryce, did not provide J.H. with homebound instruction; rather, a Ms. Audrey Askins, a properly certificated outside teacher provided J.H. with 14 hours in homebound instruction in English III (R-10, pp. 1-5). Pedro Canabal, not J.H.'s regularly assigned Spanish II teacher, provided J.H. with 20 hours in Spanish II instruction (R-10, pp. 6-10). Ms. Henry, J.H.'s regularly assigned teacher for Intermediate Algebra, provided J.H. with 13 1/4 hours instruction in that subject area (R-10, pp. 11-13). Finally, Jack Levine, not J.H.'s regularly assigned teacher in American History I, afforded J.H. eight and one-half hours instruction in that subject area (R-10, pp. 14-16).

After December 17, petitioner heard nothing more of the matter until sometime in February 1986 when the Director and his department chair told him that a salary increment would be withheld because he did not begin home instruction for J.H. quickly enough and because he had been indignant with the Director.

Petitioner's salary for 1986-87 would have been $2,200 higher than it presently is but for the action of the Board to withhold the adjustment increment from him.

This concludes a recitation of the facts of the matter according to the evidence of record.

DISCUSSION AND CONCLUSION

Boards of education are authorized to afford homebound instruction for its pupils at N.J.A.C. 6:28-4.2(b)5 which provides as follows:

> 5. Instruction provided in lieu of classroom instruction for pupils classified by the school physician as eligible for home instruction shall meet the following criteria: (emphasis added)
>
> i. Instruction shall be provided at the pupil's place of confinement.
>
> ii. The pupil shall be carried on an individual instruction register.
>
> iii. Instructional services shall begin within seven calendar days after eligibility has been established.

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

iv. The teacher providing instruction shall be appropriately certified for the subject or level in which the instruction is given.

v. The pupil shall receive a program that meets the requirements of the district board of education for promotion and graduation.

vi. Instruction shall be provided for no fewer than five hours per week. The five [hour] of instruction per week shall be accomplished in no fewer than three visits by a teacher on three separate days * * *

vii. Instruction may be provided for up to 60 calendar days in a school year. If the school physician believes that instruction for a longer period of time is indicated, referral shall be made according to N.J.A.C. 6:28-3.3 for determination by the child study team of eligiblity for special eduation and/or related services.

While it is clear boards of education may withhold employment increments or adjustment increments under N.J.S.A.. 18A:29-14, the standard of review to be applied in a teacher's appeal whose increment is denied is as stated in Kopera v. West Orange Bd. of Ed., supra. The essential elements of the standard of review are whether the underlying facts were as the board believed them to be and, if those facts did exist, whether the action of the board to withhold the adjustment increment is unreasonable on those facts. 60 N.J. Super. at 296-297.

On October 31, 1985, petitioner was confronted with his obligation to provide homebound instruction to J.H. who was diagnosed by her physician as suffering from 'possible infectious mononucleosis'. Petitioner is not a medical person despite the fact he and his wife have two children. Admittedly, petitioner has an obligation to pupils. Nevertheless, he has an equal if not greater obligation to his family. The medical diagnosis of J.H. as suffering from possible infectious mononucleosis, when seen by one not versed in the practice of medicine, would cause a reasonable person concern regarding the proximity of physical contact with the person so affected. In other words, given the circumstances on October 31, 1985 when the secretary first reported to petitioner J.H. was suffering from a "virus", to his verifying she was suffering from mononucleosis, coupled with the medical diagnosis she was suffering from possible infectious mononucleosis, and in the absence of either the director or the secretary having consulted with the school medical inspector regarding the risk of contagion of the disease, leads me to conclude that petitioner acted reasonably in his concern for his well being.

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

There is no evidence in the record that the director or her secretary consulted the school medical examiner to determine the risk of contagion to petitioner if J.H. was suffering from infectious mononucleosis nor is there evidence that the director or her secretary shared with the school medical examiner the medical note submitted on behalf of J.H. for homebound instruction to determine whether homebound instruction was, in her case, suitable. Clearly, petitioner's request for clarification of the illness suffered by J.H. was reasonable in the circumstances. It is not petitioner's obligation to consult with the school medical examiner; it is the obligation of school authorities to consult with the school medical examiner prior to exposing any of its teaching staff members to an unnecessary health risk. Whether petitioner was, in fact, exposed to a health risk in this case is not a finding which need be made here.

When the secretary secured the second medical note regarding J.H. that note advised J.H. was suffering from persistent viremia which was identified as not being contagious. Petitioner was so advised of that diagnosis on November 5, 1985. While petitioner did not report to the Office of Pupil Personnel until November 12 to arrange for homebound instruction, it must be remembered that school was closed November 7, 8 and 11. Consequently, I cannot conclude petitioner deliberately refused or impeded the Office of Pupil Personnel from arranging for homebound instruction in Chemistry I for J.H. on these facts.

It is true that petitioner recommended to J.H. on November 14, the first homebound instruction session with her, that she drop the chemistry course. The evidence before me is that that recommendation was not a unilateral recommendation on petitioner's part. Rather, J.H. complained that she had missed so much class instruction from the middle of September that she was concerned whether she could ever catch up. Petitioner not only recommended that J.H. drop the chemistry course, he offered her the alternative of doing extra work in chemistry. Consequently, I cannot conclude on these facts that petitioner deliberately discouraged J.H. during either one of the two sessions of homebound instruction he afforded her.

In regard to the three hours total instruction petitioner afforded J.H. on November 17 and December 17, 1985, the only evidence of record is that he unsuccessfully sought on eight occasions in November and in December to arrange suitable times with J.H. and her parents to afford her instruction in chemistry. I must **CONCLUDE**, absent testimony from J.H. or her parents, that petitioner made a good faith effort in arranging

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

homebound instruction with J.H. and with her parents but for reasons not attributable to petitioner a schedule of instruction could not be successfully arranged. Consequently, the fact that petitioner afforded J.H. three hours of homebound instruction in Chemistry I should not now be used against him.

In regard to the memorandum (R-5) prepared for the director by the secretary and submitted to the high school principal and read by the superintendent, the evidence shows petitioner was notified on October 31, 1985 of the need to provide J.H. homebound instruction; he was not notified on October 30, as is asserted. On October 31, 1985, petitioner persisted in learning the illness from which J.H. was suffering and it was on that day, not days later, that he was successful in seeing the medical note. The proofs do not show, as the memorandum asserts, that petitioner wanted a copy of the medical note nor does the evidence show that he was "unwilling" to provide J.H. with homebound instruction. Neither the director nor the secretary have medical expertise so that the assertion 'if there was a chance of him catching something we would not provide the service until the contagious stage has passed' is meritless. Despite the inference which may be drawn from item 9 of the memorandum that petitioner waited one month to begin the homebound instruction when it is stated 'a month later Mr. Cain called Mrs. DiGioia and told her he would not tutor because he heard [J.H.] had strept throat', the evidence of record is to the contrary. There is simply no evidence that (1) it took petitioner one month from the time he was first notified on October 31, 1985 to begin homebound instruction with J.H., nor (2) is there evidence that on or about December 1, 1985 he refused to provide homebound instruction to J.H.

Based on the foregoing conclusions, I must ultimately **CONCLUDE** that neither the director nor the high school principal had a basis in reasonable fact upon which to conclude petitioner deliberately refused and/or delayed in following proper adminstrative direction to provide homebound instruction to J.H. in a timely manner. While there was some delay that delay was due to petitioner's reasonable concern for his personal health and safety. Consequently, the delay, which at best is several days, was not occasioned by his refusal to follow proper administrative direction. Proper administrative direction would have been for the director and/or her secretary to have first consulted with the school medical inspector to determine the risk of contagion of the teachers assigned a pupil suffering from possible infectious mononucleosis. The assertion "not contag" written in different handwriting on the first medical note (R-7) is insufficient to allay a reasonable person's concerns. School authorities also could have advised petitioner that if

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

he had any questions, they would arrange for him to consult with the school medical inspector. Having concluded that neither the director nor the high school principal had a reasonable basis in fact upon which to conclude petitioner deliberately refused or delayed in affording homebound instruction to J.H., I must further **CONCLUDE** the superintendent did not have a reasonable basis in fact upon which to arrive at the same conclusion. That being so, it follows that the Board of Education did not have a reasonable basis in fact to arrive at its conclusion to withhold petitioner's salary adjustment increment. Note that the sole reason the Board acted to withhold petitioner's adjustment increment was his asserted deliberate refusal and delay in affording J.H. homebound instruction. But for that reason, the evidence shows petitioner would have been entitled to the adjustment increment.

Having found the Board ultimately had no reasonable basis in fact upon which to conclude petitioner deliberately refused and delayed in providing J.H. instruction, the action of the Board in withholding that increment is, I **CONCLUDE**, unreasonable, not being supported by fact. The action must be and is **REVERSED**. Accordingly, the Lakewood Township Board of Education is hereby **ORDERED** to grant Donald Cain the salary adjustment increment for 1986-87 it withheld from him on March 24, 1986. Petitioner's request for counsel fees is **DENIED**. The Commissioner has held he has no authority to award counsel fees.

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

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

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

January 2, 1987
DATE

DANIEL B. MC KEOWN, ALJ

JAN - 5 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 7 1987
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

sc

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

DONALD CAIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Board acknowledges that the ALJ correctly recited the burden of proof with respect to an appeal from the withholding of an increment but maintains that the application of it was inappropriately determined.

The Board avows that it had the unequivocal right to assign home instruction to petitioner in this matter and that such assignment was a valid exercise of its prerogatives, consistent with petitioner's job description and district policies. Further, it contends that it never suggested that petitioner's concern for his and his family's health was unwarranted. Rather, it reiterates that he unduly delayed providing homebound instruction, particularly after it was documented that J.H. was not contagious.

The Board argues that petitioner's 3 hours of homebound instruction were consistent with "his unannounced decision not to provide the instruction or, at least, to suffer as little inconvenience as possible." (Exceptions, at p. 2) In support of this, it points out that other teachers were able to provide instruction from 8 to 14 hours and what it terms as "half-hearted" at best his attempts to schedule the instruction. In addition, it avers that the ALJ disregarded the effect of petitioner's conduct upon the student.

Petitioner rejects the arguments advanced by the Board, asserting that the Board was proven to have acted without a rational basis in withholding his increment in that the proofs demonstrate that it relied upon inaccurate and false information. He maintains that it is "more factually accurate to portray [his] actions in this matter as reasonable and more appropriate for the general health and well being of all concerned than that of the administration." (Reply Exceptions, at p. 2)

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

Upon a review of the record, the Commissioner concurs with the ALJ's conclusion that given the circumstances, particularly the absence of any indicator that the medical inspector had determined J.H. to be contagion free, petitioner did not unduly delay commencing home instruction. He likewise concurs that, given the dates schools were closed in early November, it cannot be said petitioner deliberately refused or impeded home instruction for J.H. prior to November 12, 1985. He cannot, however, accept the conclusion of the ALJ that petitioner has met his burden of proof that he made a good faith effort to fulfill his responsibility to provide home instruction for the remainder of the period of time in question given the record before him as explained below.

Not only are boards of education "authorized" to afford home instruction by virtue of N.J.A.C. 6:28-4.2(b)5 as noted by the ALJ (Initial Decision, ante), they are required to provide it. Further, the district is mandated to provide the student a program of home instruction that meets the district's requirements for promotion and graduation. N.J.A.C. 6:28-4.2(b)5v Thus, the "amount" of instruction must be sufficient to enable the pupil to meet those requirements.

Petitioner was designated the responsibility of providing home instruction to J.H. as clearly delineated in his job description and by Board policy. He had the responsibility to arrange the specific schedule for providing that instruction. He by his own actions was fully cognizant that a delay had already occurred in the provision of that instruction, albeit that the delay was deemed to be reasonable up to November 12, 1985 as noted above. This delay factor did serve, however, to make the provision of home instruction in a timely manner particularly imperative so as to meet the requirements of N.J.A.C. 6:28-4.2(b)5.

Given the absence of a transcript and the lack of clarity in the initial decision as to petitioner's efforts to meet his professional obligation to provide home instruction post-November 12, the Commissioner finds it necessary to remand the matter for supplementing the record and the rendering of specific findings of fact with respect to that issue. One page of the initial decision, ante, states that he made at least four unsuccessful attempts to arrange said instruction, yet another page indicates there were eight unsuccessful occasions. What scant information is provided appears to rest solely on petitioner's own assertions. Absent a transcript or specific findings of fact, the Commissioner is uncertain as to why, how, and under what circumstances these unsuccessful attempts were made by petitioner, particularly when he alone out of five subject matter teachers experienced this alleged lack of success. Was there testimony adduced as to times and dates of his attempts? Was a log kept? Or were there merely assertions made by petitioner, unverified by any other evidence or testimony? This information is critical to a determination as to whether petitioner has borne his burden of proof that the Board's action was arbitrary or without rational basis.

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

Moreover, the record is void of any information with respect to petitioner's efforts to report to his superiors his alleged inability to fulfill his legal, professional and policy obligations for providing home instruction. Petitioner is a professional teacher of 18 years' standing who knew he had an ill student he had the responsibility to instruct. If he were unable to fulfill that responsibility, he had an obligation to so inform his superiors and it is he who bears the burden of proof to demonstrate he fulfilled this obligation as well.

Given the above, the Commissioner remands the matter pursuant to N.J.S.A. 52:14B-10 to supply the record with the following:

1. What specific evidence exists to demonstrate/document that petitioner did in fact make a concerted conscientious effort to fulfill his legal, professional and policy obligation to provide J.H. home instruction pursuant to the requirements of N.J.A.C. 6:28-4.2(b)5.

2. What specific efforts did petitioner undertake to inform his superiors that he was unable to fulfill his teaching responsibilities to J.H.?

Again, the Commissioner stresses that the burden of proof in this matter rests not with the Board but with petitioner. As expressed by the New Jersey Supreme Court in Bernards Twp. Bd. of Ed., supra, an increment is not an entitlement but a reward for meritorious service. While a board's discretion to grant such increment is not unfettered, it is accorded a presumption of correctness unless petitioner is able to demonstrate that the action was arbitrary or without rational basis. Kopera, supra

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 10, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2488-86
AGENCY DKT. NO. 80-3/86

STELLA COSMAS, TRUDI KASTRIOTIS, LAURA MASTER AND SHARON TUMMILLO,
Petitioners,
v.
MOUNT ARLINGTON BOARD OF EDUCATION,
Respondent.

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

Paul E. Griggs, Esq., for respondent
(McConnell, Norton & Smith, attorneys)

Record Closed: September 19, 1986 Decided: January 5, 1987

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

Statement of the Case

This is an appeal to the Commissioner of Education by four part-time teachers who seek compensation and benefits comparable to full-time teachers. During the 1985-86 school year, petitioners were employed part-time by the Mount Arlington Board of Education ("Board") either as remedial or enrichment teachers. They seek pro rata placement on the negotiated salary guide and credit for accumulated sick leave days. Three issues are raised: (1) whether petitioners are entitled by law to parity of salary and benefits with full-time teachers; (2) whether petitioners hold de facto employment

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

entitling them to equal pay under N.J.S.A. 18A:16-1l; and, (3) whether the present salary arrangement is invalid because of the Board's failure to adopt a written statement of its policy.[1]

Procedural History

On March 18, 1986, petitioners filed a verified petition with the Commissioner of Education. Respondent Board filed its answer on April 7, 1986. Subsequently, on April 10, 1986, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case. The Office of Administrative Law held a hearing on August 4, 1986, at which the parties agreed to proceed on a stipulated set of facts rather than present any testimony. Upon receipt of the final paper from the parties, the record closed on September 19, 1986. Time for preparation of the initial decision has been extended to January 5, 1987.

Findings of Fact

All of the relevant facts are undisputed. From the stipulation of facts prepared by the parties, I FIND the following:

The Board hired petitioners on a part-time basis as remedial or enrichment teachers. Each possessed an instructional certificate properly endorsed for the duties to which she was assigned. Stella Cosmas began working for the Board in 1984-85 as a teacher in the gifted and talented program. In 1985-86, Cosmas worked 19 hours per week and received an annual salary of $7,560. Trudi Kastriotis started her employment in 1978-79 as a Title I reading teacher at an hourly rate. She continued in that capacity for the next three years, then worked one year as a supplemental teacher and two years as a Chapter I teacher. More recently, in 1985-86, Kastriotis taught basic skills for 19 hours per week at an annual salary of $10,000. Laura Masters was first employed in 1984-85 as a supplemental teacher. Next year, in 1985-86, she taught basic skills for 19 hours per

[1]Although the third issue does not appear to be framed by the pleadings or prehearing order, it nevertheless has been briefed by the parties and will be considered.

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

per week and earned an annual salary of $6,480. Sharon Tummillo commenced in 1983-84 and spent two years as a teacher of conpensatory education. By 1985-86, she too was teaching basic skills for 19 hours per week and making an annual salary of $6,480.

None of petitioners are members of the majority representative unit for collective negotiations. Classroom teachers, who belong to the unit and worked only part-time in 1985-86, were paid the factional equivalent of a full-time position on the salary guide. In addition, a remedial teacher working full-time as a basic skills instructor in 1986-87 will be paid in accordance with the salary guide.

Since this appeal was filed, the Board notified Master and Tumillo that it would not renew their employment for the 1986-87 school year. Consequently, both Master and Tumillo are no longer employed by the district. Their claim for salary is limited to difference money damages for the 1985-86 year. For 1986-87, the Board has assigned Kastriotis to a full-time classroom teaching position. As a full-time employee, Kastriotis is being paid on the salary guide. Her salary claim is also limited to damages for 1985-86. Only Cosmas is currently employed by the Board in a part-time position. Effective March 1, 1985, the Board recognized petitioners' right to receive one sick leave day per month for 1985-86 and ten days per year thereafter. However, the Board still refuses to credit petitioners with any sick days accumulated prior to March 1, 1985.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that petitioners are not entitled under the education laws to pro-rata placement on the salary guide for full-time teachers; but, nevertheless, that those petitioners currently employed by the Board have a statutory right to credit for accumulated sick leave days.

It is now settled that part-time remedial or supplemental teachers are "teaching staff members" and may acquire tenure status if they satisfy the criteria set forth in the tenure law. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1962). Likewise, in Rutherford Ed. Ass'n v. Rutherford Bd. of Ed., 99 N.J. 8 (1985), the Supreme Court extended

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

retroactive relief, including back pay for the immediately preceding six years, to Title I teachers who had appeals pending on the date of the Spiewak decision. Neither Spiewak nor Rutherford, however, answered the question of what, if any, benefits the prevailing parties were entitled to, an issue which the Court in Spiewak regarded as "primarily a matter of contract." 90 N.J. at 84, fn. 3.

Instead, the State Board of Education addressed that precise issue in Hyman v. Teaneck Bd. of Ed., 1986 S.L.D., ____ (St. Bd. March 6, 1985), aff'd No. A-2508-84T7 (App. Div. Feb. 26, 1986), certif. den. 104 N.J. 469 (1986). In Hyman, the State Board considered whether part-time supplemental teachers, who were covered by a separate negotiated guide or not covered by any guide, are entitled to placement on the guide for "regular" teaching staff members. Its analysis included a review of the statutes applicable to compensation of teaching staff members. N.J.S.A. 18A:16-1 authorizes boards of education to employ teachers and to "determine, fix and alter their compensation" subject to the provisions of Title 18 and other law. N.J.S.A. 18A:29-4.1 provides, in part, that "[a] board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law."[2] Rejecting arguments virtually identical to those made by petitioners in the instant case, the State Board concluded that:

> . . . the statutes governing compensation apply only to full-time teaching staff members and, therefore, do not confer the right to placement on any salary guide to part-time teachers. Further, there is no requirement that a board adopt a salary policy for its full-time teaching staff members, although it is authorized to do so under N.J.S.A. 18A:29-4.1. (Slip op. at 10.)

---

[2]As to these other laws, the State Board referred to statutes establishing minimum requirements for any salary schedules, which statutes have since been repealed. N.J.S.A. 18A:29-6 to 18A:29-8. (L. 1985, c. 321). Also, the State Board made mention of the statute establishing a minimum salary of $2,500 for any teacher not covered by a salary schedule, which statute has since been amended to fix a minimum salary of $18,500 for any "full-time" teaching staff member. N.J.S.A. 18A:29-5.

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

Recently, in Bergenfield Ed. Ass'n v. Bergenfield Bd. of Ed., 1986 S.L.D. ___ (St. Bd. Sept. 5, 1986), the State Board reiterated that "the education laws do not prescribe any standards governing the rate or manner of compensation of teaching staff members who are not full-time." (Slip op. at 16). Subsequent to Hyman, the Commissioner of Education has consistently followed the same approach. Veldran v. Franklin Borough Bd. of Ed., 1986 S.L.D. ___ (Comm'r of Ed. May 15, 1986); Connor v. River Vale Bd. of Ed., 1986 S.L.D. ___ (Comm'r of Ed. Feb. 18, 1986). Such authoritative rulings are, of course, dispositive of petitioners' claim that they are entitled to pro rata placement on the salary guide.

Nor do petitioners fare any better on their claim that they are entitled to relief by virtue of N.J.S.A. 18A:16-11, which allows de facto school employees to recover appropriate "emoluments and compensation" in "any court of competent jurisdiction." Generally, a de facto public employee is one who has apparent authority to perform the duties of an office; who assumes such duties without fraud or dishonesty; and who is later determined to have been illegally appointed. Miller v. Bd. of Chosen Freeholders, 10 N.J. 398, 407-410 (1952); Freudenrich v. Mayor and Council of Fairview, 14 N.J. Misc. 804, 187 A. 555 (Sup. Ct. 1936). Here, however, petitioners were properly appointed by the Board to part-time positions at agreed hourly or annual salaries consistent with the school laws. (Exhibits J-18 to J-35). There was nothing "defective" or "sham" about their appointments merely because their salaries were less than the amount paid to part-time classroom teachers or full-time remedial teachers. Nothing on the record suggests that petitioners were performing different duties from those for which they were hired. Thus, the situation is readily distinguishable from Dandorph v. North Bergen Bd. of Ed., 1980 S.L.D. ___ (Comm'r of Ed. Oct. 27, 1980) (unpublished), where an employee with the title of vice principal was doing the actual duties of a principal. Simply stated, the doctrine of the de facto governmental employee has no application whatsoever to the facts of the instant case.

As previously noted, N.J.S.A. 18A:29-4.1 permits, but does not compel, local boards of education to adopt a formal salary policy. Insofar as the school law is concerned, a local board is not prohibited from setting salaries through collective negotiations or by entering into individual contracts with persons unrepresented by any

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

negotiating unit.[3] Petitioners' reliance on the line of cases invalidating secret or unwritten policies is misplaced. Unlike McAllen v. North Arlington Bd. of Ed., 1975 S.L.D. 90 (Comm'r of Ed. 1975), aff'd 1975 S.L.D. 92 (St. Bd. 1975), this is not an instance where the school administration exceeded the bounds of authority granted to it by the board. Unlike Ross v. Rahway Bd. of Ed., 1968 S.L.D. 26 (Comm'r of Ed. 1968), aff'd 1968 S.L.D. 29 (St. Bd. 1968), this is not an instance where "traditional past policy" may have been known to the parties themselves but was concealed from everyone else. Rather, the Board's action to appoint petitioners at a given salary was taken at its public meetings and was reflected in its minutes open to the public inspection. (J-2 to J-17).

Lastly, there remains petitioners' claim for sick leave credit. Pursuant to N.J.S.A. 18A:30-2, "all persons holding any office, position or employment in all local school districts . . . who are steadily employed by the board of education . . . shall be allowed sick leave with full pay for a minimum of 10 school days in any school year." Indisputably, petitioners hold steady employment in the district and, therefore, qualify for this statutory benefit, regardless of what contractual rights they may or may not possess. An award of sick leave credit must be made in the form of days held for future use rather than cash payments for prior absences. Arndt v. Rockaway Bd. of Ed., 1984 S.L.D. ___ (Comm'r of Ed. Nov. 2, 1984). Accordingly, those petitioners still employed by the Board, namely Cosmas and Kastriotis, are entitled to credit for accumulated sick leave days from their initial date of employment. Because Master and Tummillo are no longer employed by the district, their claims for sick leave credit have become moot.

Order

It is **ORDERED** that the Board immediately adjust its personnel records to show six additional accumulated sick leave days for Cosmas and 64 additional accumulated sick leave days for Kastriotis.

---

[3]Disputes pertaining to wrongful exclusion from the negotiating unit are matters falling within the exclusive jurisdiction of the Public Employment Relations Commission. N.J.S.A. 13A:5.4(c). Veldran v. Franklin Borough Bd. of Ed., supra.

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

And it is further **ORDERED** that the remaining relief requested by petitioners is hereby denied.

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

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

1/5/87
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

JAN - 5 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 8 1987
DATE

Ronald J. Parks/K.S.
FOR OFFICE OF ADMINISTRATIVE LAW

al

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

STELLA COSMAS ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioners contend that the initial decision improperly denies them placement on the salary guide in existence in the district. They argue that where a Board establishes a mechanism for part-time teacher salaries it must apply to all similarly situated teachers. They cite Hyman, supra, as being consistent with this position because that decision stands for the proposition that if any full-time teachers are placed on salary guides, then all must be; thus, one may reach a similar conclusion insofar as part-time teachers are concerned. Therefore, since the Board pays part-time classroom teachers according to the negotiated salary guide, it may not grant lower salaries to them. Moreover, petitioners argue that because the ALJ rejected previous Commissioner decisions criticizing boards for utilizing unwritten salary restrictions, he misstates the scope of those decisions.

Upon review of the record, the Commissioner is in complete agreement with the ALJ's analysis and conclusion in this matter, finding nothing in petitioners' exceptions to persuade him that the ALJ in any way erred or that his determination warrants reversal. The decision is in keeping with Hyman, supra, and the long litany of post-Hyman decisions that have been rendered on full and part-time Title I basic skills/supplemental teachers' salary entitlement. Petitioners' "conclusion" that Hyman, supra, provides support for their position is entirely without any legal basis. The State Board of Education has expressly addressed the issue of salary entitlement for part-time teaching staff members in Bergenfield Education Association v. Bd. of Ed. of Bergenfield, decided by the State Board September 3, 1986. It reads in pertinent part:

> We reiterate that, although the education laws prohibit reduction in the compensation of any tenured teaching staff member, N.J.S.A. 18A:28-5, the education laws do not prescribe any standards governing the rate or manner of compensation of teaching staff members who are not full-time. See Hyman, supra. We further emphasize that compensation, like hours of employment, is a term and condition of employment and, within applicable

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

> statutory standards, is a mandatory subject of collective negotiation. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973). We therefore conclude that the education laws provide no basis for directing that Petitioners be compensated on the basis of the salary schedule applicable to classroom teachers***.
>
> (Slip Opinion, at pp. 16-17)

Thus, it is clear that there is no requirement under the education laws that all categories of part-time teachers be compensated at the same rate or in the same manner just as was found in Hyman, supra, with respect to full-time teachers. That some part-time teachers in the Mount Arlington District are paid according to the negotiated agreement between the Board and the Association, while petitioners are not, does not alter this determination. That the salaries paid to petitioners were unilaterally determined by the Board does not alter it either. Absent any violation to education law, the Board's apparent failure to negotiate the salary paid to petitioners presents no claim for which the school laws would provide a remedy. The negotiation process is not within the jurisdiction of the Commissioner, rather it falls under that of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Thus, if petitioners believe that there was a failure to negotiate on the part of the Board or other violation of that act, their recourse is to the Public Employment Relations Commission. See Bergenfield, supra.

Accordingly, the Commissioner adopts the initial decision as the final decision in this matter for the reasons expressed therein. The Board is ordered to carry out the ALJ's directive regarding sick leave credit. The remainder of the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

February 10, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4099-86
AGENCY DKT. NO. 169-5/86

ANN MARESCA,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY,
Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri and Pincus, attorneys)

John A. Moore, Esq., for respondent
(Moore & Kealy, attorneys)

Record Closed: December 16, 1986 Decided: January 7, 1987

BEFORE **PHILIP B. CUMMIS**, ALJ:

Ann Maresca, a tenured clerical employee of the Board of Education of the Hudson County Area Vocational-Technical School District, Hudson County, contends that her tenure rights under N.J.S.A. 18A:17-2 were violated by respondent, Hudson County

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

Area Vocational-Technical School District (Board), in eliminating her job as a account clerk/typist while at the same time promoting a nontenured employee Diana Incognito to the job of senior account clerk, which job petitioner contends does not differ from that of account clerk/typist. Petitioner seeks the job of senior account clerk as of April 16, 1986, plus a prorated amount of back pay at step ten of the 1986-1987 salary guide for senior account clerk. Petitioner further seeks any benefits which may have been reduced or lost as a result of respondent's actions. Such benefits would include a full allotment of sick leave, vacation time, insurance, pension benefits and interest pursuant to any administrative regulations.

The petition of appeal was filed on May 14, 1986, with the Bureau of Controversies and Disputes of the Department of Education. The respondent's answer to the petition was filed on June 17, 1986. Thereafter, the Commissioner of Education transmitted the matter to the Office of Administrative Law on June 23, 1986, for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held at the Office of Administrative Law on August 14, 1986 and an order entered establishing, inter alia, hearing dates of November 10 and 12, 1986. The hearing was held on November 10, 1986, and the record was held open to allow both parties to submit proposed finding of facts and briefs. The petitioner's brief was received on December 4, 1986, and the respondent's brief was received on December 16, 1986, at which time the record was closed.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties have stipulated to the following:

1. Petitioner was a tenured employee of the respondent and on April 15, 1986 received notice of the elimination of her clerical position effective May 16, 1986.

2. Diana Incognito, nontenured coworker who was also account clerk/typist was laid off on or about the same time as petitioner.

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

3. Diana Incognito after her layoff was rehired by the respondent in another clerical position (senior account clerk).

4. Diana Incognito is not a tenured employee pursuant to N.J.S.A. 18A:17-2.

5. Both the petitioner and Diane Incognito were 12-month employees of respondent.

All of the above having been stipulated as true by both parties, I accept their veracity and **FIND** them to be factual.

Based upon the testimony and joint exhibits 1 through 17, I make these additional findings of fact.

1. The petitioner is a high school graduate.

2. From 1969 to 1982 she was employed by the Newark-Hudson Jointure Commission where she prepared the payroll, notices, budget statements for 45 employees who were both salaried and hourly.

3. In 1982, the Newark-Hudson Jointure Commission closed down and the petitioner applied for and was hired by the respondent as an account clerk/typist.

4. The petitioner performed all the functions as designated in her job description (J-2) for respondent Vocational and Technical High School with the exception of handling petty cash, verifying bills and entering orders. Phyllis Brautitan another account clerk did the bills and orders.

5. A coworker, Diane Incognito, worked with petitioner from December 17, 1984, doing the exact same work as petitioner.

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

6. Diane Incognito is a high school graduate.

7. Diane Incognito worked as a bookkeeper, typist, accounts receivable and accounts payable clerk prior to working for respondent. Diane Incognito also used a keypunch computer at a prior job.

8. Diane Incognito had essentially the same work experience as petitioner.

9. The respondent resolved on March 19, 1986, to reduce the position of account clerk/typist by two and terminated petitioner's services effective April 21, 1986 (J-5 and J-6).

10. On April 2, 1986, by letter from Earl W. Byrd, Superintendent, petitioner was notified that her prior notification (J-6 and J-7) did not satisfy the respondent's due process goals and, therefore, her dismissal would be submitted on April 15, 1986, to the Board of Education for discussion and/or action (J-7 and J-8).

11. On April 15, 1986, the respondent eliminated the two account clerk/typist positions held by petitioner and Incognito (J-8, J-9, J-16). Petitioner was terminated effective May 16, 1986, under that resolution (J-8).

12. Incognito did not possess tenure status pursuant to N.J.S.A. 18A:17-2.

13. On March 20, 1986, the respondent posted a vacancy for the position of senior account clerk (J-3).

14. Petitioner applied for the position but was never interviewed by respondent nor was her application acknowledged in any way by respondent.

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

15. Incognito applied for the position of senior account clerk and was hired for that position by respondent.

16. The job description of senior account clerk is practically identical with the job description of account clerk/typist.

17. Incognito testified that the only change in her job since becoming a senior account clerk was that the work load was doubled. She is now doing not only the work that she had done previously, but she is also doing the petitioner's share of the work.

18. The job of senior account clerk does not differ from that of account clerk/typist and for all intense and purposes it is the same job that both petitioner and Incognito did prior to April 16, 1986.

19. There is no evidence that petitioner was unqualified to perform the duties of senior account clerk.

20. Petitioner was given credit for prior work experience and skills as evidenced by respondent's salary guide (J-14 and J-15).

21. For 1985 and 1986, the petitioner was compensated at step ten of the salary guide applicable to account clerk/typist in the amount of $19,156 (J-12).

22. A senior account clerk on the same step would have made $21,443 for 1985-1986 and $22,730 for 1986-1987 plus an additional $1,500 stipend for both the 1985-1986 and the 1986-1987 years respectively (J-12 and J-13).

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

23. Petitioner remained in her position up to June 30, 1986, continuing to perform her usual duties, despite the resoltuion terminating her employment as of May 16, 1986.

It also appears, and I so **FIND** that exhibits J-1 through J-17 are factual and I incorporate them as part of my findings in addition to the above statements as part of my findings of fact.

ARGUMENTS

Petitioner argues that as a tenured employee she is entitled to placement in the position of senior account clerk. Petitioner contends that she has a right to preferential employment over nontenured clerical employees and cites Sheridan v. Bd. of Ed., Twp. of Ridgefield Park, 1976 S.L.D. 995 where the Commissioner held that as a basic right, an employee tenured pursuant to N.J.S.A. 18A:17-2 is entitled to continued employment over a nontenured employee. Petitioner further relies upon Board of Education, Town of Kearny v. Horan et al., 11 N.J. Misc. 751 (Sup. Ct. 1933) and Seidel v. Bd. of Ed. of Ventnor City, 110 N.J.L. 31 (Sup. Ct. 1933) aff'd, 111 N.J.L. 240 (E. & A. 1933).

> The Board's desire to reduce its staff is not questioned . . . . Nevertheless, the Board, doubtless through nescience, when effecting that economy, failed to consider petitioner's tenure rights when it did not offer her the twelve-month position held by a non-tenured secretary in its employ. [Sheridan at 999]

See, Cummins v. Bd. of Ed., Twp. of No. Bergen, 1975 S.L.D. 271; Quinlan v. Bd. of Ed., No. Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962). Petitioner alleges that since both the position of senior account clerk and account clerk/typist were identical and since Incognito was not a tenured employee that petitioner must be given that position as a tenured employee. Golden v. Bd. of Ed. Borough of Manville, OAL DKT. NO. EDU 6242-84 (March 7, 1985) aff'd Commir of Ed. (April 22, 1985). The Commissioner continued, stating that:

> . . . Given the absence of any testimony or evidence in the record that petitioner does not possess the qualifications and skills necessary to fulfill the secretarial service provided to the Special Service Office, it is the determination of the Commissioner that

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

> petitioner was improperly denied a secretarial position in a part-time capacity which was held by a nontenured individual. [at 13.]

Petitioner next argues that her termination was arbitrary and capricious. Petitioner contends that the termination ignored her rights (as a tenured employee) to be placed in the position of senior account clerk further stating that decisions made by the Board must comply with the education law. N.J.S.A. 18A:11-1 and N.J.S.A. 18A:17-2 and all attendent rights thereunder. See, Seidel, Horan, Compton v. Bd. of Ed., Twp. of Hanover, 1972 S.L.D. 274, McKay v. Bd. of Ed. Boro. of Red Bank, 1972 S.L.D. 606, 610. See also, Downs v. Bd. of Ed., District of Hoboken, 13 N.J. Misc. 853 (Sup. Ct. 1935), aff'd, Fletchner v. Bd. of Ed., District of Hoboken, 113 N.J.L. 401 (E. &. A. 1934). Bd. of Ed. City of Garfield v. State Bd. of Ed., 130 N.J.L. 388 (Sup. Ct. 1943).

The petitioner next avers that the elimination of her position was done in bad faith. Petitioner points out that she was informed on March 18, 1986, that her position was abolished as of April 21, 1986 and that the respondent immediately posted a vacancy notice for the position of senior account clerk (J-5, J-6 and J-2). The petitioner next points to the fact that her application for the position of senior account clerk (J-4) was ignored while Incognito, a nontenured employee, was appointed to that new position effective April 16, 1986 (J-17 and J-16), and that at the same time, petitioner's actual termination date was May 16, 1986. In fact, the petitioner's services were not terminated until June 30, 1986, and up to that time, she continued in the same position. Therefore, the petitioner contends that she was a de facto employee pursuant to N.J.S.A. 18A:16-11 which states:

> A person who holds de facto in any office, position or employment in a school district and who performs the duties thereof shall be entitled to the emoluments and compensation appropriate thereto for the time the same is so held in fact and may recover therefor in any court of competent jurisdiction.

Petitioner maintains, respondent acted in bad faither in retaining her in the position of account clerk/typist after the position was abolished and she was given notice of termination. The respondent never established the necessity of abolishing the position

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

of account clerk/typist. Therefore, respondent must have had motives other than occupational or administrative when it resolved to eliminate the account clerk/typist's positions.

The petitioner lastly asks that she be made whole for the violation of her tenure rights by being granted any and all rights that she may be entitled to due to respondent's actions. The petitioner ask that we follow the McKay decision at 606. Petitioner points out that the Commissioner of Education in the McKay case ruled that reinstatement to a proper position of employment constituted the critical element of the remedy. Id. at 611. Therefore, petitioner is entitled to reinstatement to the senior account clerk position which was given to Incognito. See, Golden; Beaute v. Bd. of Ed., No. Arlington, Bergen County, OAL DKT. NO. EDU 295-80 (July 28, 1981), aff'd Comm'r of Ed. (Sept. 14, 1981), aff'd State Board (Feb. 4, 1982). Petitioner further alleges that she is entitled to compensation equal to that which she would have received for appropriate employment in the clerical position since the time of her alleged termination and cites as authority for her position McCormick v. Bd. of Ed. of Hunterdon Central Regional School District, 1978 S.L.D. 160; Siderio v. Bd. of Ed. Twp. Riverside, 1975 S.L.D. 569 aff'd, State Board of Education, 1976 S.L.D. 1170. Jacobsen v. Bd. of Ed., Union City, Hudson County, Comm'r of Ed. (Sept. 16, 1983) aff'd by State Board (Feb. 1, 1984); and Golden.

Petitioner contends that in addition to being entitled to the position filled by a nontenured person, she is entitled to the back pay and the emoluments due her, and she is also entitled to a prorated amount of back pay at step ten on the 1986-1987 salary guide as a senior account clerk from June 30, 1986, to the date when she is reinstated. The petitioner also argues that the Board's bad faith in not appointing her to the one available position as senior account clerk and her retention in a de facto capacity as an account clerk through June 30, 1986, further entitles her to additional back pay from April 16, 1986 to June 30, 1986. Said pay to be at a rate she would have received as senior account clerk. Petitioner seeks the aforementioned benefits and additionally she wishes to be made whole for any benefits which may have been reduced or lost as a result of respondent's actions. Such benefits to include a full allotment of sick leave, vacation time, insurance, pension benefits and interest pursuant to administrative regulations.

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

The respondent in its brief states that the position of senior account clerk differs substantially from that of account clerk/typist. The senior account clerk would perform "responsible and varied clerical work" and "take lead in a very small account clerk unit." (J-1). The respondent states that the senior account clerk's job is a supervisory position which requires the senior, account clerk to give suitable assignments to employees, supervise a designated phase of the clerical activity of the unit, and assist with the training of the new clerical employees.

It should be noted that Incognito did none of these.

The respondent further states that the elmination of petitioner's position was done in good faith and was not done in order to circumvent the statutory or contractual rights of employees. Respondent alleges that the petitioner had an opportunity to call members of the Board to the stand in order to testify as to the reasons upon which the respondent's action was based. The respondent contends that since the petitioner elected not to call these witnesses who had direct knowledge of the Board's motives, the petitioner failed to prove the reduction was prompted by bad faith.

FINDINGS AND CONCLUSIONS

Petitioner argues that she has been knowingly, unfairly and illegally treated by the respondent when she was terminated from a job that she had held since 1982, and in which she had gained tenure. Petitioner correctly points out that the new position of senior account clerk was created and a nontenured coworker was placed into this new position. The petitioner then goes on to prove that the actual work done by Incognito in the new position was in fact, and according to Incognito's own admission, exactly the same work that she and the petitioner had both done as account clerk/typist.

After hearing the testimony and reviewing the documentary evidence, I **CONCLUDE** that the positions of account clerk/typist and senior account clerk to be

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

exactly the same. I **CONCLUDE** that the Board acted in bad faith in withholding the new job from the tenured employee. It is quite clear that the Board wanted Incognito to remain in their employ when staff was cut. It may well be, although there was no evidence presented, that a budget reduction was necessary. The problem that the respondent has is that it used the budget reduction to pick and choose without regard to the tenure status, an employee that they would rather have for the job, as opposed to the petitioner. The petitioner was highly qualified for the job, and had been in the job longer and was apparently performing the job satisfactorily.

If the petitioner was not performing the job as required, it was up to the respondent to take the straight path of following the statutes, rules and regulations for either bringing the petitioner up to standards or to terminate the petitioner under the rules and regulations. Here I **CONCLUDE** and **FIND** that the respondent acted in bad faith. In order to keep an employee that they "liked" better, they created the new position of senior account clerk and tried to disguise it as something which it was not. Despite the different title, the position was in no way different from the position of account clerk/typist.

Therefore, I **CONCLUDE** that the petitioner is entitled to reinstatement to the position of senior account clerk as of April 16, 1986, the date Incognito was appointed to that position. I **CONCLUDE** that the petitioner is entitled to salary adjustments, back pay, emoluments, stipend adjustments, including but not limited to full allotment of sick leave, vacation time, insurance, pension benefits and other benefits that she may have been entitled to from April 16, 1986 up to and including her reinstatement by the Board of Education of the Hudson County Area Vocational-Technical School District.

I therefore **ORDER** that the action in terminating the petitioner from her job as an account clerk/typist be **REVERSED.** I further **ORDER** that the petitioner be promoted to the position of senior account clerk as of April 16, 1986, and be granted all benefits as set forth in the preceding paragraph.

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

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

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

1/7/87
DATE

PHILIP B. CUMMIS, ALJ

JAN - 9 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JAN 12 1987
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

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

ANN MARESCA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner agrees with the findings of fact and legal conclusions drawn by the ALJ but seeks a modification to the relief ordered, namely, the award of pre-judgment interest. With respect to this, she contends that because the ALJ determined that the Board's actions were taken in bad faith, N.J.A.C. 6:24-1.18 clearly requires such an award.

Upon review of the record and in light of the ALJ's specific determination that the Board's action was motivated by bad faith, petitioner's request for pre-judgment interest is hereby granted. Pursuant to N.J.A.C. 6:24-1.18(d)1, said interest shall be awarded based upon the average rate of interest earned on investments by the party responsible for the payment during the period of time in which the monies awarded were illegally detained.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 17, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4985-86
AGENCY DKT. NO. 260-7/86

RUTH RENDELL,
Petitioner,
v.
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

Michael E. Buckley, Esq., for petitioner (Dwyer & Canellis, attorneys)

Irwin Weinberg, Esq., for respondent (Weinberg & Kaplow, attorneys)

Record Closed: December 26, 1986 Decided: January 15, 1987

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

Ruth Rendell (petitioner), employed by the Union County Regional High School District Board of Education (Board) as a long-term substitute for seven months in 1985-86, claims the Board improperly established her compensation for services rendered during that employment. Petitioner seeks to be paid the difference between the compensation she received and the compensation she claims she should have received. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provision of N.J.S.A. 52:14F-1 et seq., a prehearing was conducted on September 10, 1986. A hearing scheduled to occur December 11, 1986 was adjourned following receipt of the Board's motion for summary decision, together with a brief and a certification in support of the motion. Petitioner was directed to respond to the motion and the record closed December 27, 1986 upon receipt of petitioner's letter memorandum.

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

BACKGROUND FACTS

The background facts of the matter for purposes of the motion as set forth in the Board's brief and as accepted by petitioner, with one exception which shall be addressed later, are these.

1. Petitioner was employed by the Board December 1, 1985 as a long-term substitute on a temporary basis as a teacher of social studies. Petitioner began her long-term substitute duties on December 2, 1985.

2. At the time of initial employment, petitioner knew her employment was temporary and that such employment would terminate at the end of school in June 1986.

3. Petitioner agreed to and accepted compensation according to step one of the teacher's salary policy set forth in the Agreement between the Board and the Union County Regional Federation of Teachers, Local 3417, (Federation), the majority representative of teaching staff members employed by the Board.

4. Shortly after January 1, 1986, the Board and the Federation were engaged in collective negotiations ostensibly regarding Agreements to succeed the existing Agreement.

5. On or about January 28, 1986, the president of the Federation complained that petitioner's compensation was improperly determined by the Board under the teacher's salary policy of the existing Agreement. During the course of the collective negotiations regarding successor agreements, petitioner's asserted improper compensation was discussed periodically by the Federation in its attempt to achieve a negotiated settlement of this complaint.

6. On February 14, 1986, the president of the Federation met with the superintendent to discuss petitioner's compensation. Once again, the president asserted petitioner's compensation was improperly established by the Board at her initial hiring on December 1, 1985.

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

7. On April 24, 1986, the superintendent advised the president of the Federation that the Board had lawful authority to engage petitioner as a long-term substitute and that the decision, Sayreville Educ. Ass'n, 193 N.J. Super. 424 (App. Div. 1984), did not prohibit the Board from engaging a qualified person for such employment. The following day, April 25, 1986, the president of the Federation advised the superintendent he disagrees with the superintendent's view.

8. On June 16, 1986, the Federation filed a grievance under the Agreement regarding petitioner's asserted improper salary. It is inferred that the terms of the Agreement provide that grievances shall be determined by an arbitrator because of the following fact.

9. On June 24, 1986, the superintendent advised the Federation that an arbitrator did not have subject matter jurisdiction on the filed grievance, that the grievance ws not timely filed, and that in any case the dispute should have been filed before the Commissioner of Education.

10. On July 3, 1986, the Petition of Appeal was filed before the Commissioner of Education in which petitioner, a Robert Kastner, and Susan Skidmore invoked the Commissioner's jurisdiction under N.J.S.A. 18A:6-9 to determine a controversy with the Board regarding their individual compensation. The Board was served with the Petition on July 3, 1986. The Board filed its answer thereto on July 14, 1986.

11. On July 23, 1986, another Petition verified by petitioner and Susan Skidmore was filed before the Commissioner which effectively deleted Robert Kastner as a petitioner. This second petition was answered by the Board on or about July 24, 1986.

12. On August 13, 1986, a further Petition of Appeal was filed by petitioner against the Board, thereby effectively deleting Susan Skidmore from the action against the Board. The Board filed its answer to this third petition on or about August 21, 1986. The prehearing conference was conducted September 10, 1986 during which the Board was granted leave to file an Amended Answer to the Petition of petitioner against the Board. It is this

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

amended answer which interposes the defense of N.J.A.C. 6:24-1.2 by which the Board seeks summary decision by way of a dismissal for failure of petitioner to file the appeal in a timely manner.

This concludes a recitation of the agreed upon facts for purposes of the motion. Nevertheless, petitioner points out that in Fact No. 7 recited above, the last sentence of the president's letter to the superintendent reads as follows:

> It is my suggestion that we [the president and the superintendent] meet before May 12 to settle this issue [petitioner's asserted improper compensation] in accordance with existing law [the Sayreville matter], or the Federation is going to have to take appropriate action.

This then concludes a recitation of all relevant facts for purposes of the motion.

LEGAL ARGUMENTS

The Board contends petitioner failed to file the Petition of Appeal before the Commissioner within 90 days of the date "* * * after receipt of the notice by [her] of the order, ruling or other action concerning which the hearing is requested * * *" as required at N.J.A.C. 6:24-1.2. Board explains petitioner knew as early as December 2, 1985 what her compensation was to be, that she agreed to that compensation, that July 3, 1986 is 215 days after December 2, 1985 and that petitioner is time-barred from now seeking relief. Even if, the Board explains, the triggering date of the 90 days is January 28, 1986 when the president of the Federation first complained about petitioner's salary to the superintendent, that date is 156 days before July 3, 1986 when the petition of appeal was finally filed before the Commissioner. That the Federation and hence petitioner elected to negotiate their perceived dispute between January through June 1986 with the superintendent and the Board is no excuse for not complying with the 90 day rule. The Board asserts petitioner chose her remedy and she is bound by the effect of her choice which is now to be time-barred from seeking relief before the Commissioner.

Finally, the Board contends that neither the filing of a grievance nor the attempts at negotiations stayed the 90 day period of time within which a petition must be filed. Consequently, the Board demands summary decision to be entered in its favor and that the Petition of Appeal be dismissed as time-barred.

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

Petitioner contends, to the contrary, that the 90 days of N.J.A.C. 6:24-1.2 did not begin to run until May 12, 1986, when it became clear to the president of the Federation and petitioner that the Board and the superintendent refused to resolve the dispute. Accordingly, the filing of the Petition of Appeal on July 3, 1986 is clearly within the 90 day time requirement.

Even if, however, the 90 days began to run on December 2, 1985, petitioner contends that a relaxation of the 90 day rule is warranted in this case because any lapse of time has created neither surprise nor undue delay to the Board. The admitted ongoing dialogue between the Federation and the Board between January through June 1986 regarding petitioner's compensation created, in petitioner's view, a legitimate expectation that an informal, mutually agreeable solution would be reached to resolve the matter. Petitioner explains that it was only after the Board's failure to acknowledge or respond to the May 12 deadline established by the president of the Federation that formal proceedings before the Commissioner were deemed necessary to resolve the matter. Consequently, petitioner requests that the Board's motion for summary decision be denied and the matter be decided on its substantive merits.

CONCLUSIONS OF LAW

N.J.A.C. 6:24-1.2 provides:

> To initiate a proceeding before the commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respodents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.

The 90 day limitation period set forth at N.J.A.C. 6:24-1.2 has been held to be inapplicable where a petition has be filed to settle a controversy involving an absolute statutory entitlement or right. See, Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982). This case presents the issue of compensation paid for services rendered as a long-term substitute. It is not an issue involving a violation of a statutory entitlement unrelated to service as a teacher. See, North Plainfield Educ. Ass'n v. Bd. of Ed. of the Borough of Plainfield, 96 N.J. 587 (1984).

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

Petitioner had knowledge on December 1, 1985 what her compensation was to be for services to be rendered the Board as of December 2, 1985. Even if it could be fairly said, which it cannot, that petitioner did not know what her compensation was to be until the time of her first paycheck, it is clear she knew what her compensation was the day she received her first paycheck sometime in December 1985. Even if it could be fairly said, which it cannot, that petitioner did not know even after receiving her first paycheck what her compensation was to be, clearly she knew on January 28, 1986 when the president of the Federation raised the issue of her compensation with the superintendent. In order for the president of the Federation to have raised the matter with the superintendent on that date, there had to be preceding conversations between the president and petitioner regarding her compensation.

The 90 day time limit of N.J.A.C. 6:24-1.2 has been strictly construed to mean that period runs from the time the initial cause of action occurred. Watchung Hills Regional Educ. Ass'n v. Watchung Hills Regional High School District, 1980 S.L.D. 356. The initial cause of action here, compensation, occurred when petitioner had knowledge of her compensation amount. A teacher who proceeds to advisory arbitration is not relieved from compliance with the 90 day filing requirement. Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n, 79 N.J. 311 (1979). Although N.J.A.C. 6:24-1.19 confers on the Commissioner the authority to relax the 90 day rule, such authority is invoked only where there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice could occur. Pfeiffer v. Bd. of Ed. of Willingboro, 1981 S.L.D. - (St. Bd., June 31, 1981). No such circumstances are present in this matter. Petitioner elected to rely upon the efforts of the Federation to resolve what she and it perceived to be improper compensation she received for services rendered. Despite those efforts, petitioner had the obligation to file a petition of appeal 90 days from December 1, 1985 or December 30, 1985 or at the very latest January 28, 1986. In any case, petitioner did not file the petition of appeal until July 3, 1986 which date is far beyond the 90 days from the date she had knowledge of compensation she was to receive from the Board. I FIND no compelling reasons why strict adherence to the 90 day rule should not be applied in this case. That the Federation sets May 12 as the date the 90 days begins is of no moment. Petitioner had requisite knowledge long before May 12 of the amount her compensation was to be.

I CONCLUDE that the petition of appeal is time-barred in that the petition was not filed within 90 days "after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested." N.J.A.C. 6:24-1.2.

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

Accordingly, the petition of appeal is **DISMISSED.** No further proceedings shall be scheduled in the matter.

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

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

January 15 1987
DATE

DANIEL B. MC KEOWN, ALJ

JAN 16 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 21 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

sc

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

RUTH RENDELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record the Commissioner concurs with the ALJ's determination that the Petition of Appeal is time barred pursuant to N.J.A.C. 6:24-1.2. Thus, the initial decision is adopted as the final decision in this matter for the reasons stated therein. The Petition is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

February 19, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8402-86
(On Remand EDU 4101-86)
AGENCY DKT. NO. 165-5/86

MARION HAGERTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE SCOTCH PLAINS - FANWOOD REGIONAL SCHOOL DISTRICT,
Respondent.

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

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: January 7, 1987 Decided: January 13, 1987

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

This matter was remanded by a decision of the Commissioner of Education under date of December 8, 1986, wherein the initial decision of November 5, 1986 in the matter first docketed as EDU 4101-86 was rejected. Said initial decision granted respondent's Motion to Dismiss on a finding that the petition was time-barred by laches and petitioner's violation of N.J.A.C. 6:24-1.2. It is noted that respondent's motion also sought dismissal on its contention that the Commissioner lacks jurisdiction in the matter as it is a contract dispute and not one arising under school law.

New Jersey Is An Equal Opportunity Employer

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

The current matter was transmitted to the Office of Administrative Law on remand on December 9, 1986 pursuant to N.J.S.A. 52:14F-1 et seq. The record was closed on January 7, 1986 upon receipt of the negotiated agreement from the Board which had been requested by the undersigned.

A review of the Commissioner's decision reveals the reasons stated for remand are "that no stipulation of facts is set forth in the record" and "there is no discussion by the ALJ of the issue of whether the instant matter is one cognizable before the Commissioner."

Concerning no stipulation of facts, the Prehearing Order entered on August 22, 1986 states:

> The Board shall prepare a proposed Stipulation of Facts in triplicate and transmit same to petitioner . . . . Petitioner shall sign the Stipulation and transmit the original to the undersigned . . . . Petitioner shall note any proposed fact not stipulated after attempting to resolve any disputed fact proposal with respondent. Petitioner's placement on the 1984-85 and 1985-86 salary guides shall be included.

The Prehearing Order also states that "Discovery [1984-86 teacher guides and the 1985-86 negotiated agreement] shall be attached to the Stipulation of Facts. Said Order also incorporates procedures related to respondent's Motion to Dismiss.

Respondent's Notice of Motion to Dismiss was acknowledged in a letter to counsel for the parties under date of October 14, 1986, wherein reference was made to required responsive papers from petitioner pursuant to N.J.A.C. 1:1-9.2(c) and the movant's optional reply pursuant to N.J.A.C. 1:1-9.2(d). Said letter also stated "The parties are also advised that the proposed Stipulation of Facts transmitted to petitioner by respondent with the letter under date of September 30, 1986 has not as yet been filed with the undersigned." Same were due September 19, 1986.

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

Related also to stipulation of facts, discovery, and responsive papers in opposition to respondent's motion is the comment of counsel for petitioner in his exceptions to the initial decision filed with the Commissioner, which states in paragraph 1:

> Tragically, the above decision is another of the recent "rush to judgment" decisions of the Office of Administrative Law, with little or no concern for the facts or the law. The decision issued herein is an example of this rush to issue decisions with little or no care of the acts or law.

Although reluctant, I am constrained to note that the facts counsel believes should have been reviewed by the undersigned was not considered because of counsel's failure to comply with the Prehearing Order by transmitting the Stipulation of Facts with Discovery attached, and further that the law counsel wished considered was not transmitted by him due to his violation of N.J.A.C. 1:1-9.2(c). It must be noted that dismissal of the petition did not result from sanctions imposed pursuant to N.J.A.C. 1:1-3.5 due to counsel's "failure to give reasonable attention to the matter" or for "unreasonable failure to comply with any order of a judge or with any requirements of this chapter including . . . briefs, . . ."

Citing the Petition of Appeal at paragraphs three, five and six, petitioner did not note that respondent, in its Answer, disputed the salaries indicated in three and six, and denied the allegation in five.

Notwithstanding that the Commissioner's decision did not address whether the petition should or would be time barred pursuant to laches and/or N.J.A.C. 6:24-1.2 if it is determined that jurisdiction lies with the Commissioner, it must now be determined if this matter is properly within the Commissioner's jurisdiction.

Respondent's brief in support of its Motion to Dismiss, timely-filed on October 1, 1986, incorporates its argument that the Commissioner of Education lacks jurisdiction to hear and decide this matter as it is a contract dispute. In support of its position, respondent cites Board of Education of Fair Lawn v. Mayor and Council of Fair Lawn, 143

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

N.J. Super. 259 (Law Div. 1976), East Brunswick Board of Education v. Tp. Council of East Brunswick, 48 N.J. 94 (1966), Pennetta & Sons, Inc. v. Board of Education of the Tp. of North Bergen, EDU 3648-82 (April 22, 1983), Salley v. Board of Education of the City of Newark, et al., 1984 S.L.D. _____ (November 8, 1984), Larsen v. Piscataway Bd. of Ed., 1982 S.L.D. _____ (February 18, 1982), rev'd State Board 1982 S.L.D. _____ (October 6, 1982), and Belleville Education Association v. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div. 1986).

The contract matter referred to by respondent which would preclude the Commissioner from deciding this case, and which would effectively preclude the filing of a Petition of Appeal with the Commissioner by a teaching staff member or other employee who may be a party to the negotiated agreement, is "the procedure for resolving disputes of this nature . . ." (See C-1, Article 6 at page 6 of the Negotiated Agreement). This Article establishes a grievance procedure including binding arbitration.

It is indisputable that where a controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel. The cases cited by respondent, however, are clearly distinguishable from the instant matter.

Fair Lawn sought a declaratory judgment in Superior Court, Law Division, concerning N.J.S.A. 54:4-75. Pennetta was a mechanical contractor seeking payment for an alleged breach of a performance contract by the Board. Larsen was an action by a school custodian to recover damages resulting from a wrongful termination of his employment contract. The only dispute in Belleville was a legal interpretation of two collective negotiation agreements.

East Brunswick clearly established the Commissioner's jurisdiction in a budget dispute.

The substantive issue in the instant matter concerns a salary reduction allegedly in violation of petitioner's tenure rights. (See the Prehearing Order.) A resolution of this

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

dispute on the merits would not require a legal interpretation of the terms and conditions of employment as incorporated in the negotiated agreement. Article 6 simply provides a permissive process available to an employee or the Association consistent with its stated purpose in B:

> The purpose of this procedure is to secure, at the lowest possible level, equitable solutions to the grievances which may from time to time arise affecting employees. Both parties agree that these proceedings will be kept as informal as may be appropriate at any level of the procedure and confidental.

Article 6 cannot be construed to preclude petitioner from filing a Petition of Appeal with the Commissioner of Education or preclude the Commissioner from deciding any controversy or dispute arising under school laws. A contrary determination would be clearly inconsistent with the intent of the Legislature in the enactment of N.J.S.A. 18A:6-9, which states:

> The Commissioner shall have jurisdiction to hear and determine, . . ., all controversies and disputes arising under the school laws, . . ., or under the rules of the state board or of the commissioner.

In summary, I **FIND** the instant matter to be one properly before the Commissioner of Education, and **CONCLUDE**, therefore, that respondent's Motion to Dismiss for that reason shall be and is hereby **DENIED**.

As previously stated, the Board action being contested herein is the reduction of petitioner's salary effective February 1, 1986 and petitioner's contention that her salary beginning on that date, set at one-half time, should have been set at three-fifths time as it was during the previous school year.

Stated another way, the Board contends petitioner's part-time employment status was three-fifths during 1984-85, two-thirds during the period September 1, 1985 to January 31, 1986, and one-half for the period from February 1, 1986 to June 30, 1986. Petitioner does not dispute her employment status during 1984-85 or the period from

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

September 1, 1985 to January 31, 1986. Nor does petitioner dispute that her compensation was improperly calculated according to her part-time status as contended by the Board for all three periods. This dispute centers solely on whether her part-time employment status effective February 1, 1986 was one-half time as the Board contends, or three-fifths time as petitioner contends. Salary adjustment upward if petitioner were to prevail on her contention would easily flow from such a determination.

It cannot be disputed that petitioner was noticed by letters under dates of July 24, 1985 and September 5, 1985 by an agent of the Board that her part-time employment status for the 1985-86 school year would be two-thirds for the first five months and one-half time for the last five months. See C-2 and C-3.

The Petition of Appeal was filed with the Commissioner of Education on May 14, 1986 as per the May 15, 1986 notice to attorneys from Seymour Weiss, Director, Bureau of Controversies and Disputes. See C-4.

The 1986 New Jersey Lawyers Diary and Manual indicates a timely filing pursuant to N.J.A.C. 6:24-1.2 would require the occurrence of a cause of action on or after February 13, 1986. The question to be resolved, therefore, is whether the cause of action occurred before February 13, 1986 on or later than that date. Petitioner contends the cause of action occurred on or about February 15, 1986 when she received her paycheck for the period February 1 to February 15, 1986 pursuant to her pleadings in the Petition at paragraphs six and seven. Respondent contends in its brief that the cause of action occurred upon receipt of the July 24, 1985 and September 5, 1985 notices by petitioner of her part-time employment status for the 1985-86 school year.

I hereby reject the contentions of both parties. The Board's contention is rejected as the impact of its intention incorporated in the aforementioned notices would not really be known as a matter of fact until the effective date of the schedule change on or about February 1, 1986. In other words, petitioner could not be expected to know if the schedule change resulted in a change of part-time status to either one-half time or three-fifths time until the change was actually experienced.

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

This same rationale causes me to reject petitioner's contention. She knew, or should have known, that her compensation on or after February 1, 1986 would be on a one-half time basis. She also knew, or should have known, that her employment status effective February 1, 1986 was either one-half or three-fifths when she actually experienced the schedule change. It was not necessary for her to wait to receive her paycheck on or after February 15 to determine or dispute her employment status.

I FIND the cause of action to have occurred on or shortly after February 1, 1986 and certainly prior to February 13, 1986.

The Commissioner incorporated petitioner's exceptions to the initial decision in his decision and stated at 5:

> Further, petitioner claims her Petition of Appeal is grounded on asserted statutory violations, citing N.J.S.A. 18A:28-5. She argues that statutory violations are not subject to the bar of the administrative rule and relies on Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982); Rutherford Education Association v. Rutherford Board of Education, 99 N.J. 8 (1985); and North Plainfield Education Association v. North Plainfield Board of Education, 96 N.J. 587 (1984) for this proposition.

The above view was rejected by the State Board of Education in Meyer v. Board of Education of the Township of Wayne, 1983 S.L.D. _____, (decided March 6, 1983), wherein it reiterated at 7 from Gordon v. Board of Education of the Township of Passiac, 1985 S.L.D. _____ (decided March 8, 1985) that "petitioners asserting violations of tenure and seniority rights were not excused from compliance with N.J.A.C. 6:24-1.2," and further said that "although derived from statute, tenure and seniority rights are not absolute entitlements and therefore are not the kinds of statutory rights that render the 90-day rule inapplicable under the New Jersey Supreme Court's decisions in Lavin and North Plainfield."

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

Consistent with the **FINDING** herein that the instant matter is time-barred pursuant to N.J.A.C. 6:24-1.2, I **CONCLUDE** that respondent's Motion is **GRANTED**, and the Petition of Appeal shall be and is hereby **DISMISSED**.

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

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

13 January 1987
DATE

WARD R. YOUNG, ALJ

JAN 15 1987

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 16 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g

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

MARION HAGERTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner initially excepts to the determination of the ALJ that no hearing was necessary on remand, and she notes the three factual determinations that the Commissioner directed be addressed on remand as remaining unresolved.

Further, petitioner finds the reasoning of the ALJ in the initial decision, ante, concerning his discussion of the N.J.A.C. 6:24-1.2 issue herein "ignores the fact that until she received her paycheck on February 15th, Petitioner could not have known that her pay would not be commensurate with her unilaterally increased hours." (Petitioner's Exceptions, at p. 3) Petitioner relies on Stockton v. Trenton Board of Education, 210 N.J. Super. 150 (App. Div. 1986) in support of this contention and submits that Stockton mandates reversal and judgment in petitioner's favor.

The Board's exceptions maintain that the controversy herein involves the interpretation of a contract and therefore is not within the Commissioner's jurisdiction. The Board excepts to the ALJ's determination that the matter lies within the purview of the Commissioner's jurisdiction, and it cites Board of Education of Fair Lawn v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976) for the proposition that the Commissioner's jurisdiction is limited to those disputes arising under Title 18A. The Board bolsters its contention that the instant matter is not cognizable before the Commissioner by citing East Brunswick Board of Education v. Tp. Council of East Brunswick, 48 N.J. 94 (1966) and Salley v. Board of Education of the City of Newark et al., decided by the Commissioner November 8, 1984. It submits that the initial decision should be reversed as to the finding of jurisdiction on the part of the Commissioner and an Order entered dismissing the Petition of Appeal.

Further, while the Board agrees that the petition is time barred under N.J.A.C. 6:24-1.2, it does not agree with the determination of the occurrence of the cause of action. It is the Board's contention that the cause of action herein accrued upon

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

petitioner's receipt of the two notices stating the terms of employment for the 1985-86 school year, Exhibits C-2, dated July 24, 1985 and C-3, dated September 5, 1985, respectively. The Board argues that any objection from petitioner to her position or pay "***would have to be filed within ninety (90) days of her receipt of those notices. Petitioner was aware at that time of the schedule and salary being offered. She worked within the schedule and at that salary from September, 1985 until May, 1986, before filing her Petition. Her complaint, therefore, is barred by the provisions of N.J.A.C. 6:24-1.2." (Board's Exceptions, at p. 2) The Board submits that the initial decision granting the Board's Motion and dismissing the Petition of Appeal should be affirmed.

Upon a careful review of the record in toto, the initial decision on remand must again be rejected.

Initially, it is observed that the Commissioner's decision dated December 8, 1986 noted the absence of the following:

1. A determination as to whether this case is cognizable before the Commissioner of Education.

2. A stipulation of fact requisite for granting summary decision pursuant to N.J.A.C. 1:1-13.2 or, lacking that, findings of fact by the ALJ.

3. The Commissioner remanded the matter for further action on the above and for findings concerning the following three questions relating to the instant N.J.A.C. 6:24-1.2 issue:

> a. What was the workload for which petitioner was responsible as of the onset of school year 1985-86?
>
> b. Was the workload for which petitioner was to be responsible for the second semester, 1986, different from that which was made known to her at the outset of the school year 1985-86?
>
> c. If so, at what point, precisely, did petitioner become aware of the alleged discrepancy between her workload and salary as compared to her original obligation?

As noted in the Commissioner's decision dated December 8, 1986, discussion of the dismissal issue must follow discussion of the jurisdictional matter. Upon his careful review of the record now before him, the Commissioner agrees with the ALJ that the matter is properly before him by virtue of N.J.S.A. 18A:28-5 and thereby N.J.S.A. 18A:6-9. The Commissioner adopts as his own the findings and conclusions of the ALJ as stated:

> The substantive issue in the instant matter concerns a salary reduction allegedly in

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

violation of petitioner's tenure rights. (See the Prehearing Order.) A resolution of this dispute on the merits would not require a legal interpretation of the terms and conditions of employment as incorporated in the negotiated agreement. Article 6 simply provides a permissive process available to an employee or the Association consistent with its stated purpose in B:

> The purpose of this procedure is to secure, at the lowest possible level, equitable solutions to the grievances which may from time to time arise affecting employees. Both parties agree that these proceedings will be kept as informal as may be appropriate at any level of the procedure and confidental. (sic)

Article 6 cannot be construed to preclude petitioner from filing a Petition of Appeal with the Commissioner of Education or preclude the Commissioner from deciding any controversy or dispute arising under school laws. A contrary determination would be clearly inconsistent with the intent of the Legislature in the enactment of N.J.S.A. 18A:6-9, which states:

> The Commissioner shall have jurisdiction to hear and determine, ..., all controversies and disputes arising under the school laws, ..., or under the rules of the state board or of the commissioner.

In summary, I FIND the instant matter to be one properly before the Commissioner of Education, and CONCLUDE, therefore, that respondent's Motion to Dismiss for that reason shall be and is hereby DENIED. (Initial Decision, ante)

With the jurisdictional matter resolved, the Commissioner can now consider the issue of dismissal under N.J.A.C. 6:24-1.2. It is noted that the ALJ granted summary decision in his initial decision dated November 5, 1986. He did so determining the matter was time barred under N.J.A.C. 6:24-1.2 relying on the "[c]opies of letter (sic) under dates of July 24, 1985 and September 5, 1985 *** attached to respondent's Brief in Support of Motion, which were transmitted to petitioner by the Board's personnel specialist noticing her 1985-86 salary adjustments effective September 1, 1985 and on or about February 1, 1986 related to adjustments in her teaching assignment***." (Initial Decision dated November 5, at p. 2) It is further noted that of the ALJ's own admission in the decision on remand "dismissal of the petition did not result from

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

sanctions imposed pursuant to N.J.A.C. 1:1-3.5 due to counsel's 'failure to give reasonable attention to the matter' or for 'unreasonable failure to comply with any order of a judge or with any requirements of this chapter including *** briefs, ***'." (Initial Decision on Remand, dated January 13, 1987, quoting N.J.A.C. 1:1-3.5)

Finally, the Commissioner observes that the ALJ's decision on remand decided the N.J.A.C. 6:24-1.2 issue, having prefaced his findings with the statement, "It cannot be disputed that petitioner was noticed by letters under dates of July 24, 1985 and September 5, 1985 by an agent of the Board that her part-time employment status for the 1985-86 school year would be two-thirds for the first five months and one-half time for the last five months. See C-2 and C-3." (Initial Decision on Remand, ante)

The Commissioner does, in fact, observe that such finding is in dispute, as did counsel for petitioner in his timely exceptions to the November 5, 1986 initial decision filed with the Commissioner on November 17, 1986, "***It also does not appear to be in dispute that the letters relied upon by the Board as its contract argument were never signed nor returned by Mrs. Hagerty.)***" (emphasis supplied) (at p. 3) Petitioner's counsel again challenged the determination of the ALJ disallowing a hearing on factual findings in his timely exceptions to the Decision on Remand, which are incorporated herein by reference and summarized above.

The Commissioner now finds that contrary to his explicit directives concerning what matters were to be examined on remand, the ALJ, in his letters to counsel dated December 23, 1986 and again following written objection from counsel for petitioner, on January 9, 1987, precluded the submission of either further documentary submissions or further hearings on the factual contentions between the parties, to which counsel for petitioner objected and eventually requested interlocutory review. Unfortunately from the perspective of expedition of this matter, petitioner's request, while apparently meritorious, was untimely. It is entirely clear that the sole matter the ALJ was willing to consider on remand was the jurisdictional issue, with which he complied.

Absent the ALJ's acceptance of documents marked C-2 and C-3 into the record as uncontroverted evidence in granting the Board's Motion for Summary Decision as a sanction pursuant to N.J.A.C. 1:1-3.5, which the ALJ states in his decision on remand, was not the basis for his initial decision dated November 5, 1986, there have been made no factual findings in this matter which would permit summary decision under N.J.A.C. 1:1-13.2. That section states:

> 1:1-13.2 Motion and Proceedings Thereon; Reviewable by Agency
>
> (a) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought shall be

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

> rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. The judge shall find the facts and state the conclusions in accordance with N.J.A.C. 1:1-16.3. A summary decision may be rendered on any issue in the contested case although there is a genuine factual dispute as to other issues. (emphasis supplied)

See also, Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1955) which states:

> If party opposing motion for summary judgment offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, court may grant summary judgment by taking as true the statement of uncontradicted facts in papers relied upon by movant, if such papers do not themselves otherwise show existence of issue of material fact. R.R. 4:58, 4:58-3 to 4:58-5; Fed. Rules Civ. Proc. rules 1 et seq., 56(c), 28 U.S.C.A. (emphasis supplied)

Those letters, C-2 and C-3, which are unsigned copies and upon which the ALJ relies in both his initial decision dated November 5, 1986 and his initial decision on remand dated January 13, 1987 in making his determination to dismiss the Petition of Appeal as being out of time, do not represent official documents that constitute reliable evidence upon which either he or the Commissioner can rely, absent a hearing or a signed stipulation of fact between the parties.

The Commissioner in no way condones counsel for petitioner's failure to conform with the pre-hearing schedule established by the ALJ for the production of discovery. Notwithstanding that fact and absent the ALJ's reliance upon N.J.A.C. 1:1-3.5 neither can the Commissioner sanction the admittance into the record of documents that have no proof of reliability. The Commissioner is left with no other choice but to remand this matter, yet again, for resolution of the matters set forth in his Decision dated December 8, 1986, as supplemented herein.

Consequently, the initial decision is rejected and remanded for further action consistent with this Decision and the original remand of December 8, 1986.

COMMISSIONER OF EDUCATION

February 19, 1987

Settled September 4, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF THE TENURE HEARING OF THOMAS DICERBO, SCHOOL DISTRICT OF MANCHESTER REGIONAL HIGH SCHOOL, PASSAIC COUNTY	**OAL DKT. NO. EDU 6460-85** **AGENCY DKT. NO. 321-9/85**
and	
THOMAS DICERBO Petitioner, v. **MANCHESTER REGIONAL HIGH SCHOOL BOARD OF EDUCATION,** Respondent.	**OAL DKT. NO. EDU 6458-85** **AGENCY DKT. NO. 323-9/85**
and	
IN THE MATTER OF MANCHESTER REGIONAL HIGH SCHOOL BOARD OF EDUCATION AND MANCHESTER REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION	**OAL DKT. NO. N/A** **PERC DKT. NO. CO-86-18-28** (Consolidated)

Lawrence S. Schwartz, Esq., for petitioner
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Sheldon H. Pincus, Esq., for respondent
(Bucceri and Pincus, attorneys)

New Jersey Is An Equal Opportunity Employer

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

OAL DKT. NOS. EDU 6458-85 and EDU 6460-85

Record Closed: November 7, 1986 Decided: December 22, 1986

BEFORE SYBIL R. MOSES, ALJ:

I
Procedural History

This matter comes before the Office of Administrative Law (OAL) as the result of a consolidation of several actions filed by the Board of Education of Manchester Regional High School District (Board) and Thomas DiCerbo (DiCerbo or respondent). All charges arise out of an allegation that Mr. DiCerbo organized an unauthorized ski trip for students of Manchester Regional High School in January 1985, during which students consumed alcoholic beverages with Mr. DiCerbo's knowledge.

On June 20, 1985, the Board resolved to withhold DiCerbo's salary and adjustment increments for the 1985-86 school year, alleging conduct unbecoming a teacher. The Board alleged that DiCerbo permitted the consumption of alcoholic beverages by students on a trip to Lake Placid, in January 1985, which DiCerbo organized and conducted. On July 19, 1985, the Manchester Regional High School Education Association (Association or MEA) filed an unfair labor practice charge against the Board with the Public Employement Relations Commission (PERC), alleging that the Board violated the New Jersey Employer-Employee Relations Act (Act) when it withheld Mr. DiCerbo's salary increments for the 1985-86 school year.

On August 9, 1985, the director of unfair labor practices of PERC issued a complaint and notice of hearing. On August 30, 1985, the Board filed an answer denying the allegations of the unfair labor practice complaint.

On August 15, 1985, the Board certified tenure charges against DiCerbo, alleging conduct unbecoming a teacher and insubordination. On August 23, 1986, the Board resolved to suspend DiCerbo without pay from his teaching position, effective September 1, 1985. The resolution and certification of charges was served on DiCerbo, pursuant to

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

N.J.S.A. 18A:6-11, on September 10, 1985, charging him with insubordination and conduct unbecoming a teacher.

On September 13, 1985, DiCerbo filed a petition with the Commissioner of Education alleging that the Board was arbitrary, capricious and unreasonable when it withheld his increment. On September 24, 1985, the Association filed an amended unfair labor practice charge with PERC, alleging that the tenure charges were in retaliation against both DiCerbo and the Association's activity. On September 30, 1985, DiCerbo filed an answer to the tenure charges, denying the allegations and urging that PERC had primary jurisdiction to decide the matter. On October 3, 1985, the Board filed an answer with the Commissioner to DiCerbo's petition concerning withholding of increments. The matter was forwarded to the OAL during October 1985 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On October 28, 1985, the Association filed a motion to consolidate the matters before PERC. On November 1, 1985, the Board filed a response and a cross-motion before PERC, asking it to defer jurisdiction on the unfair labor practice claim and to transfer the case to the Commissioner of Education. The Board also moved before the Commissioner of Education for an Order consolidating the unfair labor practice charge pending before PERC with the tenure charges pending before the Commissioner, which consolidated case would be heard by an administrative law judge at the OAL.

On December 10, 1985, the chairman of PERC, pursuant to N.J.A.C. 1:1-14.4, referred the motions to this judge for initial determination, subject to the Commission's review.

On January 23, 1986, I issued an Order on the motions for consolidation and to determine predominant interest. I agreed with the parties that consolidation was appropriate and ordered that the unfair labor practice complaint filed by Mr. DiCerbo with PERC be consolidated with the appeal by Mr. DiCerbo of the denial of his 1985-86 increments (Thomas DiCerbo v. Manchester Regional High School Board of Ed.) and with the tenure charges filed against Mr. DiCerbo by the Board (In the Matter of the Tenure

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

Hearing of Thomas DiCerbo, School District of Manchester Regional High School, Passaic County). I further ordered that the Commissioner of Education had predominant interest in this matter; that issues arising from the January 1985 ski trip and any conduct of Mr. DiCerbo relating thereto were the predominant issues; and that the Commissioner of Education had authority to issue a final decision on those issues. My Decision and Order of January 23, 1986, is attached to this Initial Decision and fully incorporated herein as if set forth at length.

On January 31, 1986, the Association filed exceptions to that decision, and on February 6, 1986, the Board filed a response. The Commissioner of Education affirmed the Initial Decision. On April 18, 1986, the chairman of PERC affirmed the Initial Decision, except for its reversal of that part of the order which said "if there are sufficient legal grounds to withhold the increment and/or suspend Mr. DiCerbo pursuant to the education law, then any legal grounds for anti-union animus will become moot." It directed application of the legal standards enunciated in In re Bridgewater Tp., 95 N.J. 235 (1984).

On March 20, 1986, respondent moved to dismiss the tenure charges based on failure to comply with N.J.S.A. 18A:6-11, election of remedies, waiver and estoppel. The Board responded on April 3, 1986. A decision on the motion was reserved pending completion of the hearing.

Notwithstanding the exceptions filed to the decision on predominant interest, a prehearing conference took place on February 4, 1986. It was agreed that the following legal issues had to be determined:

A. Issues raised by the Board:

1. Whether the Board acted in an arbitrary, capricious and/or unreasonable manner in withholding Mr. DiCerbo's 1985-1986 increment.

2. If the answer is yes, to what remedy is Mr. DiCerbo entitled.

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

3. Whether the tenure charges, if proved, encompass conduct unbecoming a teacher and/or insubordination.

4. If the answer to that question is yes, what is the appropriate sanction to be imposed upon Mr. DiCerbo.

B. Issues raised by DiCerbo:

1. Were the tenure charges filed in retaliation for Mr. DiCerbo's filing unfair labor practice charges against the Board.

2. Were the standards of conduct applied to Mr. DiCerbo which led to both actions of the Board different from those previously applied to other staff members.

3. Were the standards of conduct applied to Mr. DiCerbo which led to both actions of the Board different from those previously applied to members of the Board of Education.

4. Whether the Board's actions violated Mr. DiCerbo's rights to privacy, pursuant to the 9th and 14th Amendments to the United States Constitution.

5. Whether the tenure charges should be dismissed for failure to have been perfected, pursuant to N.J.S.A. 18A:6-11 (specifically, improper service and delay of transmittal to Mr. DiCerbo and to the Commissioner of Education).

6. Are the instant tenure charges barred under the doctrines of election of remedies, waiver and/or estoppel because of the withholding of increment in June 1985 prior to the filing of tenure charges?

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

7. Do the actions of the Board constitute violations of the Employer/Employee Relations Act, N.J.S.A. 34:13A-5.4(a)1, 3, 4, 5 and 7.

8. If the answer is yes, what is the appropriate remedy.

Counsel agreed that for all issues arising under tenure statutes and regulations, the Board was the petitioner and Mr. DiCerbo was the respondent. It was agreed that the Board would present its evidence first and had the burden of proof by a preponderance of the competent and credible evidence in regard to education law questions. Counsel agreed that for all issues arising under the appeal of the denial of increment and the labor law statutes, the petitioner was Mr. DiCerbo and the respondent was the Board, with the same burden of proof by a preponderance of the competent and credible evidence.

Hearings commenced on June 23, 1986, and continued on June 24, 25, and August 5, 1986. Initial briefs and responses were filed pursuant to a schedule agreed upon between the parties and this judge. The record closed on October 7, 1986. As the result of the extremely complex legal issues in this matter and the extensive record, an Order of Extension granting more time within which to file this Initial Decision was signed on November 21, 1986.

II
Witnesses and Evidence

A list of those persons who testified on behalf of the Board and on behalf of Thomas DiCerbo is attached to this Initial Decision and designated Appendix A.

A list of those exhibits admitted jointly into evidence is attached to this decision and designated Appendix B. A list of those exhibits moved into evidence or marked for identification by DiCerbo is attached to this decision and designated Appendix C. A list of those exhibits moved into evidence or marked for identification by the Board is attached to this decision and designated Appendix D.

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

III
Analysis of Testimony

The Board relied heavily on the testimony of Mr. Galese, superintendent of schools, and Mr. Catalano, principal of the high school, as well as on testimony of various students. Mr. Galese testified that he did not learn about the ski trip until late March 1985, when Elsie Gould, a parent of one of the seniors and a secretary in the central office, told him about the January trip. Ms. Gould spoke to Galese because of concern about the spring senior trip. She had not expressed any concern in January or February about the ski trip or about students carrying cases of beer onto the bus.

After speaking to Ms. Gould, Mr. Galese spoke to Catalano, who knew nothing of the ski trip to Lake Placid, and asked him to investigate. Mr. Catalano spoke to various students about the trip, including J. S., the student who became ill on the trip. As a result of Catalano's investigation, Mr. Galese testified he learned that Thomas DiCerbo, a teacher at the high school and president of the Association, organized the trip to Lake Placid, collected the money and held meetings during and after school to discuss the trip. Mr. Galese discovered that students drank beer on the bus going up and coming back and that J. S. became ill. The students said that DiCerbo told them that there would be "no hard stuff" and that he would take care of the beer. As a result of this information, Galese asked for a special meeting with the Board.

DiCerbo called Galese at 9:30 p.m. on April 3, asking for a meeting. He admitted that the trip did occur but asserted that it had nothing to do with the school and that he was not responsible for the students while at the ski resort. Galese had a meeting with DiCerbo, Mr. Spreen, Mr. Nicholson and Mr. Brown on April 4.

Mr. Galese had a list of questions for DiCerbo to answer, but Mr. DiCerbo did not want to respond to the questions until he knew who had complained about the trip. DiCerbo stated that Galese had no right to ask anything about the trip since it was not school sponsored. Mr. Galese said he read the entire list of questions to Mr. DiCerbo, who did not choose to answer them even when Galese repeated the questions one at a time.

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

Galese insisted he told DiCerbo to answer the questions so he could determine if something untoward had occurred. Galese denied telling DiCerbo he did not have to answer the questions. He stated he told DiCerbo he could or could not answer but that the report would reflect whether he had responded.

No member of the administration knew of the January ski trip before Ms. Gould spoke to Galese. DiCerbo never sought Board approval and did not ask permission to discuss the trip or to solicit money during school and on school property. After the April 4 meeting with DiCerbo, Galese recommended that the Board dismiss DiCerbo based on the gravity of the situation, which included students drinking and unsupervised collection of funds in the school. Galese was concerned because he thought DiCerbo had consumed beer in front of the students and had discussed the purchase and drinking of beer in or after his Biology 2 class. He was also concerned about students drinking beer on the bus, when DiCerbo was present. He first recommended that Mr. DiCerbo's increment be withheld, which was done in June 1985. He then felt that Mr. DiCerbo's conduct warranted filing of tenure charges. Mr. Galese felt that Mr. DiCerbo was insubordinate at the April 4 meeting because he refused to give any information about the trip.

Mr. Galese was present while Mr. Catalano took statements from students, but he denied trying to intimidate the students. He had no recollection of telling J. M. that she did not have to sign the statement but that she could be subpoenaed. The mothers of M. and V. came to see him because they were concerned that their daughters would be ostracized by other students if the other students learned of the statements. None of the parents of the students interviewed by Mr. Catalano were advised of the interviews and the subsequent statements. Mr. Galese was clearly uncomfortable in answering questions concerning the meetings with students.

It is uncontroverted that the entire policy manual that deals with school trips (P-10) is not distributed annually to the teaching staff and in September 1984 was made available only in the library. It is now missing and has been lost or misplaced. Mr. Galese pointed out that the teachers get a faculty manual which contains the field trip policies.

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

Mr. Galese relied heavily on the school field trip policy in saying that if a teacher has a student at his home or on a canoe trip, that would constitute a field trip of which the administration should have been notified. Galese denied knowing that members of the Foreign Language Department took students on trips to Europe, although he has since learned that none of the foreign language teachers who took students to Europe on unapproved trips had tenure charges filed or increments withheld. Mr. Galese was very uncomfortable in answering questions concerning Foreign Language Department trips. He said they could be distinguished from the DiCerbo trip because money was not collected and discussions were not held on school property; the trips involved very small groups organized by parents. He further pointed out that the teachers went along as chaperones and/or escorts, which DiCerbo refused to do.

Mr. Catalano investigated the trip and interviewed individual students. DiCerbo told him the trip had nothing to do with the high school, there was no drinking and no damage, and the students were on their own. DiCerbo did not stay in the hotel with the students and felt he should not have been expected to be a chaperone.

Mr. Catalano had statements prepared by the Board's attorney for the students' signatures. He said the students signed them of their own free will and that he did not force, intimidate or threaten the students. Mr. Catalano did not speak to any of the parents before taking the statements from the students or asking them to sign the typed statements. Forty of the 47 individuals listed on P-27, the money collection list, were students at the high school in January 1985. I found Mr. Catalano a credible, but frightened, witness who was not tenured in the school system. Adoption of his testimony must be tempered by that fact.

The testimony of Karen Ritchie, owner of Belmont Travel, is basically uncontroverted. Mr. DiCerbo spoke to her in late 1984 about taking a group of friends and young people skiing. She worked through a wholesaler, Ski Safaris, to arrange a bus to and accommodations at Lake Placid. Three "comps" were given, including two free trips to Mr. and Mrs. DiCerbo. Ms. Ritchie specifically asked DiCerbo if the Board approved the trip, and he said it had nothing to do with the school. He gave her the list of names of

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

teenagers and young adults, and the individual checks and/or cash payments, for which she gave him receipts. Each participant signed a contract, which went directly to Ski Safaris and which contained nothing concerning minor children.

Ms. Ritchie said that two representatives of Ski Safaris were present on the bus, both going and coming, and were with the group the entire time in Lake Placid. The bus left after 5 p.m. on January 25, 1985 from 335 Belmont Avenue, Haledon. Ms. Ritchie received no complaints from parents, students, Ski Safaris, the Ramada Inn in Lake Placid or the bus company. A representative of the Ramada Inn said the group was very well behaved and would be welcomed back.

The students' testimony differed on some major factors, but all testified that some students drank beer on the bus ride up and back. Those students were sitting from the middle to the back of the bus, while Mr. DiCerbo sat in front of the bus. The students agreed that Mr. DiCerbo held a meeting shortly before the trip, either after school or after biology class, and told them that this was not a school-sponsored trip and that he would not be a chaperone and was not responsible for them. The students agreed that Mr. DiCerbo collected the money before school, during lunch period, after class or after school. Most of the students agreed that Mr. DiCerbo walked to the back of the bus at least once during the trip to Lake Placid but said nothing about beer drinking.

Mr. DiCerbo never told the students during any discussion, including the final meeting, not to bring alcohol or beer. All agreed he told the students he was bringing beer, but there is a dispute about what he said concerning students bringing beer. Some of the students were candid in responding to questions concerning whether DiCerbo saw the students drinking on the way up, saying "I guess so" or "How could he miss it?" Others denied seeing him walk through the bus (contrary to Mr. DiCerbo's testimony) or stated that he did not go to the back of the bus. They all agreed that on the way back, Mr. DiCerbo told the students to stop drinking, asserting they had nothing to lose while he had a lot to lose.

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

The testimony of Z. H., a most impressive witness, combined with the testimony of L. M. and B. V., convinces me that the students were intimidated and frightened into signing the statements presented to them after the Catalano interviews. Z. H. conceded that he drank beer on the trip. He felt that if he did not sign the statement, Mr. Catalano would not help get him into college. Z. H.'s testimony confirmed and limned the testimony of the other students in regard to the pre-trip meeting in DiCerbo's biology room. Mr. DiCerbo told them he would not be a "keeper" or chaperone for the students, as they had to act as adults because it was not a school-sponsored trip. Z. H. never told DiCerbo he was bringing beer on the trip, never saw DiCerbo with a beer and never received a beer from him.

Both L. M. and B. V. testified they were intimidated into signing the statements because either Mr. Catalano or Galese told them that if they did not sign, they would be subpoenaed to testify in court. B. V. and J. M. testified that at the meeting before the trip Mr. DiCerbo told the students that if they brought beer, he had to know about it. He also told them he was bringing beer, but it was for his friends, who were of age, to drink. All the students agreed that Mr. DiCerbo never told them not to bring beer. They all testified that the students concealed the beer and other alcoholic beverages by bringing them on the bus in bags and coolers and by drinking behind the tall bus seats and not in the aisles.

Thomas DiCerbo testified on his own behalf. He has been president of the MEA since July 1984. Prior to that time, he was on the negotiating team and served as grievance chairman. Mr. DiCerbo's testimony can be divided into three parts. He explained the ski trip, he discussed the aftermath of the ski trip and he discussed the relationship between the Association and the Board.

In the fall of 1984, an ad hoc committee was set up by the Board, at Mr. DiCerbo's request, to clear up problems between the Board and teaching staff. Mr. DiCerbo told Mr. Havlin, vice president of the Board, that he was taking a ski trip with his friends and that some students would be going on the trip. In September 1984, Mr. DiCerbo spoke to Belmont Travel about a ski package at reasonable rates for himself and some of his

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

friends. After reviewing information, he decided that Ski Safaris offered a good trip to Lake Placid. He distributed brochures to students who had asked if he were going to conduct a ski trip. (Mr. DiCerbo had previously gone with students on other ski trips.)

Mr. DiCerbo collected money for the trip before and after school and before and after classes. He took the money to Belmont Travel and received receipts. He held one meeting after school in his room the day before the trip. The meeting was attended by 50 percent of the students going on the trip. He told them where and when they should meet, that this was not a school-sponsored trip, that he was not their chaperone and that he expected them to act like adults. He said that if they really needed him, he would be available. Mr. DiCerbo conceded that the Ski Safaris brochure said that alcohol was allowed and conceded that students asked him if he was bringing beer. He told the students that he was bringing beer but that no hard liquor would be allowed. He did not tell the students it was all right for them to bring beer.

Mr. DiCerbo denied any responsibility for arranging the trip, saying that it was all done by Belmont Travel and Ski Safaris. He pointed out that the bus left from a commercial establishment, not from the school. DiCerbo arrived at 4:30 p.m. on January 25, 1985 with a case of beer he had purchased for his friends and with soda for the students. He denied purchasing or supplying beer for students. As he waited for his friends, DiCerbo saw students (and others) unpacking skis, luggage and coolers and piling these items all over the parking lot. When the bus arrived, representatives of Ski Safaris were on hand. Skis and suitcases were put in the luggage compartment, and coolers and bags were put in the bus. DiCerbo said he did not see any alcoholic beverages in the parking lot or on the bus. He sat in the front of the bus and most of the students sat near the back.

DiCerbo said the bus was dark on the trip to Lake Placid. He went to the back of the bus once, to go to the bathroom. He became angry because the students locked the bathroom while he was in it, and therefore he went right back to the front of the bus. He did not observe of any students drinking alcohol during the trip. He ate, drank coke and listened to his Sony Walkman.

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

On arrival at Lake Placid, Mr. DiCerbo went to his room, which was across the road from the building in which the students were staying. He saw students swimming that night, but saw no alcoholic beverages at the pool.

On Saturday morning he went by bus with the students to White Face Mountain. He intended to ski but did not because he saw J. S. having an epileptic seizure at the ski lift. He turned J. S. on his side so that he would not swallow his tongue and went in the ambulance with him to the hospital. He stayed with him for several hours until J. felt better. He called Mrs. S. and explained the situation to her. J. S. checked himself out of the hospital in the afternoon and returned to the hotel. During the evening, DiCerbo checked on him two or three times and called J. S.'s parents to tell them that J. was doing well.

On Saturday evening, Mr. DiCerbo received an emergency call that his own son was sick. He was very upset and did not pay much attention to the students, other than to note they were not intoxicated. There were no complaints made at the hotel, and the students were very well behaved.

The bus left for the return trip at about 3:30 p.m. on January 27, 1985. It was dark in the bus. About one hour into the trip, Mr. DiCerbo walked to the back of the bus after the bus driver told everyone to keep the noise down. He then saw a couple of students drinking beer and became irate. He was disappointed with the students and yelled at them. He told them he had treated them like adults and therefore they should act like adults. They had nothing to lose, but he did. Mr. DiCerbo asked two of his friends to collect the beer and other alcoholic beverages. When the bus arrived in Haledon, he drove J. S. home and discussed with J. S.'s parents what had happened to him.

Mr. DiCerbo thought nothing more about the ski trip until March 1985 when he learned that Galese and Catalano were asking questions about DiCerbo and the trip. DiCerbo met with Catalano at the end of March 1985, and Catalano told him that the superintendent had been called by a parent in regard to the trip and therefore they were checking it out.

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

At 9:30 p.m. on April 3, 1985, DiCerbo called Galese at home and asked for a meeting. DiCerbo said Galese was reluctant to meet with him, but DiCerbo pressed him by threatening court action. Galese then arranged a meeting for 3 p.m. the next day.

DiCerbo described the April 4, 1985 meeting. Mr. Galese, Mr. Spreen, Mr. Nicholson, Mr. DiCerbo and his representative, Mr. Brown, were present. Galese told DiCerbo that first a parent and a member of the Board and then the entire Board had called about the ski trip. He told DiCerbo that the Board was concerned that there had been drinking on the bus. DiCerbo denied that there had been and told Galese the ski trip was not a school trip. Mr. Galese had a list of questions for DiCerbo to answer but said he did not have to answer the questions if he did not want to. DiCerbo chose not to answer. At this meeting, Galese revealed his philosophy concerning trips. He said that a field trip consists of any teacher contact with a student outside the building, and parental and Board permission are needed.

DiCerbo said that after the April 4 meeting, he spoke to members of the Board, who said they were not aware of this investigation. In fact, he filed a grievance (R-11), which the superintendent denied. He then pursued the grievance to the Board in May 1985, but no action has been taken to date.

Mr. DiCerbo was very self-righteous during his testimony, asserting time and again that he had done nothing wrong. He felt he was not responsible for children whose parents gave them alcohol which he did not see. He felt he was being prevented from associating with persons with whom he wanted to associate. Consistently throughout his testimony he denied being the organizer of the trip and denied having responsibility for the trip. He said he made it clear to the students that they were on their own and that he would not be their chaperone. Therefore, he never checked the coolers that went on the bus to see if they contained beer.

Although I find Mr. DiCerbo sincere, I find him lacking in judgment. He allowed his friends to drink beer in front of the students and testified that he did not know if that was setting a good example for 16- to 17-year-olds. He even conceded that he told the

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

students he was going to bring beer for his friends and, when pressed, said he had no recollection if he told the students they could not bring beer. He said he did not investigate the children because he was treating them like adults. He asserted his only role on the trip was to help people and to be a facilitator. He was not going as a teacher, but just as another person on the trip. Mr. DiCerbo adamantly denies knowing whether the students were drinking on the bus going to Lake Placid, yet he conceded he did not look to see if the students were drinking. Mr. DiCerbo feels that the ski trip was "his personal affair and a private situation."

Mr. DiCerbo testified about the relationship between the MEA and the Board. He became president of the Association in July 1984, but as early as April 1984, he went to a public meeting of the Board where he was not allowed to speak and was threatened with removal by the police.

In August 1984, Mr. DiCerbo asked for a meeting with the Board, urging that a committee of Board members and teaching staff be established to clear up problems and to facilitate communications with the superintendent of schools. An ad hoc committee was set up with an agenda that included staff morale, treatment of students by Board and administration, grading procedures and conflict between the principal (Mr. Spreen) and the superintendent. The committee met monthly in August, September, October and November 1984 but has since ceased to function. DiCerbo testified that Mr. Peters (president of the Board) told him the committee is not functioning because Mr. Galese felt he could handle things himself. Mr. DiCerbo said that Mr. Galese told him he did not appreciate public discussion of problems between Mr. Spreen and himself and did not want DiCerbo to speak to Board members without his permission. DiCerbo asserted that Mr. Galese said he expected DiCerbo to be his friend, but if DiCerbo would not be his friend, Galese would get him on insubordination. DiCerbo asserted that Mr. Galese always insisted that he was the boss and that even if the faculty liked Mr. Spreen, there would be trouble if they did not cooperate with Galese.

DiCerbo explained the Association's vote of no confidence in Superintendent Galese. It was based on the fact that for three years he had sent directives to his staff without

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

leaving his office, that Mr. Galese had asked staff for input into a report and then had refused to let them see the report, that staff was upset by Board ridicule of students and parents at Board meetings and that teachers were harassed by Galese. DiCerbo asserted that Galese responded to the vote by repeating that if DiCerbo ever brought up the situation with Spreen, Galese would get DiCerbo on insubordination since he was the boss. In DiCerbo's opinion, staff morale was very low because they were frightened and unhappy with the atmosphere in the school.

Mr. Nicholson, Mr. Brown and Mr. Spreen testified about the April 4, 1985 meeting in the superintendent's office. Mr. Nicholson was quite certain that when Galese asked DiCerbo to answer a list of questions he said, "You may choose not to answer these questions." Nicholson, a credible witness, said that Galese read the list of questions through and then read them one at at time, at which point DiCerbo said no or shook his head, refusing to answer. Mr. Nicholson testified he had a conversation with Mr. DiCerbo on August 30, 1985 when DiCerbo was removing some of his material from the school. DiCerbo told Nicholson (and Catalano) that the students had brought liquor or beer of their own volition and that the parents knew it.

Mr. Brown accompanied Mr. DiCerbo to the April 4 meeting as a friend/representative. He concurred with Mr. Nicholson's version of what Galese said to DiCerbo about answering the questions. In Mr. Brown's opinion, Mr. DiCerbo was given a choice of whether to answer the questions. He advised DiCerbo, as his teacher representative, not to answer the questions without legal representation.

Mr. Spreen was formerly principal of the high school and since 1985 has been assistant superintendent for curriculum and funding. His version of the April 4 meeting is on "all fours" with that of Nicholson and Brown. Spreen was quite sure that Mr. Galese said, in a jovial manner, "if I were you, I wouldn't answer them either," when referring to the questions. Mr. Spreen said that he told Harold Peters, president of the Board in early July 1985, that the DiCerbo situation was the equivalent of a witch hunt and/or was related to DiCerbo being a very vocal president of the Association. He conceded that Mr. Peters felt that teachers have an obligation to prevent minors from drinking at any time

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

or any place. During this conversation, Mr. Peters tried to resolve the situation, telling Spreen that if DiCerbo accepted the loss of increment, it would be over. Peters told Spreen that Galese was pursuing the case. Spreen conceded that Galese denied that, saying it was being pursued on the advice of the Board's attorney. Mr. Spreen was a credible witness, who did not deny that he had problems with Galese.

Four teachers testified about the relationship between the Association and the Board. The guidance counselor, Ann Smith Hughes, said that the MEA was not in agreement with Galese's field trip policy, feeling it would deprive the teachers of their civil rights. She was not familiar with the ski trip, but was familiar with foreign language trips which had been going on for at least 15 years and which were handled by outside agencies in conjunction with members of the Foreign Language Department. It was stipulated that Mr. Phillips's testimony would be identical to that of Ms. Hughes. He added that he had a discussion in the spring of 1985 with the former president of the Board, Harold Peters, who told him to advise DiCerbo to "tone down his comments." Jean Brown is an English teacher and director of student activities at the high school. She disagreed with Galese's policy that any trip accompanied by teachers is a field trip and therefore should receive official Board sanction.

Diane Klein, former president of the MEA, teaches home economics. She corroborated DiCerbo's testimony about the April 1984 meeting, at which he attempted to speak on her behalf and was silenced and threatened by the Board, and about the MEA's vote of no confidence in the superintendent. She pointed out that the delegate assembly of the NJEA condemned the Manchester Board in May 1984. In Ms. Klein's opinion, by July 1984 the relationship between the MEA and the Board and superintendent was not good. For the second year over half the staff anticipated job loss, which was perceived as a scare tactic. The staff did not trust the administration and were afraid to say anything because of warnings from Mr. Galese. People were resigning even when there were no reductions in force. Ms. Klein conceded that no charges of unfair labor practices had been filed between 1978 and 1984 while she was president of the Association.

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

Members of the Foreign Language Department, Gabrielle Whittemore and Lori Dow-Moore, have conducted student trips to Europe for educational purposes. Ms. Dow-Moore testified that a trip is organized if a sufficient number (seven to ten) of students are interested. She always keeps her department chair, principal and superintendent informed of the trips. There is no question that she is the chaperone on the trip and that she tells the students she is the chaperone on the trip. They always travel in a group, and the students are not permitted to leave her sight. She does not receive a salary for being a chaperone but receives expenses.

Ms. Whittemore said she is the chaperone for the students when she conducts a Foreign Language Department trip. Discussions take place on school grounds after school, and the trip is publicized in the classroom and over the PA system. She does not collect the money. Neither Dow-Moore nor Whittemore ever received official Board approval for the trips.

All the students and former students who testified on behalf of respondent conceded that beer was drunk on the bus to and from Lake Placid. Their testimony differed on other issues. For example, R. L. specifically remembers DiCerbo saying in response to a student's question at the meeting before the trip that there would be no alcohol on the trip. DiCerbo told the students he would provide soda. Beer was purchased by the adults and drunk by them in front of the students. On cross- examination, R. L. conceded that DiCerbo did see drinking on the trip up but did not take the beer away. All testified that Mr. DiCerbo never said it was all right to drink beer, never offered beer to the students and never drank beer himself in front of the students. J. S. described how Mr. DiCerbo helped him when he passed out in the ski line on Saturday. He said that Mr. DiCerbo explained what had happened to him, spent six hours with him in the hospital and then met him back at the hotel.

J. S. and L. M. prepared a petition (R-9) urging that Mr. DiCerbo was not responsible for any of the groups' actions on the trip, which was signed by 29 parents. Mrs. S. and Mrs. M., mothers of J. S. and L. M., testified that they were sure DiCerbo would watch after their children because he was a family man and was very responsible, although they

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

knew he was not the chaperone. Mrs. S. was very satisfied with the care Mr. DiCerbo gave J. while he was ill at Lake Placid.

Mrs. M. was very disturbed that her daughter was forced into signing a statement without receiving parental consent. Mrs. M. assumed that if DiCerbo went on the trip, he would chaperone and would not allow the children to engage in illegal or bad conduct. Mrs. M. said she learned that there was drinking on the trip when her daughter was forced to sign a statement. She was more upset about the intimidation and threats used to get L. M. to sign the statement than she was by the drinking of beer.

I find that the students who testified, whether on behalf of the Board or on behalf of DiCerbo, were sincere in what they said and did not try to dissemble. Most were candid about what happened on the trip and during the meeting before the trip. I further find that Messrs. Nicholson, Spreen, Brown and DiCerbo told the truth in regard to the tenor and events of the April 4 meeting. Clearly, there were problems between the Association and Mr. Galese, which colored the testimony of Mr. Galese, Ms. Klein and other teachers. Mr. Catalano's testimony must be viewed in light of his precarious position in the school system. It is against the background of this general discussion of the testimony of the witnesses and of their demeanor and credibility that I have made specific findings of fact.

IV
Findings of Fact

After considering the testimony and evidence, the demeanor and credibility of the witnesses, and the arguments of counsel, I make the following findings of fact.

1. Thomas DiCerbo is a tenured teaching staff member employed by the Manchester Regional High School Board of Education since 1969 as a secondary school science teacher.

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

2. Since July 1, 1984, Mr. DiCerbo has been president of the Manchester Education Association. Prior to July 1, 1984, he served as grievance chairperson and chief negotiator.

3. In September 1984, Mr. DiCerbo visited Belmont Travel Agency, Haledon, New Jersey, and inquired about the availability of reasonably priced ski packages for his friends and some young people interested in a weekend ski trip.

4. About one month later, Karen Ritchie, owner of Belmont Travel, provided DiCerbo with a list of ski trip operators offering ski packages. DiCerbo selected a package offered by Ski Safaris for the weekend of January 25, 26 and 27, 1985 at Lake Placid.

5. Mr. DiCerbo informed various students at Manchester Regional High School about the availability of the trip and distributed brochures and information from Ski Safaris and Belmont Travel.

6. Forty students between the ages of 16 and 18 decided to go on the trip. They paid $140 each for the ski trip. They gave the money to Mr. DiCerbo before school, after school, in homeroom or before or after his class. DiCerbo, in turn, brought the money to Belmont Travel along with contracts signed by each of the participants.

7. Mr. DiCerbo did not discuss the trip during class but did discuss it before and after class, before and after school, in the lunch room and in homeroom.

8. Mr. DiCerbo held one formal meeting in his biology room after school one day prior to the trip. He told the students the trip was not a school-sponsored event and that he was not going to be their chaperone. He told them he expected them to act as adults, but if they needed help, he would be there to help them.

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

9. At the same meeting, Mr. DiCerbo told the students, in response to a question, that he was bringing beer for his friends, but no hard liquor would be allowed. He did not tell the students that it was all right for them to bring beer.

10. Mr. DiCerbo and his wife did not have to pay $140 each because Ski Safaris issues complimentary passes to individuals in charge of trips.

11. Mr. DiCerbo organized and facilitated the trip in that he informed students of the trip, collected the money for the trip and was the "leader" to whom people could turn if they needed help. He did not personally arrange for bus transportation, hotel accommodations, purchase of ski lift tickets or ski rentals.

12. The bus left Haledon from a private parking lot at about 5 p.m. on Friday, January 25, 1985. Some students carried beer onto the bus, either in coolers or in bags which Mr. DiCerbo did not inspect.

13. Mr. DiCerbo brought a case of soda for the students and one case of beer for his adult friends. He sat in the front of the bus, while most of the students sat in the middle to the rear of the bus.

14. During the trip to Lake Placid, up to 50 percent of the students drank beer while sitting in their seats. The students tried to conceal the beer when they brought it onto the bus and while they drank it.

15. Mr. DiCerbo did not supply or offer alcoholic beverages to any student while the bus was proceeding to Lake Placid. He made no effort to observe what the students were doing on his only trip to the back of the bus.

16. Mr. DiCerbo himself did not consume any alcoholic beverages on the bus to Lake Placid, although his adult friends did drink beer in front of students. He

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

does not know if this was a poor example for 16- to 18-year-old high school students.

17. The driver or representatives of Ski Safaris, who were also on the bus, did not receive any complaints of students misbehaving while the bus was proceeding to Lake Placid, nor did representatives of the hotel or of Ski Safaris receive complaints of students misbehaving while at Lake Placid.

18. On January 26, 1985, J. S. became ill at the ski lift, and Mr. DiCerbo responded in a caring fashion. He accompanied J. S. to the hospital, maintained repeated contacts with the parents of J. S. and made certain that J. S. was comfortable and receiving proper care. He made arrangements for J. S.'s return to the hotel and checked on his comfort and condition periodically, keeping J. S.'s parents abreast of his condition.

19. At no time on Saturday, January 26, did DiCerbo supply or offer alcoholic beverages to any students, nor did he see any students drinking alcoholic beverages on that day. He did not make any attempt to monitor the students' activities in their rooms.

20. The bus left Lake Placid to return to Haledon at approximately 3 p.m. on Sunday, January 27, 1985. Mr. DiCerbo was seated in the front and the students were seated from the middle to the rear of the bus. About one hour after leaving Lake Placid, the bus driver asked DiCerbo to speak to the students about the noise level.

21. Mr. DiCerbo left his seat and proceeded to the back of the bus. He saw several students drinking beer.

22. Mr. DiCerbo became angry and told the students involved that their behavior was wrong, that he would not tolerate it, that they must be mature and realize

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

that while they had nothing to lose, he did. Mr. DiCerbo asked two of his friends to collect the beer and other alcoholic beverages, which was done.

23. After returning to Haledon, DiCerbo drove J. S. home and conferred with J. S.'s parents in regard to J. S.'s epilepsy.

24. Mr. DiCerbo did not take any affirmative action to determine if beer was being drunk or to prevent beer being drunk on the bus trip to Lake Placid, despite the fact that he told the students he was bringing beer on the trip. Mr. DiCerbo did not take any affirmative action to monitor the students on the trip up, during the weekend itself or for the first hour of the trip back, based on his premise that he was not their chaperone.

32. The Board did not sponsor the trip to Lake Placid and did not designate Mr. DiCerbo as having specific responsibilities for the students. However, Mr. DiCerbo was more than just a mere member of the public interested in securing the travel services offered by Belmont Travel and Ski Safaris.

26. In late March 1985, Superintendent of Schools Galese learned of the ski trip as a result of an inquiry by Ms. Gould, secretary to the school administrator. She was concerned about her daughter going on a future trip and its possible impact on her daughter's participation in graduation. Ms. Gould had heard that beer drinking took place on the ski trip and that a student had been hospitalized.

27. No other parents complained to the Superintendent about the ski trip, either in January or March 1985. Some of the parents assumed that Mr. DiCerbo was the chaperone because he was a teacher in the school system and because he spoke to the students in school about the trip.

28. The trip was investigated by Mr. Catalano, then dean of students at the high school. He interviewed at least four students, who subsequently either

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

initialed Mr. Catalano's report or signed separate statements about the trip. None of the statements signed by the students were under oath or signed in the presence of a notary public. The students signed because they were intimidated, either with the threat of being subpoenaed if they did not sign or, in one instance, by a fear of not getting into college.

29. None of the parents of the students questioned were advised beforehand that their children would be interviewed by Mr. Catalano and/or Mr. Galese.

30. On April 3, 1985, DiCerbo telephoned Galese and requested a meeting the next day to find out what was going on. At first, Galese refused, but then scheduled a meeting for the afternoon of April 4, 1985.

31. The April 4, 1985 meeting was attended by Peter Nicholson, respondent's area supervisor, Robert Spreen, principal, Robert Brown, industrial arts teacher, Mr. DiCerbo and Mr. Galese, superintendent of schools.

32. At the meeting, Mr. Galese refused to disclose of the identity of the parent who complained about the trip or the Board member he said had requested an investigation.

33. Superintendent Galese asked respondent to answer a list of questions Galese had prepared. Mr. Galese told Mr. DiCerbo that he did not have to answer the questions if he chose not to do so. The questions were read to Mr. DiCerbo twice, and he chose not to answer.

34. At the meeting, DiCerbo told those present that the trip was none of the school's business and that the superintendent had no right to investigate the trip because it took place outside of school.

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

35. At that meeting, Mr. Galese said that any contact by a staff member with a student while they were away from the school constituted a field trip. His definition of a field trip was rejected by Mr. Brown.

36. Subsequent to the April 4, 1985 meeting, Superintendent Galese recommended withholding Mr. DiCerbo's employment adjustment and salary increments for 1985-1986. The Board adopted a resolution to that effect on June 20, 1985.

37. In April 1985, DiCerbo grieved the superintendent's actions toward him, which was rejected by Superintendent Galese. On May 3, 1985, Mr. DiCerbo presented the grievance to the Board, which has not yet taken action.

38. Board Policy on Instruction 2340, page 1, prohibits staff members from soliciting pupils in the district, within the facilities or on school grounds, without Board permission. In order to conduct a specific school-sponsored field trip, Board approval is required, as are written consents from both the student and the parent. Money collected for field trips is to be counted and deposited in the general organization fund in the business administrator's office.

39. Prior to and including school year 1985-86, the Board did not enforce that portion of Board Policy 2340 which it alleges Mr. DiCerbo violated. That is not to gainsay the fact that Mr. DiCerbo did not seek Board approval of the trip or obtain appropriate parental approvals.

40. For many years prior to January 1985, members of the Foreign Language Department accompanied students on trips to Europe and Canada. These trips were not specifically sponsored by the Board. Money collected by staff members was not deposited in the business administrator's office, nor were the district's field trip approval forms or parental approval forms utilized. Students were solicited on school grounds, money was collected on school grounds and the teachers conducted meetings about the trip on school grounds.

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

41. A major difference between trips sponsored by members of the Foreign Language Department staff, who have never been reprimanded or disciplined for their actions associated with these trips, and the trip facilitated and organized by Mr. DiCerbo is that the Foreign Language Department teachers specifically viewed themselves as chaperones of the students. They each told students that he/she was the chaperone on the trip. On Foreign Language Department trips, students travel in a group and are not permitted to leave sight of the teacher and the courier from the supporting agency. The Foreign Language Department teachers accept responsibility for the students while on these trips.

42. The relationship between the Board and the MEA is not good, nor is the relationship between Mr. Galese and Mr. DiCerbo.

43. Examples of problems between Mr. DiCerbo, the Association, and Mr. Galese and the Board include the following:

A. In April 1984, Mr. DiCerbo was not permitted to address the Board of Education on behalf of the then president, Diane Klein.

B. In May 1984, the Association expressed a vote of no confidence in Superintendent Galese.

C. In May 1984, the governing body of the New Jersey Education Association (Delegate Assembly) found that the Board had engaged in "anti-union behavior."

D. Mr. Peters, the Board president, told Mr. Phillips to tell DiCerbo to "tone down his comments."

E. Mr. DiCerbo was considered a very vocal president of the Association.

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

44. Upon assuming the presidency in July 1984, DiCerbo began meeting with an ad hoc committee of the Board and Association members, including Mr. Galese, to present staff concerns to the Board. The meetings were eventually terminated because Mr. Galese felt he could handle the problems himself.

45. Between August and November 1984, Mr. Galese told Mr. DiCerbo that he did not want DiCerbo discussing his (Galese's) problems in dealing with Mr. Spreen, then principal of the high school. Mr. Galese also told Mr. DiCerbo not to talk to any Board members without Galese's prior permission and knowledge of the topic. Mr. Galese told Mr. DiCerbo that he wanted to be his friend, and if DiCerbo would not be, Galese would get him (on insubordination charges).

46. As a result of the withholding of Mr. DiCerbo's salary and adjustment increments for 1985-86, his salary has been maintained at the same level at which it was set for the 1984-85 school year, $27,440 (scale 3, step 10). Had the Board not withheld his salary and adjustment increments, his salary in 1985-86 would have been $29,367 (scale 3, step 11.)

V

Arguments of Counsel

Both attorneys submitted lengthy and cogent briefs, as well as detailed reply briefs, which are hereby made part of this record. The legal arguments set forth in the initial briefs and the reply briefs, as well as the proposed findings of fact and the testimony, were referred to and considered at length before reaching the findings of fact and conclusions of law set forth herein.

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

VI

Conclusions of Law

It has already been determined that the Commissioner and the Department of Education have predominant interest in this matter, that issues arising from the January 1985 ski trip and any conduct of Mr. DiCerbo relating thereto shall be the predominant issues and that the Commissioner of Education shall have the authority to issue a final decision on those issues. The Public Employment Relations Commission (PERC) reversed that portion of my decision which said if there are sufficient legal gounds to withhold the increment and/or suspend Mr. DiCerbo pursuant to education law, then any legal grounds for findings of anti-union animus will become moot. PERC ruled that it was necessary to apply the Bridgewater test to see if the action would have taken place even in the absence of protected activity or if anti-union animus of the Board was a substantial motivating factor leading to the disciplinary actions.

A. Should the tenure charges be dismissed because of various alleged procedural defects?

Respondent has moved to dismiss the tenure charges because he alleges the Board improperly delayed forwarding the certified charges to respondent and the Commissioner. The Board resolved to certify tenure charges at its August 15, 1985 meeting but did not forward the charges to the respondent until September 9 or 10, 1985, and did not actually file the charges with the Commissioner until September 12, 1985. Counsel asserts that the provision of N.J.S.A. 18A:6-11 requiring the Board to forthwith notify the employee of the charges has been violated by virtue of passage of 25 days between the resolution and the actual notification received by Mr. DiCerbo.

The Board argues that its secretary was presented with tenure charges and a statement of evidence against respondent on July 10, 1985. The charges were forwarded to respondent so that he would have an opportunity, pursuant to statute, to submit a written statement of evidence under oath as well as an opportunity to appear before the Board at a private meeting on August 15, 1985. On August 12, 1985, the Board received a

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

letter from respondent, dated July 26, 1985, in response to the charges. DiCerbo indicated that his position and evidence would be presented before the Commissioner or another agency of competent jurisdiction. Therefore, on August 15, 1985, three days later, the Board determined to proceed to a hearing on the charges. On August 23, 1985, the Board, through counsel, notified respondent that pending a hearing by the Commissioner on the charges of unbecoming conduct, he was suspended without pay effective September 1, 1985. On September 10, 1985, 26 days later, the statement of written charges, certificate of determination, memorandum of charges and sworn statement of evidence were served on the respondent. The same documents were filed with the Commissioner on September 12, 1985.

A review of the cases cited by both attorneys indicates that the definition of the statutory time limit for service, "forthwith," upon the teacher and the Commissioner is not set forth in numbers of days, but merely described as "reasonable" time. The Board argues that both the State Board and the Commissioner have held that a board of education has 45 days within which to file and serve statements of charges on a teacher and with the Commissioner. See, In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, 1977 S.L.D. 451, aff'd State Bd., 1977 S.L.D. 458; as well as In the Matter of the Tenure Hearing of Joseph Murphy, School District of Manalapan, Englishtown, 1980 S.L.D. 1519.

Upon reviewing the statutes, the cases and the logic of the situation, I conclude that the Board first notified Mr. DiCerbo of its proposal to file tenure charges in July 1985. Three days after receipt of a letter from him indicating that he would not supply a statement of evidence to the Board, it determined to certify charges. Mr. DiCerbo learned eight days later, through counsel, that he would be suspended without pay pending a hearing of the charges. Nineteen days after that he received a statement of written charges. Considering that the activities in question were going on during the summer months and that respondent has not argued any prejudice from the 26-day interim period, I have decided to deny the motion to dismiss on the basis of improper delay. The terms "forthwith" and "reasonable" time are subject to interpretation, given the circumstances of each particular case. In the case at bar, not only did respondent know what was going

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

to happen, but he had already indicated that he wanted to present his evidence before the Commissioner or another court of competent jurisdiction. Given that response and his absolute knowledge, and given the fact that the aforementioned cases indicate a 45-day time limit, I conclude that there was not an unreasonable delay in forwarding the certified charges either to respondent or to the Commissioner and that the Board acted consistent with the statutory direction to forward said charges "forthwith."

DiCerbo also argues that the tenure charges are barred by the doctrine of election of remedies, in that once the Board determined to withhold his salary and adjustment increments pursuant to N.J.S.A. 18A:29-14, it was estopped from certifying tenure charges based on the same allegations. Counsel argues that the two proceedings are inconsistent because the teacher has the burden of proof to establish that the withholding was arbitrary or improper, whereas the Board has the burden of proof to establish the merits of the tenure charges. Mr. DiCerbo's counsel also asserts that the Board is equitably estopped from asserting tenure charges against DiCerbo because it had previously determined to withhold his increments for the 1985-86 school year. Said decision was a final determination of the appropriate penalty for his alleged inproprieties, and therefore the Board could not reverse itself and certify tenure charges. In the same vein, counsel argues that the Board waived its known right when it did not initiate tenure charge proceedings in June 1985 but elected instead to withhold Mr. DiCerbo's increments.

The Board argues that there is no merit to the theories of election of remedies, estoppel and/or waiver in the instant matter. Counsel asserts the Commissioner has specifically concluded that there is no statutory provision forbidding any board of education from filing tenure charges and withholding a salary increment, even if based on the same allegations. Counsel also argues that Mr. DiCerbo has not acted in response to the Board's withholding of his increment in such a way as to engender application of the doctrine of estoppel or waiver.

The basic argument of the Board, and one that I adopt, is that the Commissioner has determined on a number of occasions that N.J.S.A. 18A:29-14, which permits withholding

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

of increments, and N.J.S.A. 18A:6-10 et seq., which establishes procedure for filing tenure charges, are two distinct statutory provisions that provide independent redress to the Board against a tenured teacher, even if the two avenues are based on the same underlying facts. I have reviewed the cases upon which the Board relies and find that they are absolutely on point and dispositive of the issue. See, School District of the Township of East Brunswick, Middlesex County v. Renee Sokolo, Commissioner's Decision, 1982 S.L.D. 1382, aff'd State Board (May 4, 1983), Tenure Hearing of Ernest E. Gilbert, School District of the Township of Willingboro, Commissioner's Decision, 1982 S.L.D. 325, aff'd State Board, 1982 S.L.D. 328 and Harrell v. Bd. of Ed. of the City of Paterson, 1978 S.L.D. 382.

For all the foregoing reasons, I have concluded that the motion to dismiss the tenure charges based on various procedural deficiencies should be denied.

B. Did the Board act in an arbitrary, capricious and/or unreasonable manner in withholding Mr. DiCerbo's 1985-86 increment.

It is undisputed that a board of education has the right to withhold employment and adjustment increments for "inefficiency or other good cause . . . or both . . ." N.J.S.A. 18A:29-14. While the Board has the authority to withhold those increments, see Francis Filardo v. Board of Education of the Township of Mahwah, Bergen County, 1975 S.L.D. 830, and Francis Dullea v. Board of Education of the Borough of Northvale, Bergen County, 1978 S.L.D. 558, aff'd, State Board, 1978 S.L.D. 563, such power is not absolute, but is subject to procedural safeguards. See, Zucaro v. Board of Education of Red Bank, Monmouth County, 1980 S.L.D. 586, 592, aff'd, State Board, 1980 S.L.D. 594.

The authority of the Commissioner of Education to examine a Board's decision to withhold an increment was clearly articulated in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). The Kopera court directed the Commissioner as follows:

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

> . . . [W]e think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. Id. at 296-297.

The Appellate Division held that the Commissioner could only review whether the Board had a reasonable basis for its conclusions. Id. at 295-296. It should be noted that upon remand, the Commissioner of Education added a further dimension of consideration in such matters when he said:

> . . . To withhold an increment on such a salary schedule, it is not necessary to show shortcomings in the part of a teacher sufficient to justify dismissal under the Teachers' Tenure Act.

1960-61 S.L.D. at 62. In accord, Trautwein v. Board of Education of the Borough of Bound Brook, 1980 S.L.D. 1539 (N.J. App. Div., April 8, 1980.) (unreported), certif. denied, 84 N.J. 469 (1980).

Applying the rationale and guidelines of Kopera to the case at bar, it is clear that Mr. DiCerbo has the burden of proof to show (1) the underlying facts were not as claimed by the Board and Superintendent Galese, and (2) it was unreasonable, arbitrary and/or capricious for the Board to conclude to withhold his increments based on those facts. DiCerbo contends that he did not engage in conduct unbecoming a teacher when he went to Lake Placid with the students and that he had no knowledge that students brought alcohol onto the bus or drank alcohol during the bus ride to Lake Placid or while they were there.

The Board argues that his conduct was unbecoming, that he was insubordinate to Mr. Galese in refusing to answer the questions and that there was other good cause to deny both the salary step increment and contractual increase. This is especially true, the Board argues, in light of the fact that respondent has to show that the Board acted in an arbitrary, capricious or unreasonable manner and that mere allegations of arbitrariness are insufficient to prevail in a case involving an increment withholding.

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

If the instant charges of either conduct unbecoming a teacher or subordination are grounded in fact, they would certainly support a withholding of the increments in question. The testimony has clearly established that Mr. DiCerbo, while a sincere and good person, lacked judgment in the manner in which he organized and facilitated the ski trip to Lake Placid. He encouraged 40 students between the ages of 16 and 18 to attend. He told these children that he would not be a chaperone and that he would treat them as adults and expected them to act as such. He made these representations on school property, during school hours (although not during classroom hours) and collected money on school property and during school hours. He told the students he was bringing beer for himself and his friends and did not tell them not to bring beer, and he specifically did nothing to prevent the consumption of alcohol on the bus trip to or during the weekend at Lake Placid. I have considered all of these facts and conclude that the first criterion established by Kopera, 60 N.J. Super. at 296 has been met. The relevant underlying facts were as the Board claimed. The record includes sufficient competent and credible evidence that Mr. DiCerbo engaged in conduct which showed poor judgment and which could have led, and did lead, students to think that it was permissible or at least tolerable to drink beer on the trip to Lake Placid.

I further conclude that the second Kopera criterion has been established. It is obviously not unreasonable, arbitrary or capricious for the Board to recommend, based on these proven underlying facts, testified to by respondent himself as well as by the students who were credible witnesses, that the increments for the 1985-86 school year be withheld.

Even if, theoretically, I were to conclude differently, based on the facts presented to the Board, I will not and may not substitute my judgment for that of the Board as long as it rests its decision on a reasonable basis and as long as it is not arbitrary and capricious. Kopera, 60 N.J. Super. at 296-297. It is not my function to second guess or reevaluate the determination of the Board that Mr. DiCerbo's conduct in regard to the ski trip was unbecoming a teacher and merited a withholding of increments. It is merely my function to evaluate whether the basis upon which the action of the Board was made was reasonable under the circumstances. A careful review of the testimony and evidence fully

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

supports the determination of the Board insofar as it rests on an assertion of conduct unbecoming a teacher.

I make no such finding in regard to the allegation of insubordination. I find as true that Mr. Galese told Mr. DiCerbo during the meeting on April 4, 1985 that he did not have to answer the questions and that Galese stated he would not do so if he were asked the questions himself. I believe Mr. DiCerbo, Mr. Brown and Mr. Spreen in regard to what happened at the April 4 meeting, as they were credible and their testimony was consistent. Accordingly, I conclude that to withhold the increments based on a finding of insubordination would be arbitrary and capricious because there is no basis in fact to support said determination.

The foregoing analysis is made in light of the fact that withholding of increments is the mildest statutory disciplinary measure available to a board of education. It is unnecessary to martial the quantum of proof needed to justify suspension or dismissal. See, Hillman v. Board of Education of Caldwell-West Caldwell, Essex County, 1977 S.L.D. 218. Furthermore, the Board has no obligation to carry the burden of proof in regard to its reasons for withholding the increment. Trautwein. I therefore conclude that the Board of Education of Manchester Regional High School did not violate N.J.S.A. 18A:29-14 in withholding respondent's salary increments for the 1985-86 school year insofar as said withholding rests upon a determination of conduct unbecoming a teacher. It did violate the foregoing statute and acted in an arbitrary, capricious and unreasonable manner when it determined that Mr. DiCerbo acted in an insubordinate fashion.

C. Do the tenure charges, if proved, encompass conduct unbecoming a teacher and/or subordination.

A board of education bringing tenure charges has the burden of proving said charges are true by a preponderance of the competent and credible evidence. See, In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, 1978 S.L.D. 526; In the Matter of the Tenure Hearing of Madeleine Ribacka, Sussex-Wantage Regional School District, Sussex County, 1978 S.L.D. 929, and In the Matter of the Tenure

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

Hearing of Fred Brown, School District of the City of Bayonne, 1970 S.L.D. 239. The appellate courts have also concluded that the standard of proof to be applied in administrative cases is that of a preponderance of the believable evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), In re Tenure Hearing of Grossman, 127 N.J. Super. 13 (App. Div. 1974).

In the instant case, the Board has leveled five charges against Mr. DiCerbo which it must prove by a preponderance of the evidence. One charge deals with his alleged refusal to cooperate and/or respond to the superintendent's questions concerning the trip at the meeting on April 4, 1985. The remaining four charges concern Mr. DiCerbo's conduct prior to and during the trip to Lake Placid on January 25 to 27, 1985.

1. The first charge alleges that Mr. DiCerbo organized and conducted a trip on or about January 25 to 27, 1985, which was not approved by the Board of Education or superintendent and which involved solicitation for participation of pupils of the Manchester Regional High School district.

The Board asserts that Policy 2340 prohibits the conduct of Mr. DiCerbo in facilitating and organizing the trip, as he was obligated to get approval for the trip from the Board and/or superintendent. The Board argues generally that Mr. DiCerbo abdicated his responsibility as a teacher and did not maintain his professional stance in the eyes of his students and in the eyes of the community at large. I have already concluded that Policy 2340 was not generally enforced by the administration and was not distributed to staff members. The one copy placed in the library for staff members to review was lost and not available after September 1984. I further conclude that the policy was worded in such a way as to absolve the Board of liability for problems arising on unapproved trips conducted by staff members ("The Board does not endorse, support or assume liability in any way for any staff member of this district who takes pupils on trips not approved . . ."). This was the main purpose of the policy. Further, as late as April 4, 1985 there was no accepted definition of field trip. It is not necessary to decide the issues of lack of notice or selective enforcement because the policy was not enforced at all and does not specifically apply to the case at bar in terms of Charge 1. I conclude that there is

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

insufficient evidence in the record to support a finding of insubordination arising from failure to obtain Board approval.

However, Mr. DiCerbo showed a lack of good judgment when he told the students he was not their chaperone and when he told them he was bringing beer for his friends. This lack of good judgment is also seen in the omission of a specific directive from him to the students, at any time while organizing and facilitating the trip, NOT to bring or drink beer. This is conduct unbecoming a teacher.

2. Charge 2 alleges that DiCerbo solicited and encouraged pupils for the trip unapproved by the Board of Education or superintendent of school and did so on school grounds without Board approval.

I wholeheartedly adopt the argument of Mr. DiCerbo's counsel that Charges 1 and 2 are substantially identical and should be merged. Any difference between them is de minimus. I therefore conclude that the assertions of Charge 2 are also not sufficiently grounded in fact to support a finding of insubordination. Other teachers did solicit students for trips which were not specifically approved by the Board of Education (the foreign language trips) and did so on school grounds without specific Board approval.

3. Charge 3 alleges that on April 4, 1985, Mr. DiCerbo refused to cooperate and/or respond to questions of the superintendent of schools concerning a trip involving pupils at the Manchester Regional High School district, which took place on January 25 to 27, 1985.

The Board gives short shrift to the insubordination assertion. It merely states it can constitute grounds for dismissal and that refusing to cooperate or respond to questions of the superintendent or refusing to follow applicable Board rules would be equivalent to insubordination.

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

Mr. DiCerbo argues that the charge of insubordination should be dismissed because the weight of the evidence does not support it. Counsel points out that insubordination has been defined by the Commissioner to include a willful or intentional disregard of the lawful and reasonable instructions of the employer. In the Matter of Tenure Hearing of Wardlaw Hall, School District of the Township of Cinnaminson, 1972 S.L.D. 485. He thus urges that the Board has not proved that Mr. DiCerbo willfully disobeyed a substantive directive of Superintendent Galese. He further argues that the charges of insubordination must be examined in context, not in a vacuum, and all the events leading to the allegations of insubordination must be considered.

The law is clear that charges will be dismissed when "the weight of the evidence does not support the charges or demonstrate unfitness." In Re Tenure Hearing of John Nies, 1963 S.L.D. 172, 210. In this case the Board has charged that Mr. DiCerbo refused to cooperate and/or respond to questions of the superintendent concerning the ski trip and pupils of the district, and thus was insubordinate. The Board has failed to sustain its burden of proof in regard to that specific charge.

I accept the arguments of Mr. DiCerbo's counsel, as well as the case law which indicates that the charges against any individual or tenured employee may not be examined in a vacuum. Events leading up to those allegations must be taken into account since they may help to explain the situation. Types of situations which are considered include those described in In re Tenure Hearing of Peter J. Romanoli, 1975 S.L.D. 352 (abusive language coming at the end of a long and hard meeting); in Board of Education of Wallington v. Thomas L. Harty, 1960-61 S.L.D. 199 (Superintendent's contact with newspaper based on provocation and attempt to defend staff from criticism); in In re Tenure Hearing of Harry I. Buch, 1977 S.L.D. 95 (alleged assault and battery provoked by questionable conduct of board member); and in In re Tenure Hearing of Gerald Matcho, et al., Comm'r of Ed. (July 29, 1980), (uncooperative behavior based on provocation).

DiCerbo was questioned on April 4, 1985 after the superintendent and Mr. Catalano had undertaken to investigate the ski trip without speaking to Mr. DiCerbo first. The April 4, 1985 meeting was instigated by DiCerbo and was granted only after Mr. DiCerbo

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

pressured Mr. Galese. Further, and most important, Mr. Galese did not specifically direct Mr. DiCerbo to answer the questions. Instead, he read the questions to him twice, and when Mr. DiCerbo asked if he had to answer the questions, Mr. Galese said he did not have to answer. Mr. Galese intimated that if he were Mr. DiCerbo he would not answer the questions. Thus, Mr. DiCerbo's subsequent refusal to answer the questions was clearly NOT a willful and/or intentional disregard of Galese's instructions.

While the statement of charges does not specifically refer to Board Policy 2340, governing field trips, there was an assertion during the hearing that Mr. DiCerbo willfully failed to follow that as well. There is insufficient evidence to support such a finding. That Board policy was not disseminated to teachers but was available only in a handbook in the library. After September 1984, when the trip in question began to be planned, the handbook was lost or misplaced. Further, many trips had been organized and facilitated by members of the Foreign Language Department without adhering to the requirements of Policy 2340. Those teachers were not charged with insubordination and willful disregard of policy. This is not to say there were no substantive differences between the foreign language field trips and Mr. DiCerbo's trip. It is to say that Mr. DiCerbo did not willfully disregard a Board policy concerning field trips since said policy had not been enforced uniformly and was not even available to the staff. Accordingly, I conclude that Mr. DiCerbo did not engage in acts of insubordination which would give rise to his suspension or dismissal as a tenured employee of the Manchester Regional High School Board of Education.

4. Charges 4 and 5 allege that Mr. DiCerbo permitted, allowed, aided and abetted the availability of alcoholic beverages on the bus and permitted, allowed, aided and abetted the consumption of alcoholic beverages by the pupils during the trip.

The charges will be dealt with together because they deal with the same facts and because the applicable law applies to both charges.

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

The Board argues that the Commissioner is adamant that any teaching staff members who have either sanctioned, abetted or been indifferent to the use of alcohol by school pupils must be strongly disciplined. The Board asserts that the facts here show that Mr. DiCerbo told the students that he was bringing beer and/or that they could bring beer; that he knew or should have known that beer was brought on the bus; that he knew or should have known that beer was being drunk on the bus; that he knew or should have known that beer or other alcoholic beverages were consumed during the trip; and that he definitely knew that beer was consumed on the return trip to North Haledon. Counsel relies on In the Matter of the Tenure Hearing of Michael Gwaley, School District of the Township of Middletown, OAL DKT. EDU 3609-85 (Dec. 18, 1985), aff'd by Comm'r of Ed. (January 30, 1986), aff'd State Board (June 4, 1986), where that teacher knew that students were consuming alcohol at a party at the home of another teacher and did nothing to stop it and In the Matter of the Tenure Hearing of John Ahern, School District of the Township of Middletown, OAL DKT. EDU 2891-85 (Sept. 6, 1985), aff'd by Comm'r of Ed. (October 24, 1985), where a teacher was charged with hosting a party at his home where alcoholic beverages were available. The Commissioner affirmed the administrative law judge's decision that even though the testimony established that Ahern did not directly serve beer to the pupils, neither did he advise those pupils who were under the legal drinking age in New Jersey to refrain from drinking beer, and thus he was guilty of conduct unbecoming a teaching staff member.

Respondent's attorney argues that DiCerbo told the students not to bring any alcoholic beverages and did not know that, in fact, that they brought beer onto the bus. He did not know that the students were drinking while on the bus because he remained in the front of the bus. Counsel argues that Mr. DiCerbo was under no obligation to search the students' belongings and to do so would have been to disregard their constitutional rights. He relies on New Jersey v. T.L.O., 469 U.S. ___, 83 L. Ed. 2d 720 (1985). Counsel also argues that there is no proof that Mr. DiCerbo permitted and allowed the availability or consumption of alcoholic beverages while the students were actually at Lake Placid. Furthermore, when he saw the students drinking beer on the bus ride home he immediately stopped what he saw and knew to be wrong. Prior to that point he had no knowledge and no reason to know that the students had been drinking.

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

Counsel asserts that the legal definitions of aiding and abetting another are inapplicable to the case at bar and require evidence of one who acts with a purpose. Counsel distinguishes the facts of this case from the conduct the Commissioner found inappropriate in In the Matter of the Tenure Hearing of John Ahern and In the Matter of the Tenure Hearing of Michael Gwaley on the basis that Mr. DiCerbo did not create a social environment and did not have intimate contacts with the students; that the events took place in a bus or a public place and not in his home; that he did not know that beverages had been surreptitiously brought on the bus; that when he became aware of it, he acted to stop the drinking; and that he did not provide any alcohol.

The problem in the case at bar is whether DiCerbo's course of conduct as found in the facts is sufficient to justify a conclusion of conduct unbecoming a teacher and to justify his dismissal from teaching at Manchester Regional High School. Conduct unbecoming a teacher is not specifically defined in the statute. Gwaley and Ahern have found a teacher guilty of such conduct where alcohol was available to students and the teacher did not take affirmative steps to stop it. Other cases in which teachers were found to be guilty of unbecoming conduct have encompassed serious situations such as a teacher's absence an average of 89 days each school year with recovery from alcoholism unlikely, see Matter of Peter Canzoniare, East Brunswick School District, Comm'r of Ed. (April 24, 1981), a serious mental problem, see, Matter of Claire DeKrafft, School District of Cherry Hill, 1981 S.L.D. 1308, a teacher who had unsatisfactory ratings despite significant aid and cooperation from the school administration, see, Matter of Ethel P. Hogue, School District of the Township of Teaneck, OAL DKT. EDU 4598-82 (Nov. 30, 1982), aff'd by State Board (March 3, 1983), and see also, Matter of David B. Powell, Union School District, OAL DKT. EDU 5584-82 (Sept. 29, 1982), aff'd by Comm'r of Ed. (November 9, 1982), where the teacher had alcohol or drug problems, could not return to work and was, in fact, absent without authorization for seven weeks. In determining whether a particular set of facts rises to the level of conduct unbecoming a teacher, one must always keep in mind that "[t]eachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience and learn about the

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

teacher." [emphasis added] In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97, at 98-99.

The Commissioner has spoken deliberately and specifically to the conduct of teachers who in any way are linked with minor students consuming alcohol. While the facts in In the Matter of the Tenure Hearing of John Ahern and In the Matter of the Tenure Hearing of Gwaley are more egregious then the facts here, the determinations of the administrative law judges and the Commissioner in both cases are instructive. In Gwaley, the Commissioner said, "[r]espondent's behavior in attending the party and condoning the pupils' drinking cannot be excused on the pretext that he was not the host nor personally served any alcohlic beverages." Id. at 30. In Ahern, the administrative law judge found it reprehensible that even though the respondent in that case did not serve beer to the pupils, he did not specifically advise them to refrain from drinking beer.

In the case at bar, Mr. DiCerbo's argument is that (a) he was not the chaperone and not responsible for the students because it was a private trip and (b) he did not observe the beer being brought onto the bus or being drunk on the ride up or during the time spent at Lake Placid. However, I have found the following to be fact: Mr. DiCerbo organized and facilitated the trip. He told the students he was bringing beer for his friends, although no hard liquor would be allowed. He did not specifically tell the students not to bring beer. He personally brought a case of beer onto the bus, which beer was consumed by his friends on the bus in plain view of the students. Mr. DiCerbo deliberately stayed in front of the bus for the entire trip, thus avoiding, with one exception, any observation of the students. On his one observation, he could not have helped but see the students drinking beer, if he had only looked. Mr. DiCerbo made no efforts to monitor the students' activity while at Lake Placid, although it is clear from the students' own testimony that beer was consumed on the bus during the trip up and in the hotel on the weekend.

The basic premise that Mr. DiCerbo was not a chaperone and thus was not responsible and that this was a private trip cannot be accepted in light of the clear obligation of a teacher to act in such a way as to always maintain the trust of the

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

students and their parents. The mere statement that he was not the chaperone for a trip attended by 40 underaged students does not absolve Mr. DiCerbo of his responsibilities as a role model, if nothing else. At least some of the parents assumed Mr. DiCerbo was the chaperone on the trip. (See, testimony of Mrs. M.) If Mr. DiCerbo wants to compare this trip with the trips sponsored by the Foreign Language Department for purposes of showing there was no insubordination, he cannot avoid a comparison with the testimony of the foreign language teachers that they were chaperones and monitored the students' activities at all times.

Respondent's reliance on New Jersey v. T.L.O. is inapposite to the case at bar because it does not involve criminal charges filed against a student. Should it be deemed apposite, I note that the standard established by T.L.O. for search and/or seizure of property of students does not rise to the level of probable cause, but only hinges on a determination of reasonableness; that is, was the search justified at its inception and was it reasonably related in scope to the circumstances which justified the initial interference. In the case at bar, it is clear to me that Mr. DiCerbo would have been well within his rights, considering his comments about alcohol at the meeting the day before, to ask the students to open the coolers and/or brown paper bags they were bringing onto the bus. Any such question is reasonably related to a necessity to prevent underaged students from drinking any form of alcohol, which is prohibited by law. Mr. DiCerbo must be held responsible for, at the very least, permitting or allowing the availability of alcoholic beverages and permitting and allowing the consumption of said beverages on the bus trip to Lake Placid and at the hotel. However, testimony is skimpy as to what actually occurred at the hotel and I rely on the students' testimony in that regard. Mr. DiCerbo's lack of assuming responsibility there is mitigated by the fact that he was preoccupied with caring for J. S. and with concern for his own child.

I agree with Mr. DiCerbo's counsel that the charge of aiding and abetting is not appropriate and has not been proved in the case at bar. Mr. DiCerbo did not assist, support or supplement the efforts of the students to make the beer available or to consume it, nor did he encourage, incite or instigate them to consume it. See, State v. Metcalf, 168 N.J. Super. 375 (App. Div. 1979).

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

However, I conclude that the Board has proved portions of Charges 4 and 5. Mr. DiCerbo cannot evade and avoid his responsibility as a teacher by merely stating that he was not the organizer of the ski trip and that he was not a chaperone when, at the very minimum, he specifically facilitated this trip. Mr. DiCerbo also cannot avoid responsibility for permitting and allowing the availability and consumption of beer by "shutting his eyes" by means of staying in front of the bus listening to a tape and not looking to the right or left as he went on his one trip down the aisle. A preponderance of the evidence exists in support of those portions of Charges 4 and 5 which state that Mr. DiCerbo permitted and allowed availability and student consumption of alcoholic beverages on the bus trip to Lake Placid and while at the hotel. This is conduct unbecoming a teaching staff member as contemplated by N.J.S.A. 18A:6-10 and as discussed in both Gwaley and Ahern.

D. Since the Board has proved Mr. DiCerbo engaged in conduct unbecoming a teacher, what is the appropriate sanction to be imposed.

The Board argues that dismissal is not unreasonable or unduly harsh, given the circumstances of a teacher abdicating responsibility to his students and indicating indifference to teenagers consuming alcohol in specific defiance of the law. Counsel urges dismissal because of Mr. DiCerbo's failure to recognize the significance of arranging an out-of-state weekend trip for 16- to 18-year-old students without assuming responsibility for those students, who were in his presence and therefore nominally under his charge.

Mr. DiCerbo's counsel argues that, should the tenure charges be proved, the penalty can be fashioned by this judge. Counsel argues that dismissal is not required, especially in light of the uncontroverted evidence of Mr. DiCerbo's long and unblemished record of service in the school district and of the students' respect and admiration for him. Counsel also urges this judge to take into account Mr. DiCerbo's caring attention to J. S. when he suffered a seizure and to consider the anguish and humiliation suffered by Mr. DiCerbo as a result of the instant matter. He also argues that should this judge find that Mr. DiCerbo

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

engaged in conduct unbecoming a teacher, said acts were of omission, in contradistinction to the acts of commission by respondents in the Ahern and Gwaley matters.

I have concluded that DiCerbo's conduct in relation to the ski trip does equal conduct unbecoming a teacher. However, this conclusion does not automatically mean that respondent must be dismissed. The Commissioner has previously imposed monetary penalties in lieu of dismissals where mitigating circumstances existed. In this case, I find there are extensive mitigating circumstances. The actions underlying the unbecoming conduct comprise the only known instance of inpropriety in an otherwise spotless and unblemished record, which record includes his activities in the Association. Public confidence in Mr. DiCerbo has not been shaken. Parents, students and fellow teachers see him as a teacher who performs his job with dedication, perseverance and enthusiasm. While the administration now has no confidence in his ability to perform his job well in the future, certainly his evaluations indicate that the administration has determined in the past that he performed his job well. Mr. DiCerbo erred in his premise that he did not organize the trip and in his premise that he did not have an obligation to monitor the activities of these minors. However, this lapse in judgment, covering all his conduct from the inception to the conclusion of the trip, was a one-time lapse in judgment and does not automatically condemn him to dismissal. Since mitigating factors are present, since Mr. DiCerbo has endured the increment withholding, which is affirmed, and since Mr. DiCerbo has endured the mental anguish and humiliation of these lengthy procedures, dismissal would be too severe a penalty. I conclude that that portion of the tenure charges requesting forfeiture of his position should be dismissed.

Pursuant to N.J.S.A. 18A:6-10, the Commissioner can reduce compensation of persons under tenure for conduct unbecoming a teacher. I find that a reduction or forfeiture of salary is required as the appropriate penalty under all the circumstances in this case. See, In re Buch, 1977 at 195, where that respondent forfeited two months' salary. This judge finds that a forfeiture of two months' salary to be in order in the instant matter, said forfeiture to be at the salary schedule in effect in 1984-85, the time of the conduct in question.

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

E. Affirmative defenses.

In my Order on motion for consolidation and to determine predominant interest dated January 23, 1986, I concluded that if there were sufficient legal grounds to withhold the increment and/or suspend Mr. DiCerbo pursuant to the education law, any legal grounds for anti-union animus will become moot. PERC reversed that aspect of the Order which declared the unfair practice charge moot if sufficient legal grounds existed to withhold the increment and suspension. I will therefore decide the affirmative defenses raised by respondent concerning unfair labor practices.

1. Were the tenure charges filed in retaliation for Mr. DiCerbo's filing unfair labor practice charges against the Board.

Counsel for DiCerbo has correctly stated the legal standards to be used in cases involving allegations of anti-union animus, as set forth in Township of Bridgewater v. Bridgewater Public Works Association, 95 N.J. 235, where the Supreme Court adopted the analysis of the National Labor Relations Board (NLRB) in Wright Line, Inc., 251 NLRB 150, 105 LLRM 1169 (1980), which in turn was based upon the Supreme Court decision in Mount Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977). The Bridgewater/Wright Line/Mount Healthy test requires that matters involving anti-union animus are to be decided by a two-part analysis. First, the employee must come forward and prove a prima facie case that the termination or other discrimination was motivated by protected conduct. If that is done, the burden of proof shifts to the employer to establish that the action taken against the employee would have occurred even in the absence of any protected activities.

Mr. DiCerbo has shown that his union activity was protected and that both the Board and the school administration had knowledge of his conduct. He has also shown that the relationship between the Board and the union was not good in 1984-85 and is not good to the present day. He has shown that the relationship between himself and Mr. Galese has not been good. Accordingly, it is not unreasonable to infer that an anti-union, anti-DiCerbo animus did exist, at least on the part of Mr. Galese, if not the Board of

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

Education. Pursuant to the standards set forth in Bridgewater, Wright Line and Mount Healthy, the foregoing proofs would be the equivalent of a prima facie case. The burden thus shifts to his employer, the Board, to show that the actions would have occurred regardless of Mr. DiCerbo's union involvement.

In the case at bar, I have found that the withholding of increments and filing of unbecoming conduct charges were well founded in fact, and would have, and should have, occurred regardless of any anti-union feelings on the part of Mr. Galese and/or the Board toward Mr. DiCerbo and the MEA. Further, withholding of an increment and filing of tenure charges are two separate and consistent disciplinary actions which may be taken by a board of education. I therefore conclude that the tenure charges were not filed in retaliation for the unfair labor practice charge filed by Mr. DiCerbo after his increment was withheld.

The question of retaliation may arise in regard to those charges asserting insubordination as a result of failure to answer the questions at the April 4 meeting and/or failure to get Board approval for the trip, pursuant to Policy 2340, since those charges have not been proved. However, the question of whether those charges were motivated by anti-union animus is moot on the ultimate issue of filing of tenure charges, given the overwhelming proofs that Mr. DiCerbo permitted and allowed the availability and consumption of alcoholic beverages on the bus to Lake Placid, in the hotel and during the first hour of the return trip.

I also note that even if the employer has been shown to have knowlege of and to be hostile to said union activities, if the employer shows, by a clear preponderance of the evidence, that absent such knowledge and hostility it would have conducted itself identically in regard to the teacher or employee in question based on the facts in the case, then the hostility to and knowledge of union activities is irrelevant. Matter of Ocean County College, 204 N.J. Super. 24 (App. Div. 1985), reversing 11 N.J.P.E.R. 16257, and 10 N.J.P.E.R. ¶15230, (1984). Certainly, it is a given that a board of education must take action in regard to any teacher who permits and/or allows minors to consume alcohol.

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

2. Were the standards of conduct applied to Mr. DiCerbo which led to both actions of the Board different from those previously applied to other staff members.

Counsel for Mr. DiCerbo argues that Foreign Language Department teachers were never disciplined or reprimanded or had salary adjustment increments withheld for violating Policy 2340 or for failing to get Board approval of trips. Counsel argues that it was because DiCerbo was president of the Association that only he had such an action taken against him. Therefore different standards were applied to him than those previously applied to other staff members.

The Board argues no evidence was presented of any acts or incidents on the out-of-country foreign language trips which even remotely resemble what occurred on the ski trip. Therefore, the standards of conduct applied to Mr. DiCerbo do not differ.

In the case at bar, the Foreign Language Department teachers testified that they knew they were chaperones for the students and so told the students, and that they specifically monitored the students' activities at all times while on the trips and accepted responsibility for the students. I conclude that the standards applied to Mr. DiCerbo which led to the actions of the Board were not different from those previously applied to other staff members. I accept the argument of Mr. DiCerbo's counsel that given the size of the Manchester Regional School District, knowledge of conduct of teachers can be inferred. The Board knew that the foreign language teachers were acting as chaperones in the conduct of those trips and therefore did not institute any charges against them. I conclude that the circumstances of the Foreign Language Department trips and of Mr. DiCerbo's ski trip are not at all similar and therefore do not support a finding that Mr. DiCerbo was the victim of selective enforcement.

3. Were the standards of conduct applied to Mr. DiCerbo which led to both actions of the Board different from those previously applied to members of the Board of Education.

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

This question has already been decided in the context of the hearing. I sustained an objection of counsel for the Board and did not permit the testimony of a student witness in regard to alleged improper conduct on the part of the president of the Board of Education. This was based on my conclusion that its admission would necessitate undue consumption of time, create substantial danger of undue prejudice and create unnecessary confusion. I was not persuaded that the evidence was relevant. I adopt my ruling of June 24, 1986 herein as if set forth at length.

4. Did the Board's actions violate Mr. DiCerbo's rights to privacy, pursuant to the Ninth and Fourteenth Amendments to the United States Constitution.

Counsel for DiCerbo argues that inquiry into this trip impinges on Mr. DiCerbo's right to privacy as determined in Griswold v. Connecticut, 381 U.S. 479 (1965) and Meerwarth v. Meerwarth, 128 N.J. Super. 285 (Ch. Div. 1974) aff'd. 137 N.J. Super. 66 (App. Div. 1975).

Counsel for the Board argues that as a public school teacher, Mr. DiCerbo must be judged by standards more stringent than those of the normal citizen and must maintain a professional mode of conduct at all times. Counsel points out that the right to privacy is not absolute, citing Lehrhaupt v. Flynn, 140 N.J. Super. 250 (App. Div. 1976).

There is no evidence whatsoever that Mr. DiCerbo's conduct in relationship to the ski trip is clothed with the right of privacy similar to the right of privacy to utilize contraception in one's own bedroom as enunciated in Griswold. The argument about a right of privacy while organizing and leading a trip which includes 40 minor students is specious at best and will be disregarded. A bare assertion of generalized allegations of infringement of constitutional rights does not automatically create a violation of the constitution. See, Trap Rock Industries v. Kohl, 63 N.J. 1 (1973), as well as O'Halloran v. Boards of Education of the Townships of Independence, Liberty and Alamucci, OAL DKT. EDU 5558-84 (August 27, 1984), aff'd State Board (December 5, 1984). There is no evidence in the record to substantiate DiCerbo's claims that his right to privacy was invaded.

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

5. Did the Board commit an unfair practice in failing to process the grievance filed by and on behalf of Mr. DiCerbo.

Counsel for DiCerbo argues that N.J.S.A. 34:13A-5.4(a)(1) and (a)(5) make it a prohibited practice for an employer, its representatives or agents to interfere with the exercise of the rights guaranteed public employees or to refuse to process grievances presented by the majority representative. In this case, Mr. DiCerbo filed an individual grievance rather than go through the majority representative, which grievance was rejected by the superintendent. It is uncontroverted that on May 3, 1985, Mr. DiCerbo presented the grievance to the Board and that to date it has not been acknowleged and no action been taken with respect thereto. Counsel asserts that because Mr. DiCerbo was president of the Association at the time the grievance was filed, it was done in both an associational and individual capacity. Counsel asserts a complete absence of affirmative steps or assurances taken by the employer in regard to the grievance.

Counsel for the Board asserts two procedural reasons this argument should be rejected. First, he argues that the Prehearing Order does not even identify this issue as one to be addressed in this case. Further, the collective bargaining agreement was never made part of this record, and therefore it is impossible to ascertain what constitutes a grievance in this school district and how said grievances have to be handled. Counsel asserts that notwithstanding the lack of evidence, a board does not violate its bargaining obligation when it refuses to process a grievance filed by an individual employee. See, In Re Paterson Board of Education, 6 N.J.P.E.R. ¶11056 (1980).

It is impossible for me to determine this issue in the absence of evidence in the record of the collective bargaining agreement in this district. That agreement defines the parameters of grievances and the time frames within which they must be filed and considered. The fact that this matter was not made an issue in the Prehearing Order is irrelevant, since such an Order can be amended to conform to the proofs in the case. However, the proofs are not here. Further, notwithstanding that the Board did not act on Mr. DiCerbo's appeal of Galese's denial of his grievance of Mr. Galese's actions in regard to the April 4, 1985 meeting, he has had a full, if not overblown, hearing concerning the

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

meeting of April 4, 1985. He has not been found guilty of insubordination. Accordingly, I conclude that the Board did not commit an unfair practice, in the context of this case, in failing to process Mr. DiCerbo's grievance. Mr. DiCerbo has had a full and fair hearing before me concerning the content and substance of that grievance.

In sum, I conclude that the employer has shown that its actions in regard to both the withholding of the increment and the tenure charges of conduct unbecoming a teacher would have been taken notwithstanding any anti-union animus or hostility toward the Association or Mr. DiCerbo. Accordingly, I find that the actions of the Board of Education in regard to Mr. DiCerbo did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (4), (5) and/or (7). Even given the prima facie showing by DiCerbo of the presence of an anti-union animus, he has not shown that said anti-union animus was the motivating force or the substantial reason for the Board's action in regard to the increment withholding or in regard to the tenure charges of unbecoming conduct. To the contrary, it would have been a dereliction of their duty for either the Board and/or the superintendent to stand by once it learned of the consumption of alcohol and lack of chaperonage on the trip.

VII
Disposition and Order

Based upon the foregoing findings of fact, analysis of law and application of said law to the facts, it is hereby **ORDERED** that those portions of tenure Charges 1, 2 and 3 that allege insubordination should be, and are, hereby **DISMISSED**; and

It is further **ORDERED** that those portions of tenure Charges 1, 2, 4 and 5 that assert conduct unbecoming a teacher, in that respondent did permit and allow availability and consumption of alcoholic beverages on the trip to Lake Placid, in the hotel and during the first hour of the trip home, should be **AFFIRMED**; and

It is further **ORDERED** that respondent's petition asserting that the Board acted in an arbitrary, capricious and/or unreasonable manner in withholding Mr. DiCerbo's 1985-86 increment should be dismissed; and

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

It is further **ORDERED** that the unfair labor practice charges filed by Mr. DiCerbo alleging retaliation, inter alia, and alleging the actions of the Board to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (a)(3) and (a)(5) should be **DISMISSED**; and

It is further **ORDERED** that respondent's motion to dismiss tenure charges for failure to comply with the provisions of N.J.S.A. 18A:6-11, for failure to elect remedies, for waiver and for estoppel should be **DISMISSED**; and

It is further **ORDERED** that that portion of the tenure charges requesting the dismissal of Mr. DiCerbo from his position as a tenured teaching staff member of the Manchester Regional High School District should be **DISMISSED**; and

It is further **ORDERED** that Thomas DiCerbo be restored to his position as teaching staff member in the Manchester Regional High School District, Passaic County; and

It is further **ORDERED** that Mr. DiCerbo's salary be reduced, in that he forfeit the equivalent of two months' salary at the rate he was making when the conduct took place in January 1985; and

It is further **ORDERED** that the withholding of Mr. DiCerbo's 1985-86 salary and adjustment increments be **AFFIRMED**; and

It is further **ORDERED** that any remedies requested in the unfair labor practice complaint, including Orders to the Board to cease and desist, Orders to restore back pay and interest, salary and adjustment increments for 1985-86, requests for counsel fees and costs, Orders to destroy and otherwise expunge documents and directions to secure proper pension credit be, and are, hereby **DENIED.**

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

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

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN.**

Pursuant to N.J.A.C. 1:1-14.8, upon rendering his final decision, **SAUL COOPERMAN** shall forward the record, including the initial decision and its final decision, to the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **SAUL COOPERMAN** shall, pursuant to N.J.A.C. 1:1-16.6., request an extension to permit the rendering of a final decision by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** within forty-five (45) days of the decision of the **DEPARTMENT OF EDUCATION.** If the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** does not render a final decision within the extended time, this initial decision on the remaining issues and remedies shall become the final decision.

DEC. 22, 1986
DATE

SYBIL R. MOSES, ALJ

DEC 22 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 26 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER
ON MOTION FOR CONSOLIDATION AND TO DETERMINE PREDOMINANT INTEREST

IN THE MATTER OF THE TENURE HEARING OF THOMAS DiCERBO, SCHOOL DISTRICT OF MANCHESTER REGIONAL HIGH SCHOOL, PASSAIC COUNTY	OAL DKT. NOS. EDU 6460-85 AGENCY DKT. NOS. 321-9/85
AND	
THOMAS DiCERBO v. MANCHESTER REGIONAL HIGH SCHOOL BOARD OF EDUCATION	OAL DKT. NO. EDU 6458-85 AGENCY DKT. NO. 323-9/85 PERC DKT. NO. CO-86-1828

This is a decision on the motion of the Board of Education of Manchester Regional High School (Board) to vest jurisdiction of the above-captioned matters at the Office of Administrative Law (OAL) and to consolidate all matters involving the instant parties, including an unfair labor practice complaint filed by Thomas DiCerbo at Public Employment Relations Commission (PERC). On December 10, 1985, the PERC chairman indicated to instant counsel that this administrative law judge should determine where the matter should be heard and which agency has the predominant interest, pursuant to N.J.A.C. 1:1-14.5.

The procedural history here indicates that the Board suspended Thomas DiCerbo, a teacher in its employ, without pay, and certified tenure charges of insubordination and conduct unbecoming a teacher against Mr. DiCerbo. All charges arise out of an allegation that Mr. DiCerbo organized an unauthorized ski trip for students in January 1985, during which students consumed alcoholic beverages with Mr. DiCerbo's knowledge.

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

In June 1985, prior to the filing of tenure charges and suspension of Mr. DiCerbo, the Board voted to withhold his salary increment for the 1985-86 school year. Mr. DiCerbo filed an unfair labor practices complaint with PERC, which alleged that the withholding of the increment was related to an anti-union animus on the part of the Board. DiCerbo amended his unfair labor practice complaint after the Board certified tenure charges against him, which he argued stems from the same anti-union animus. As an affirmative defense to the tenure charges, DiCerbo asserted that PERC has primary jurisdiction and/or the predominant interest in the case and that the Commissioner of Education (Commisioner) does not have jurisdiction to hear the unfair labor practice charges.

The Board moved before PERC on November 1, 1985, asking it to defer jurisdiction on the unfair labor practices claim and to transfer the case to the Commissioner. The Board also moved before the Commissioner for an Order consolidating the unfair labor practices charge pending before PERC with the tenure charges pending before the Commissioner, which consolidated case would be heard by an administrative law judge at the OAL.

In support of the motion, the Board relied on Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514, 531 (1978), which states that administrative jurisdictional questions should be resolved by the forum best suited to do so by virtue of its regulatory expertise. The Board also relied on Hackensack v. Winner, 82 N.J. 1 (1980), characterizing the holding of Hackensack as stating that PERC could not exercise jurisdiction over an unfair practices claim when it involved mixed questions of public employment and civil service law. Id. at 9. The Board also relied on Hackensack v. Winner for the proposition that the OAL was a particularly suitable forum to decide multiple-issue jurisdictional disputes among administrative agencies. Id. at 10.

The Board argued that the determination of a proper forum must be made after a decision is made regarding which agency has the predominant interest. This dispute is characterized by the Board as arising essentially under education law because the heart of the matter is DiCerbo's conduct in regard to the field trip. Any finding of legitimate grounds for dismissal, argues the Board, would override any possible finding of anti-union

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

prejudice by the Board. Because there is an identical factual basis from which the charges arise, the Board asserts the Commissioner has the expertise in education law, and therefore should hear and decide the controversy.

Mr. DiCerbo is in agreement with the Board that the hearing should be consolidated and heard in a single forum. His attorney argues that PERC should conduct the hearing since the unfair labor practice claims are the dominant issues in this case. He asserts that any finding of anti-union motivation by the Board would render the disciplinary action illegal. DiCerbo's attorney concedes that additional hearings may be necessary to permit the Commissioner to resolve any unanswered questions of education law following the PERC hearing on the unfair labor practices claim. Mr. DiCerbo's counsel acknowledges that even if PERC is found to have the predominant interest in this case, the Commissioner still has jurisdiction to render a final decision on the education law issues, and therefore it would not be improper to hold further hearings on the educational issues, if necessary.

The Board argues that if the Department of Education has the predominant interest, the Commissioner has final decision power to "hear and adjudicate the allegations involved in the unfair practice charge." Use of the term "adjudicate" appears to mean that the Board thinks that due to a predominant interest in the case, the Commissioner will also have final jurisdiction over the unfair labor practices issue.

In Hackensack v. Winner, 82 N.J. at 33-34, the Supreme Court outlined a number of considerations which must be examined in order to determine the proper forum for a consolidated hearing. These standards are reflected in N.J.A.C. 1:1-14.5(a), which provides:

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

1. Whether more than one agency asserting jurisdiction over a common issue has jurisdiction over the issue, and if more than one agency has jurisdiction, whether the jurisdiction is mandatory for one of the agencies;

2. Whether the common issue before the two agencies is, for either agency, the sole, major or dominant issue in dispute and whether its determination would either serve to moot the remaining questions or to affect substantially their resolution;

3. Whether the allegations involve issues and interests which extend beyond the immediate parties and are of particular concern to one or the other agency;

4. Whether the claims, if ultimately vindicated, would require specialized or particularized remedial relief available in one agency but not the other;

5. Whether the common issue is clearly severable from the balance of the controversy and thus will permit non-duplicative factual and legal determinations by each agency.

Once predominant interest is determined, that agency will have final review power over all issues within the scope of its predominant interest. N.J.A.C. 1:1-14.6(b). The regulations further provide that there may be claims for relief which are not within the jurisdiction of the agency possessing predominant interest. If such claims exist, they will be reviewed later by the agency which properly has jurisdiction. N.J.A.C. 1:1-14.6(c). It is the ALJ's function to clearly specify which agency will have jurisdiction over which issues that relate to that agency's authority. N.J.A.C. 1:1-14.6(b), (c). Thus a finding of predominant interest in no way extends the jurisdiction of an agency beyond its statutory authority. The argument by the Board that a finding of predominant interest on tenure charge issues will also give it jurisdiction over the unfair practices issue is therefore incorrect. In a case where two agencies have an interest in the outcome, the ALJ will make an initial decision upon all issues in the case. As part of the decision, the ALJ will identify the issues to be reviewed by the agency possessing predominant interest in the case. N.J.A.C. 1:1-14.8(b). The other agency involved in the case renders a final decision on the remaining issues which are within its jurisdiction. Ibid.

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

Applying the standards for determining predominant interest to the DiCerbo matters, it appears that both PERC and the Commissioner have exclusive jurisdiction over certain issues raised in this case. e.g., Willingboro Education Association v. Board of Education of Willingboro, OAL DKT. EDU 0112-84 (October 2, 1984) adopted, Commissioner of Education (November 20, 1984), adopted, Public Employment Relations Commission, 11 NJPER ¶16009, p. 20 (November 30, 1984). This finding is based upon the distinct and explicit statutory obligations placed in PERC and the Commissioner. Id. at 4-5. N.J.S.A. 18A:6-9 clearly gives the Commissioner jurisdiction over all controversies arising under the school laws. See, Theodore v. Dover Board of Education, 183 N.J. Super. 407, 412-413 (App. Div. 1982). (Commissioner has "fundamental and indispensible" jurisdiction over all disputes and controversies under the school laws.)

PERC also has exclusive jurisdiction over unfair employment practice claims pursuant to N.J.S.A. 34:13A-5.4c. See, Galloway Township Board of Education v. Galloway Township Education Association, 78 N.J. 25, 33 (1978) (PERC has exclusive jurisdiction to adjudicate and remedy allegations of unfair employment practices.) But, as Hackensack v. Winner states, this jurisdiction is exclusive but not mandatory in that such claims could be heard before other agencies in mixed issue cases. 82 N.J. at 22. In Hackensack the court ruled that PERC could not attempt to conduct a rehearing on an unfair practice issue once that issue had been heard before another agency. Ibid. This is distinguishable from PERC's statutory right to review conclusions of law within its administrative expertise based upon a factual record developed before a different agency. This latter type of review is provided for in a consolidated hearing under N.J.A.C. 1:1-14.6.

Turning to the remaining factors in determining predominant interest, it does not appear that the claims under either statute would provide specialized remedies available in one agency but not another. See, In the Matter of Willingboro Board of Education, 7 NJPER 12016 (1980). Further, it does not appear that resolution of this issue would permit nonduplicative factual determinations by either agency. In the Matter of Woodstown-Pilesgrove Regional Board of Education, 5 NJPER ¶10232 (1979). The main issue in this case is whether the Board suspended DiCerbo based upon his alleged

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

misconduct or because of its prejudice against his union activities. While PERC has jurisdiction over unfair practice claims, it would have to limit its fact-finding to those matters involving the allegation of anti- union animus. Ibid., N.J.S.A. 34:13A-5.4c. The Commissioner of Education would, however, be concerned with, and be able to decide, all the issues contained in DiCerbo's tenure charges, including teacher union-school board relations. See, Pietrunti v. Bd. of Ed. of Brick Tp., 128 N.J. Super. 149, 162-163 (App. Div. 1974), certif. den., 65 N.J. 573 (1974), cert. den., 419 U.S. 1057, 42 L.Ed.2d 654, 95 S.Ct. 640 (1974). This ability leads to the conclusion that the Commissioner, via the OAL, is the proper forum for holding the initial hearing in DiCerbo's case.

N.J.A.C. 1:1-14.5 (a)2 sets forth the determining factor in deciding predominant interest. If ruling upon either issue in this case would serve to moot or affect substantially the remaining issue, then the agency with jurisdiction over that issue has the predominant interest. In unfair labor practice cases, the employer frequently claims that the employee was discharged for valid business reasons. PERC has adopted the federal labor law standard for evaluating whether an employer's motivation makes a personnel action illegal under N.J.S.A. 34:13A-5.4c. Black Horse Pike Regional Board of Education, 9 NJPER ¶ 14017 (1982). The employee must demonstrate by a preponderance of the evidence that the discharge was motivated in a substantial way by the anti-union animus of the employer. East Orange Public Library v. Taliaferro, 180 N.J. Super. 155, 163 (App. Div. 1981), accord, In re Bridgewater Township, 95 N.J. 235, 245 (1984). Once this burden has been met, the employer must establish that legal grounds exist to discharge the employee. East Orange, 180 N.J. Super. at 163. The employer must also show that the disciplinary action would have been taken in the absence of anti-union animus. If the employer can establish this, then the discharge could not have been substantially motivated by anti-union animus. Ibid.

An analysis of the serious allegations in the tenure charges here show that if they are upheld, a finding of anti-union animus could not be a substantial factor leading to the discharge of DiCerbo. Thus, a determination by the Commissioner as to the validity of the tenure charges would serve to moot or substantially affect the remaining PERC

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

issues. This analysis weighs heavily against DiCerbo's attorney's argument that PERC has the predominant interest in this case, and mitigates against a PERC hearing officer serving as the fact finder in this case. The predominance of education law issues would require a fact-finding forum with the expertise to properly conduct a complete hearing.

Research has not uncovered any appellate level case in New Jersey which has ruled upon a jurisdictional conflict between the Commissioner and PERC. However, the OAL has served as a forum for the consolidation of unfair practice claims with education law claims. Both PERC and the Commissioner have adopted ALJ decisions which ordered a consolidated hearing before the OAL in such cases. See, e.g., Willingboro, at 5, which held that the ALJ can take evidence on all issues in the case, render an initial decision on those issues and delineate which issues are to be reviewed by each agency. Id. at 4-5. This is especially relevant here, since DiCerbo's counsel has acknowledged that additional hearings on the tenure issues would probably be necessary if PERC held the initial hearing. PERC has neither the education law expertise nor the procedural mechanism to hold a consolidated hearing as does the OAL. Hackensack v. Winner, 82 N.J. at 36-37. The need for additional hearings on tenure law issues would also be directly contrary to the "single controversy doctrine" as applied to administrative proceedings in Hackensack, at 34.

It is also the policy of PERC to defer to the Commissioner in a case in which unfair labor charges arise in conjunction with a tenure charge proceeding. Woodstown, 5 NJPER ¶10232 (at 458, 460). In Woodstown, the employee urged PERC to rule on the unfair practice charge as the agency which had primary jurisdiction over such claims. Id. at 459. PERC refused to rule on the unfair practice claim due to the Commissioner's expertise in dealing with tenure charges. Ibid. The decision pointed out that the factual issues of the tenure charges substantially overlapped with the factual issues of the unfair practices charge. Id. at 460. The PERC hearing officer reserved judgment on the unfair practices claim until a factual record had been compiled by the ALJ in the tenure charge hearing. Ibid. This record would then be forwarded to PERC for final review of the unfair practices allegations. Id. at 461, n. 13.

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

PERC has stayed final determination of an unfair labor practice charge pending the determination of related education law issues before the OAL. Magnolia Board of Education, 6 NJPER ¶11285, p. 563 (1980). The Board in Magnolia initiated a proceeding in the OAL and moved that PERC transfer the unfair practice charge for consolidation with the education law issues. Ibid. The ALJ ordered consolidation, ruling that the Commissioner had predominant interest over the education law issues and PERC had predominant interest over the unfair practices issues. Id. at 564. PERC adopted this decision, modifying it only in that it would wait for the Commissioner's final decision on the education law issues before ruling on the unfair practice charge. If the disciplinary action by the Board violated education law, the employee would receive almost the same relief he would be afforded by PERC. But, if the disciplinary action was valid, then anti-union animus could not be a substantial motivating factor and the employee would lose on his unfair practice claim. Ibid. This pursuaded PERC to defer to the Commissioner's expertise in education law prior to making any ruling on the unfair practices charge. Ibid. See also, Willingboro Board of Education, 7 NJPER ¶10216 (at 20).

Cf., Black Horse Pike Regional Board of Education, 9 NJPER ¶14017 (at 36), in which consolidation of unfair practice charges and education law claims before an ALJ was approved by PERC. This was because the Board admitted it was partially motivated to bring charges against the teacher by its anger at the teacher's union representative. Id. at 39. The ALJ ruled that the filing of charges against the teacher was justifiable under education law. As a result, PERC held that the anti-union animus of the Board was not the substantial motivating factor leading to the disciplinary action. The ALJ's decision that the disciplinary action would have occurred even in the absence of anti-union animus was sufficient to defeat the employee's unfair practice claim. Ibid.

The foregoing cases indicate that PERC will not exercise jurisdiction here over DiCerbo's unfair practice claim until a ruling has been made on the validity of the tenure charges. PERC has clearly followed a policy of deference to the expertise of the Commissioner on education law issues in cases similar to DiCerbo's.

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

I conclude that in regard to this case, which involves issues of unfair labor practices as well as tenure charges, the proper forum for the initial hearing is the OAL and not PERC. Woodstown. This result is due to the predominance of the education issues. PERC cannot determine if anti-union animus is the substantial motivating factor until a ruling is made on the validity of the disciplinary action under educational law. Black Horse Pike. Determination of the validity of DiCerbo's suspension is within the exclusive statutory duty of the Commissioner of Education. N.J.S.A. 18A:6-9. See also, Theodore v. Dover Bd. of Ed., 183 N.J. Super. at 412-413.

Both parties have agreed to the consolidation, which will be a single fact-finding hearing before the OAL which will delineate the specific issues for both agencies to review. Willingboro, at 4. This hearing will protect the agencies' "exclusive spheres" of authority while also satisfying the Hackensack v. Winner concern for a single, thorough, fact-finding hearing binding upon both agencies. 82 N.J. at 37-38.

Accordingly, it is hereby **ORDERED** that the unfair labor practices complaint filed by Thomas DiCerbo before the Public Employment Relations Commission shall be consolidated with Thomas DiCerbo v. Manchester Regional High School Bd. of Ed., an appeal by Mr. DiCerbo of the denial of his 1985-86 increments, and In the Matter of the Tenure Hearing of Thomas DiCerbo, School District of Manchester Regional High School, Passaic County, the filing of tenure charges against Mr. DiCerbo by the Board; and

It is further **ORDERED** that the Commissioner of the Department of Education has the predominant interest in this matter; and

It is further **ORDERED** that the issues arising from the January 1985 ski trip, and any conduct of Mr. DiCerbo relating thereto, shall be the predominant issues and that the Commissioner of Education shall have the authority to issue a final decision on those issues; and

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

It is further **ORDERED** that if there are sufficient legal grounds to withhold the increment and/or suspend Mr. DiCerbo pursuant to the education law, then any legal grounds for anti-union animus will become moot; and

It is further **ORDERED** that if there are no sufficient legal grounds to uphold the tenure charges and/or the withholding of increment, then the Public Employment Relations Commission shall make the final decision, after review of the Initial Decision of the administrative law judge, on charges of anti-union animus and unfair labor practice claims, when deciding if anti-union animus of the Board was the substantial motivating factor leading to the disciplinary actions.

This Order may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN, or by the CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, JAMES W. MASTRIANI,** who by law are empowered to make a final decision in this matter. Saul Cooperman and James Mastriani are encouraged to consult and coordinate with each other before issuing a final order. However, if Saul Cooperman and James Mastriani do not so act in forty-five (45) days and unless such a time limit is otherwise extended, this Order shall be deemed adopted by the Department of Education and the Public Employment Relations Commission.

Jan. 23, 1986
DATE

SYBIL R. MOSES
Administrative Law Judge

amn

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

IN THE MATTER OF THE TENURE HEARING OF THOMAS DI CERBO, SCHOOL DISTRICT OF MANCHESTER REGIONAL HIGH SCHOOL, PASSAIC COUNTY.

THOMAS DI CERBO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

RESPONDENT.

IN THE MATTER OF THE MANCHESTER REGIONAL HIGH SCHOOL BOARD OF EDUCATION AND THE MANCHESTER REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION.

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the record of these consolidated matters before him including the initial decision rendered by the Office of Administrative Law.

It is observed that the parties' exceptions to the initial decision, as well as their respective replies to exceptions, were filed pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Because of the complexity of the issues and the arguments advanced by each of the respective parties in connection with each of these issues, the Commissioner shall first summarize DiCerbo's exceptions to the initial decision followed by the Board's reply to those exceptions. A summary of the Board's exceptions to the initial decision will thereafter be addressed to be followed by DiCerbo's reply to the Board's exceptions.

Upon review of Mr. DiCerbo's exceptions to the initial decision, it is evident that he has essentially renewed those arguments advanced in his post-hearing brief and those positions he advanced in his brief in support of his earlier Motion to Dismiss the Board's tenure charges against him.

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

More specifically, it is noted that DiCerbo's arguments in his brief in support of his Motion to Dismiss appear in pertinent part in his exceptions to the initial decision and they relate to his claims that the tenure charges against him should be dismissed on the following grounds:

1. The Board improperly delayed forwarding its tenure charges against him to the Commissioner in violation of N.J.S.A. 18A:6-11 as amended.

2. The Board's tenure charges against him are barred by the Doctrine of Election of Remedies by virtue of the fact that it had previously withheld his salary increment pursuant to N.J.S.A. 18A:29-14 and it may not thereafter seek further remedy on the same grounds before the Commissioner through the filing of tenure charges pursuant to N.J.S.A. 18A:6-10 et seq.

3. The Board is also estopped from asserting tenure charges against him by virtue of its earlier action to withhold his salary increment.

Similarly, in excepting to 11 of the findings of fact set forth in the initial decision (Nos. 3, 5, 6, 11, 13, 14, 15, 19, 24, 36 and 41), DiCerbo has renewed 40 of the 120 proposed findings of fact previously set forth in his post-hearing brief filed with the ALJ. Most of these proposed findings of fact rely upon citations from the transcripts of the testimony of witnesses who appeared during the five days of hearing conducted in this matter. All the above-referenced exceptions raised by Mr. DiCerbo which relate to the withholding of his salary increment and the tenure charges against him, insofar as they are cognizable before the Commissioner, have been addressed in detail in the initial decision. Therefore, they are fully incorporated herein by reference.

The remaining exceptions raised by DiCerbo with respect to the withholding of his salary increment and the tenure charges against him are summarized below.

Mr. DiCerbo maintains that the ALJ erred in his analysis of the issue regarding whether or not the Board acted in an arbitrary, capricious or unreasonable manner when it withheld his salary increment for the 1985-86 school year. Initially, he points out that the ALJ's analysis of this issue exceeds the reason provided by the Board for withholding his salary increment. In this regard, he claims that the Board's sole reason for withholding his increment was that of unbecoming conduct. Mr. DiCerbo therefore rejects the further analysis of the issue by the ALJ which includes insubordination which clearly was not stated by the Board as a reason for withholding his salary increment.

Moreover, DiCerbo argues that he has satisfied the Kopera standards in demonstrating by a preponderance of credible evidence that the Board failed to establish that he exhibited "***unbecoming

You are viewing an archived copy from the New Jersey State Library.
conduct, to wit; permitting the consumption of alcoholic beverages by Manchester Regional High School students on a trip to Lake Placid*** which you organized and conducted." (R-5)

Mr. DiCerbo argues that the Board's action in withholding his increment for the reason so stated is without a basis in fact and that it was unreasonable for the Board to reach that conclusion given the facts presented to it by the Superintendent. He rejects the "investigative" procedures employed by the Superintendent and Mr. Catalano which included the intimidation of pupils for the purpose of gathering information against him.

Mr. DiCerbo maintains that there are glaring inconsistencies in the Superintendent's testimony as to what did actually occur on the bus trip to and from Lake Placid. He claims that the Superintendent's failure to prove that he had knowledge of the presence of beer with students, or that they were drinking beer during the period of time in question, not only undermines the Board's increment withholding, but also the tenure charges against him. In this regard, Mr. DiCerbo relies on the fact that not one student who was present on the bus to Lake Placid could testify that DiCerbo saw any student drinking beer.

Mr. DiCerbo asserts that on the one occasion during the bus trip home from Lake Placid when he observed some students drinking beer, he took the appropriate action by taking the beer away from them and admonishing them. Mr. DiCerbo rejects the ALJ's determination that it would have been reasonable for him to search the pupils and their belongings at any time during the incident in question, as well as the ALJ's suggestions that his failure to do so supported the Board's tenure charge of unbecoming conduct against him. Such conclusion, DiCerbo maintains, violates the court's standards laid down in T.L.O., supra.

DiCerbo argues further that the circumstances herein giving rise to the tenure charges against him are distinguishable from those in Ahern, supra, and Gwaley, supra, inasmuch as when he learned that certain students were drinking beer on the bus trip back from Lake Placid, he did not remain passive but he affirmatively acted to stop them from drinking beer. DiCerbo also maintains that the ALJ erred in denying him an opportunity to present testimony of other students regarding their being served alcoholic beverages in the home of Board members after football games and on other occasions. He submits that the ALJ's determination in this regard was an abuse of her discretion.

Finally, DiCerbo argues that the forfeiture of two months' salary and sustaining the increment withholding against him on the same facts in this case constitute an unduly harsh penalty with respect to his being found guilty of the tenure charges against him for the following reasons:

> In balancing the issue of remedy (assuming the Commissioner upholds the determination below), some salient facts need repeating. There is

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

controverted evidence of DiCerbo's long and unblemished record of service in the school district and of the students' respect and admiration for him. His peers have recognized the superlative nature of his teaching by having nominated him twice as Teacher of the Year. As an Honors Level teacher, one would expect a great deal of commitment to go into his teaching. That this is evident becomes obvious from a review of any of DiCerbo's observations and evaluations which were submitted as joint exhibits in this matter. It is imperative that the Court review each of these exhibits since the ultimate travesty which could occur to the educational community would be to lose such a quality teacher. Indeed it is a shame that the student body was deprived of an invaluable learning experience since the Board in its ill-wisdom determined to suspend DiCerbo from his teaching duties since September 1, 1985. It did so despite the fact that the record is barren of any past disciplinary infractions.

The Court must also weigh in its analysis that DiCerbo was not in flippant disregard of the safety and welfare of students who went on the trip. It is submitted that the whole line of testimony surrounding the seizure experienced by J.S., evidences the exact opposite from that claimed by the Board. DiCerbo is a responsible, caring individual. His candid and forthright testimony had the simple ring of truth to it. There was, moreover, no injury whatsoever proven by the Board in the conduct complained of.

***

Judge Moses limits her conclusion to finding an act of omission rather than commission. But in assessing a monetary penalty, a $7415.00 fine is visited on DiCerbo; $1927 for the increment withholding, and an additional two months salary ($5488.00). Is it proper to conclude that an isolated "error of judgment" warrants a 20% forfeiture of the salary paid to DiCerbo? Such sum will, obviously, be magnified considerably in future years by DiCerbo's lagging a step behind on the salary guide by virtue of the withholding.***

Assuming that the Commissioner determines to disagree, two further points must be born (sic) in mind:

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

(A) Judge Moses' decision assumes, that in upholding the tenure charges and the increment withholding, a separate penalty must be assessed aside from the increment (i.e. forfeiture of two months' salary). This is not so. It could be concluded that the increment withholding alone was the appropriate remedy.

(B) While assessing a two month forfeiture of pay, and reinstating DiCerbo to his position, Judge Moses fails to additionally order back pay for the additional two months when DiCerbo was suspended without pay pursuant to N.J.S.A. 18A:16-14 (sic). Back pay was denied in the unfair practice proceeding only because the underlying charge was dismissed. But as part of the tenure proceeding it is clear that a complete analysis requires this issue to be cleared up in DiCerbo's favor.

(DiCerbo's Exceptions, at pp. 14-16)

The Board in its reply to DiCerbo's exceptions also relies on the record of the testimony in the transcripts to categorically reject each and every proposed finding of fact advanced by DiCerbo in his exceptions. The Board further maintains that DiCerbo's exceptions with regard to his claim that it violated the provisions of N.J.S.A. 18A:6-11 by delaying the filing of its tenure charges against him is totally without merit for the reasons expressed in the initial decision. Moreover, the Board claims that there is no allegation of any prejudice sustained by what DiCerbo claims was a failure by the Board to have acted "forthwith."

The Board, argues that the ALJ's determination adequately and correctly disposed of DiCerbo's claim with regard to his arguments that the Doctrines of Election of Remedies, Estoppel or Waiver apply to the filing of its tenure charges against him.

The Board maintains that the factual circumstances, as presented by way of the ALJ's findings, that he arranged a trip during which alcoholic beverages were available to and consumed by students and that he told students that he was bringing beer without telling them that they were not to bring beer on the trip, constitute unbecoming conduct. The Board urges the Commissioner to adopt the ALJ's findings in this regard in support of its denial of his salary increment, as well as his guilt of the tenure charges filed against him.

Similarly, the Board contends that insofar as DiCerbo is claiming that it was unlawful to search the students or their possessions during the bus trip or at Lake Placid, such claim was adequately addressed and rejected by the ALJ in the initial decision.

According to the Board, DiCerbo's claim of error by the ALJ in denying him an opportunity to present testimony regarding alcoholic beverages served to students in the homes of Board members on

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

other occasions must be viewed as a deliberate attempt to confuse and obfuscate the main issues in this case. The Board asserts that it is DiCerbo's conduct held in question herein and that the ALJ properly precluded any testimony which would have necessitated an undue consumption of time, created substantial confusion, as well as created a danger of undue prejudice in these proceedings. The Board in its reply relies on a host of prior school decisions which stand for this proposition. They are incorporated herein by reference at page 12 of its reply.

In conclusion, the Board in its reply addresses DiCerbo's exception to the ALJ's determination of the penalty to be imposed upon him as follows:

> Under Point VI of his Exceptions, DiCerbo argues that the penalty of forfeiture of two months salary, together with the upholding of the increment was unduly harsh under the facts of this case. He argues that because of his alleged excellent record as a teacher, little or no disciplinary action should be invoked against him. DiCerbo is urging a total disregard of the duties and obligations he owed to the students who were entrusted to his care and whose participation on the trip he sought, solicited and encouraged; his individually proclaimed self-righteousness (Initial Decision, p. 14); his outright refusal to supervise the conduct of students participating in the ski trip; his indifference to what was going on among the students; and his failure and refusal to assume the role model his status as a teacher mandated. He not only did not assume the role model he was called upon to assume - he assumed the exact opposite role. He let the students do whatever they chose as if "adults." His indifference to what the students were doing demonstrated to them that the consumption of alcoholic beverages was permissible and sanctioned. His conduct flaunted public policy, and violated State Law by allowing underage students to consume alcoholic beverages. DiCerbo argues that the anguish and humiliation he suffered as a result of having to undergo the ordeal of a tenure hearing is sufficient and adequate punishment. It is respectfully submitted that the facts of this case are so overwhelming that such consideration cannot mitigate the penalty.
>
> Unfitness of a teacher to serve may be shown by a single incident or series of incidents. Redcay v. State Bd. of Ed., 136 N.J.L. 369 (Sup. Ct. 1943); Aff'd 131 N.J.L. 326 (E&A 1944). In Re Fulcomer, 93 N.J. Super. 404, 421 (App. Div.

You are viewing an archived copy from the New Jersey State Library.
1967); In the Matter of the Tenure Hearing of Thomas Molineux, School District of the Tp. of Medford, [decided] (Aug. 8, 1986); In the Matter of the Tenure Hearing of Eligio Ortiz, Schl. District of the City of Camden, [decided] (April 21, 1986); Aff'd by State Bd.*** (Sept. 3, 1986). (Board's Reply Exceptions, at pp. 9-10)

The following testimony of DiCerbo further illustrates the attitude and inappropriate demeanor and thinking by him:

Q. So you collected the money in school; you spoke to the students in school; you put together this trip with students. Didn't you also put all the room assignments together?

A. They told me who they wanted to stay with, yes.

Q. And when you collected the money, I believe you testified you went over [to] the Belmont travel agent and you gave them that money?

A. Yes.

Q. Wouldn't you, with all of this, consider yourself to be the organizer of this trip?

A. No, not really. (5T:150)

Q. You made it clear to them (the students) that you were not going to be their chaperone?

A. Yes.

Q. That you were going to have very little to do with them? Isn't that so?

A. Yes.

Q. That they were on their own?

A. Yes. (5T:152)

Q. And you allowed your friends after you purchased the liquor, brought it on the bus, and washed your hands, you didn't drink the beer on the bus? You allowed them to drink it in front of the students?

A. Yes.

Q. Is this an example for 16 and 17-year olds?

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

A. I don't know.

Q. You don't know? You met with the students, I believe you testified, the day before you went on the trip. Is that correct?

A. Right.

Q. And, at that time, you told the students that you were going to bring beer for your friends. Is that correct?

A. Correct.

Q. You felt that there was no problem telling students that you were going to bring beer?

A. No, I didn't. (5T:155-156)
(Board's Reply Exceptions, at pp. 10-11)

In its exceptions to the initial decision, the Board supports the ALJ's finding that DiCerbo's actions constituted unbecoming conduct as a tenured teacher; however, it excepts to certain of the ALJ's findings and conclusions in the initial decision. The Board's objections to the initial decision are fully set forth in its exceptions incorporated by reference herein and summarized below.

The Board excepts to the ALJ's determination with regard to her characterization of the meeting of April 4, 1985 between DiCerbo and the Superintendent in the presence of others. It maintains that DiCerbo committed an act of insubordination by refusing to answer those questions posed to him by the Superintendent with regard to DiCerbo's knowledge and involvement in the Lake Placid trip attended by approximately 30 or more students from Manchester Regional High School.

The Board also maintains that the ALJ erred in suggesting in her findings that the parents of the students interviewed by Mr. Catalano and himself were required to be notified prior to the time such interviews were conducted.

The Board rejects the ALJ's characterization of the Superintendent's testimony which states that he was "uncomfortable" when responding to questions concerning his meetings with the students who were interviewed about the Lake Placid trip and with those questions involving his knowledge about unauthorized Foreign Language Department field trips. Notable exception is taken by the Board to the ALJ's finding that the "problems" between the Association and the Superintendent "colored" his testimony as well as the testimony of other teachers. The Board maintains that the ALJ failed to set forth the rational basis for such a finding.

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

Notwithstanding the fact that the ALJ found that the Board's policy manual was not distributed annually to teachers, she did report that Policy No. 2340 (Field Trips) was included in the teachers' manual. Thus, the Board concludes that DiCerbo was in fact aware of the policy in question and his failure to comply with the policy must be deemed to be insubordination. The Board also rejects the conclusion reached by the ALJ that Policy No. 2340 was not generally enforced by the administration on the grounds that such a finding has no bearing on the facts of this case especially since there was no finding of selective enforcement of the policy against Mr. DiCerbo.

The Board claims that although there were instances in the past where Policy No. 2340 may not have been enforced in connection with European field trips organized by its Foreign Language Department, there is no evidence that there were any incidents remotely resembling those which occurred on the bus trip to and from Lake Placid organized by Mr. DiCerbo.

Finally, the Board argues that the record of this matter fails to support the ALJ's findings that Z.H., L.M. and B.V. were intimidated when interviewed by its administrators. The Board acknowledges that these students were nervous and that they did not want to appear in Court to give testimony; however, they all agreed to sign the statements giving their version of what occurred in connection with the bus trip to Lake Placid in January 1985.

In his reply to the Board's exceptions to the initial decision, Mr. DiCerbo claims that the record does not support the tenure charge which accuses him of insubordination for failing to answer those questions posed to him by the Superintendent at the meeting held on April 4, 1985.

Moreover, DiCerbo contends that the callous disregard and treatment of the students interviewed by the Superintendent and Mr. Catalano give weight and credibility to the ALJ's determination that they were uncomfortable and intimidated into signing statements with regard to the incidents pertaining to the administration's investigation of the ski trip.

With regard to the Board's contention that he had knowledge of the existence of the Board's Policy No. 2340 pertaining to field trips prior to the ski trip to Lake Placid, DiCerbo relies on the record of the findings in this matter which he claims establishes that said policy was neither distributed nor enforced by the Board.

DiCerbo further maintains that the record of this matter undeniably reveals that he did not personally bring beer on the bus at the time of the ski trip to Lake Placid nor did he actively encourage students to bring beer on that trip.

Finally, DiCerbo argues that the ALJ has fully discussed and distinguished the prior school law decisions in Ahern, supra, and Gwaley, supra, as a basis for support relied upon by the Board

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

to sustain the tenure charges against him. Moreover, DiCerbo relies upon his post-hearing brief and his exceptions to the initial decision incorporated by reference in his reply insofar as it pertains to a mitigation of the ALJ's recommended penalty to be imposed against him.

The Commissioner has reviewed the respective positions advanced by the parties in their exceptions and replies to exceptions. It is observed from the record that Mr. DiCerbo correctly excepts to that portion of the initial decision on page 34 in which he asserts that the ALJ in her analysis of the issue pertaining to the withholding of his increment by the Board exceeds the reason provided by the Board for withholding his increment for the 1985-86 school year. It is clear that the sole reason given by the Board for the withholding of DiCerbo's increment is that which was stated in the letter from the Board Secretary to DiCerbo dated June 21, 1985 which reads in pertinent part as follows:

> The withholding of the salary increase is based upon your unbecoming conduct.*** (R-5)

Consequently, the Commissioner finds that paragraph 1 on page 34 of the initial decision which contains the ALJ's findings and conclusions related to insubordination in connection to the withholding of DiCerbo's increment will not be considered for the purpose of reaching a final determination on this issue.

The Commissioner has also reviewed the ALJ's findings and conclusions which hold that Mr. DiCerbo is guilty of unbecoming conduct in connection with those portions of the Board's tenure charges nos. 1, 2, 4 and 5 by virtue of the fact that he "did permit and allow availability and consumption of alcoholic beverages [by students] on the trip to Lake Placid, in the hotel and during the first hour of the trip home***." (Initial Decision, ante)

While the Commissioner concurs with the ALJ's finding that DiCerbo's actions with respect to tenure charges nos. 1, 2, 4 and 5 constitute unbecoming conduct, he does not agree that it was for the specific reasons stated by the ALJ. The record of this matter fails to establish that Mr. DiCerbo permitted students to bring alcoholic beverages (beer) on the bus trip to or from Lake Placid or that he was aware that students were drinking beer at any time other than after the first hour on the bus trip home. It was at that time that DiCerbo discovered that some students were drinking beer on the bus and he confiscated the beer and admonished the students. In the Commissioner's judgment, DiCerbo on this occasion did recognize his responsibility to the students who accompanied him on the Lake Placid trip. He further recognized his responsibility as a teacher in charge of the ski trip when he assisted J.S., a student who became ill at Lake Placid. Additionally, DiCerbo contacted parents to inform them of the incident and the care that J.S. was receiving at Lake Placid. It must be concluded therefore that at least on these two occasions DiCerbo did, in fact, act responsibly toward the students who accompanied him on the Lake Placid ski trip.

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

Specifically, the Commissioner considers that the ALJ's comments in the initial decision, ante, lend support to this view as follows:

> I agree with Mr. DiCerbo's counsel that the charge of aiding and abetting is not appropriate and has not been proved in the case at bar. Mr. DiCerbo did not assist, support or supplement the efforts of the students to make the beer available or to consume it, nor did he encourage, incite or instigate them to consume it. See, State v. Metcalf, 168 N.J. Super. 375 (App. Div. 1979).

Consequently, the Commissioner cannot agree that DiCerbo's unbecoming conduct in this regard is analogous to those circumstances which prevailed in Gwaley, supra, or Ahern, supra.

The Commissioner does, however, find and determine that DiCerbo is guilty of unbecoming conduct as charged by the Board specifically for those reasons that appear in the initial decision, ante, which read in pertinent part:

> ***Mr. DiCerbo organized and facilitated the trip. He told the students he was bringing beer for his friends, although no hard liquor would be allowed. He did not specifically tell the students not to bring beer. He personally brought a case of beer onto the bus, which beer was consumed by his friends on the bus in plain view of the students. Mr. DiCerbo deliberately stayed in front of the bus for the entire trip, thus avoiding, with one exception, any observation of the students. *** Mr. DiCerbo made no efforts to monitor the students' activity while at Lake Placid, although it is clear from the students' own testimony that beer was consumed on the bus during the trip up and in the hotel on the weekend.
>
> The basic premise that Mr. DiCerbo was not a chaperone and thus was not responsible and that this was a private trip cannot be accepted in light of the clear obligation of a teacher to act in such a way as to always maintain the trust of the students and their parents. The mere statement that he was not the chaperone for a trip attended by 40 underaged students does not absolve Mr. DiCerbo of his responsibilities as a role model, if nothing else. [Tordo, supra] At least some of the parents assumed Mr. DiCerbo was the chaperone on the trip. (See, testimony of Mrs. M.) If Mr. DiCerbo wants to compare this

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

> trip with the trips sponsored by the Foreign Language Department for purposes of showing there was no insubordination, he cannot avoid a comparison with the testimony of the foreign language teachers that they were chaperones and monitored the students' activities at all time.

Except for the above modifications, the Commissioner concurs with those findings and conclusions in the initial decision pertaining to Mr. DiCerbo's increment withholding and the Board's tenure charges against him. The initial decision is thoroughly documented by the testimony of the witnesses and the exhibits in evidence, as well as the ALJ's interpretation of the applicable statutes and case law.

The Commissioner therefore concludes that the remaining exceptions taken by the parties to the initial decision must be rejected as being either irrelevant, misplaced or without merit insofar as they seek to reverse or modify the ALJ's findings of fact and conclusions rendered in the initial decision. The Commissioner hereby adopts those findings and conclusions in the initial decision as his own.

Accordingly, for all of the foregoing reasons set forth in findings and conclusions in the initial decision, ante (Issues A through E), except for those issues pertaining to Mr. DiCerbo's allegations of unfair labor practice charges which are subject to a final determination by PERC, the Commissioner hereby issues the following orders:

Based upon the foregoing findings of fact, analysis of law and application of said law to the facts, it is hereby ordered that those portions of tenure charges nos. 1, 2 and 3 that allege insubordination are hereby dismissed.

It is further ordered that those portions of tenure charges nos. 1, 2, 4 and 5 that assert Mr. DiCerbo is guilty of conduct unbecoming a teacher are affirmed for the reasons above set forth in full by the Commissioner.

It is further ordered that Mr. DiCerbo's petition asserting that the Board acted in an arbitrary, capricious and/or unreasonable manner in withholding his 1985-86 increment is hereby dismissed and it is further ordered that Mr. DiCerbo's motion to dismiss the tenure charges for failure to comply with the provisions of N.J.S.A. 18A:6-11, for failure to elect remedies, for waiver and for estoppel are hereby dismissed.

It is further ordered that that portion of the tenure charges requesting the dismissal of Mr. DiCerbo from his position as a tenured teaching staff member of the Manchester Regional High School District is hereby denied and it is further ordered that Thomas DiCerbo be restored to his position as teaching staff member in the Manchester Regional High School District.

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

It is further ordered that the ALJ's recommended penalty of the forfeiture of 2 months' salary by Mr. DiCerbo be modified to the extent that Mr. DiCerbo forfeit the equivalent of 120 days' salary which resulted from his suspension without pay by the Board pursuant to the provisions of N.J.S.A. 18A:6-14 and

It is further ordered the withholding of Mr. DiCerbo's 1985-86 salary and adjustment increments be affirmed.

Finally, in view of the fact that the consolidation of these cases requires a further determination of the allegations by the Association of unfair labor practices by the Public Employment Relations Commission, it is ordered that a copy of the Commissioner's decision and the record of this matter be immediately transmitted to that agency.

COMMISSIONER OF EDUCATION

February 19, 1987

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

IN THE MATTER OF THE TENURE HEARING OF THOMAS DI CERBO, SCHOOL DISTRICT OF MANCHESTER REGIONAL HIGH SCHOOL, PASSAIC COUNTY.

THOMAS DI CERBO,

PETITIONER-CROSS/APPELLANT,

V.

BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

RESPONDENT-APPELLANT.

IN THE MATTER OF THE MANCHESTER REGIONAL HIGH SCHOOL BOARD OF EDUCATION AND THE MANCHESTER REGIONAL HIGH SCHOOL EDUCATION ASSOCIATION.

STATE BOARD OF EDUCATION

DECISION

Predominant interest determination by the Administrative Law Judge, January 23, 1986

Decision of the Commissioner of Education, February 6, 1986

Decision of Chairman of the Public Employment Relations Commission, April 18, 1986

Decided by the Commissioner of Education, February 19, 1987

Decision on Motion by the Commissioner, May 5, 1987

For Respondent/Petitioner-Appellant, Schwartz, Pisano, Simon and Edelstein (Nathanya Simon, Esq., of Counsel)

For the Petitioner/Respondent-Cross-Appellant, Bucceri and Pincus (Sheldon H. Pincus, Esq., of Counsel)

This is a consolidated case arising from a weekend ski trip organized by Thomas DiCerbo, a tenured high school science teacher. Mr. DiCerbo has been employed by the Board since 1969, and since July 1984, has been President of the Manchester Education

You are viewing an archived copy from the New Jersey State Library.
Association. The record indicates that in the fall of 1984, he selected from a travel agency a package ski trip to Lake Placid offered by a ski trip operator for the weekend of January 25, 26 and 27, 1985. He informed various students at the high school about the availability of the trip, and distributed brochures and information from the agency and ski trip operator.

Forty students between the ages of 16 and 18 signed up for the trip, paying $140 each. They gave the money to Mr. DiCerbo before and after school, in homeroom or after his class. Mr. DiCerbo remitted the money to the travel agency, along with contracts signed by each participant.

Mr. DiCerbo discussed the trip with the students before and after school, before and after class, in the lunch room and in homeroom. He did not discuss it during his classes.

He held one formal meeting prior to the trip in his biology room after school. At that meeting, he told the students that the trip was not a school sponsored event and that he would not be their chaperone. He informed them that he expected them to act as adults, but that he would be there if they needed help. Additionally, in response to questions, he informed the students that he was bringing beer, but that no hard liquor would be allowed. However, at no time did he tell the students that it was all right for them to bring beer.

When the bus left for the trip from a private parking lot, some of the students carried beer onto the bus in coolers or bags. Mr. DiCerbo did not inspect such containers. He brought a case of soda on the trip for the students and one case of beer for his adult friends.

During the trip, Mr. DiCerbo sat in the front of the bus. Most of the students sat at the middle or in the rear. Mr. DiCerbo made no effort to observe the students on the one occasion during the trip when he went to the back of the bus.

Although Mr. DiCerbo did not consume any alcoholic beverages on the bus, his adult friends did drink beer in front of the students. Up to half of the students drank beer during the trip, concealing the beer while they drank it. Again, Mr. DiCerbo did not offer or supply alcoholic beverages to the students during the trip. Nor, although he made no attempt to monitor their activities in their rooms, did he offer or supply alcoholic beverages to the students while the group was at Lake Placid.

Consistent with his statement to the students that he would be available if they needed help, Mr. DiCerbo insured that one of students received proper care when he became ill at the ski lift. In fulfilling his commitment, Mr. DiCerbo accompanied the student to the hospital, checked on him periodically after arranging his return

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

to the hotel, and maintained communication with the student's parents. No other problems arose or were reported during this portion of the trip.

On the return trip, however, the bus driver asked Mr. DiCerbo to speak to the students about the noise level. Mr. DiCerbo then went to the back of the bus and saw several students drinking beer. Mr. DiCerbo became angry, and told the students involved that their behavior was wrong. He further advised them that they must be mature and realize that while they had nothing to lose, he did. Mr. DiCerbo then asked two of his friends to collect the beer and other alcoholic beverages.

The school administration found out about the trip in late March 1985, as the result of an inquiry by the secretary to the school administrator. Following investigation, the superintendent recommended withholding Mr. DiCerbo's increments for 1985-86. The Board adopted a resolution on June 20, 1985, withholding the increments because of unbecoming conduct based on Mr. DiCerbo's conduct in regards to the trip. R-5, in evidence.

On July 19, the Manchester Regional High School Education Association filed an unfair labor practice charge against the Board with the Public Employment Relations Commission (PERC), alleging that the withholding of increments violated the New Jersey Employer-Employees Relations Act, N.J.S.A. 34:13A-1 et seq. On August 15, 1985, the Board certified tenure charges of conduct unbecoming a teacher and insubordination against Mr. DiCerbo. On September 13, 1985, Mr. DiCerbo filed a Petition of Appeal to the Commissioner of Education, challenging the withholding of his increments under the education laws. On September 24, 1985, the Association filed an amended unfair labor practice charge with PERC, alleging that the tenure charges were brought in retaliation for protected activity.

Upon motions filed by the Association and the Board, the Administrative Law Judge directed consolidation of the matters and determined that the Commissioner of Education had predominant interest to render a final decision on issues arising from the January ski trip and any conduct of Mr. DiCerbo relating to that trip. The Commissioner of Education adopted the Administrative Law Judge's determination, as did the Chairman of PERC, who however reserved the right to resolve, following determination of the matter under the education laws, whether the Board's actions violated the New Jersey Employer-Employees Relations Act.

The Administrative Law Judge's determination encompassed both those aspects of the case requiring resolution under the education laws and the unfair labor practice allegations. Before considering the substantive issues, she determined that Mr. DiCerbo's motion to dismiss based on procedural deficiencies should be denied. She then turned to the substantive issues to be resolved under the education laws. Applying the standard established in Kopera v. West Orange Board of Education, 60 N.J.

You are viewing an archived copy from the New Jersey State Library.
Super. 288 (App. Div. 1960), the ALJ found that insofar as the Board's withholding of Mr. DiCerbo's increments was based on his conduct during the trip, its actions were in conformity with N.J.S.A. 18A:29-14, although withholding his increments on the basis of insubordination was arbitrary, capricious and unreasonable.

The ALJ then considered the tenure charges, concluding that although there was insufficient evidence in the record to support a finding of insubordination based on either Mr. DiCerbo's failure to obtain Board approval for the trip or his conduct in refusing to answer questions during the investigation, his conduct in permitting the availability of alcoholic beverages on the bus and thereby permitting the consumption of alcoholic beverages by students during the trip was established by a preponderance of the evidence, and constituted conduct unbecoming a teacher. In reaching this conclusion, she reasoned that

> [i]n the case at bar, Mr. DiCerbo's argument is that (a) he was not the chaperone and not responsible for the students because it was a private trip and (b) he did not observe the beer being brought onto the bus or being drunk on the ride up or during the time spent at Lake Placid. However, I have found the following to be fact: Mr. DiCerbo organized and facilitated the trip. He told the students he was bringing beer for his friends, although no hard liquor would be allowed. He did not specifically tell the students not to bring beer. He personally brought a case of beer onto the bus, which beer was consumed by his friends on the bus in plain view of the students. Mr. DiCerbo deliberately stayed in front of the bus for the entire trip, thus avoiding, with one exception, any observation of the students. On his one observation, he could not have helped but see the students drinking beer, if he had only looked. Mr. DiCerbo made no efforts to monitor the students' activity while at Lake Placid, although it is clear from the students' own testimony that beer was consumed on the bus during the trip up and in the hotel on the weekend.
>
> The basic premise that Mr. DiCerbo was not a chaperone and thus was not responsible and that this was a private trip cannot be accepted in light of the clear obligation of a teacher to act in such a way as to always maintain the trust of the students and their parents. The mere statement that he was not the chaperone for a trip attended by 40 underaged students does not absolve Mr. DiCerbo of his responsibilities as a role model, if nothing else. At least some of the parents assumed Mr. DiCerbo was the chaperone

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

> on the trip... If Mr. DiCerbo wants to compare this trip with the trips sponsored by the Foreign Language Department for purposes of showing there was not insubordination, he cannot avoid a comparison with the testimony of the foreign language teachers that they were chaperones and monitored the students activities at all times.

Initial Decision, at 41-42 (citation omitted).

In assessing whether dismissal was the appropriate penalty, the ALJ found that extensive mitigating circumstances were present. The ALJ emphasized that Mr. DiCerbo's conduct in this instance represented the only known impropriety in an otherwise unblemished record, that public confidence in him had not been shaken, that parents, students and fellow teachers perceived him as a dedicated and enthusiastic teacher and that his evaluations showed that the administration in the past had determined that he performed his job well. Thus, although she concluded that Mr. DiCerbo had erred in his premises that he had not organized the trip and that he had no obligation to monitor the activities of the minors, she further concluded that his lapse in judgment was a one-time occurrence, which did not automatically condemn him to dismissal. Rather, the ALJ found that the appropriate penalty in this case was, in light of the withholding of increments that Mr. DiCerbo had already endured, the forfeiture of two months salary as established by the salary schedule in effect in 1984-85.

The ALJ's determination of the penalty was not altered by her consideration of the asserted violations of the New Jersey Employer-Employees Relations Act. In that regard, the ALJ concluded that the Board had shown that its actions both in withholding of increments and in certifying the tenure charges would have been taken notwithstanding any anti-union animus or hostility toward the Association or Mr. DiCerbo. Accordingly, the ALJ found that the Board had not violated the New Jersey Employer-Employees Relations Act and that, to the contrary, the Board and the Superintendent would have been in dereliction of their duty had they stood by once it was learned that alcoholic beverages had been consumed and that there was a lack of chaperone on the trip.

Following his review of the positions taken by the parties, the Commissioner first found that the sole reason given by the Board for withholding Mr. DiCerbo's increment was his unbecoming conduct, and consequently he determined not to consider the ALJ's findings and conclusions relating to insubordination in reaching his determination concerning the withholding of increment. The Commissioner then turned to the ALJ's findings concerning the tenure charges. While concurring with the ALJ's conclusion that Mr. DiCerbo's actions constituted unbecoming conduct, the Commissioner rejected the specific reasons given by the ALJ, concluding that the record failed to establish that Mr. DiCerbo permitted students to bring alcoholic beverages on the trip, or that he was aware that they were

You are viewing an archived copy from the New Jersey State Library.
drinking beer prior to the bus trip home. Rather, the Commissioner found that when Mr. DiCerbo discovered students drinking beer on the trip home, he recognized his responsibility to the students by confiscating the beer and admonishing the students. The Commissioner found that Mr. Di Cerbo further recognized his responsibility as a teacher in his actions concerning the student who became ill on the trip.

However, although rejecting the argument that Mr. DiCerbo's conduct was analogous to that in In the Matter of the Tenure Hearing of Michael Gwaley, decided by the Commissioner, Jan. 30, 1986, aff'd by the State Board, June 4, 1986, or In the Matter of the Tenure Hearing of John Ahern, decided by the Commissioner, Oct. 24, 1985, the Commissioner found that Mr. DiCerbo was guilty of conduct unbecoming a teacher, specifically for the reasons set forth on pages 41 and 42 of the Initial Decision. Finding that the Initial Decision was thoroughly documented, the Commissioner adopted the ALJ's findings and conclusions concerning the increment withholding and the tenure charges with the modifications set forth above. Accordingly, the Commissioner directed Mr. DiCerbo's reinstatement to his position. However, while sustaining the ALJ's determination concerning the propriety of the withholding of Mr. DiCerbo's increments, he modified the monetary penalty assessed by the ALJ by increasing the penalty to forfeiture of 120 days' salary.[1]

The Board appealed the Commissioner's determination, arguing that dismissal is the proper penalty in this case in light of Mr. DiCerbo's conduct and the public policy of this state concerning the consumption of alcoholic beverages by minors. Mr. DiCerbo cross-appealed, claiming that the Commissioner's determination that the record fails to establish that Mr. DiCerbo permitted students to bring beer on the trip or knew that they were drinking prior to the trip home mandates a conclusion that the withholding of his increments was not supported by the facts and was unreasonable. He further claims that the monetary penalty imposed by the Commissioner was too severe under the circumstances. He reasserts his arguments presented below that the ALJ erred in excluding testimony relating to the conduct of the vice-president of the Board involving alcoholic beverages, as well as his procedural arguments relating to the Board's compliance with N.J.S.A. 18A:6-11 and those concerning the application of the doctrines of election of remedies, estoppel and waiver.

---

[1] In his decision, the Commissioner imposed a penalty of 120 days loss of salary, but indicated that such loss was that resulting from Mr. DiCerbo's suspension pursuant to N.J.S.A. 18A:6-14. We note that any salary loss resulting from suspension pursuant to N.J.S.A. 18A:6-64 is limited to loss for the first 120 calendar days following the certification of tenure charges.

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

On May 5, 1987, the Commissioner denied the motion for stay of his decision filed by the Board and declined to entertain Mr. DiCerbo's cross-motion for an order enforcing his decision. On June 2, 1987, following submission of Mr. DiCerbo's brief which was filed on May 22, 1987, the Board applied to us for a stay of the Commissioner's decision. In response, Mr. DiCerbo renewed his cross-motion for enforcement. Although we emphasize that pursuant to R 4:67-6, the proper forum in which to seek enforcement of final decisions of the Commissioner of Education, see N.J.S.A. 18A:6-25, is not the administrative agency but superior court, we need not decide the motions filed by the parties in this matter since we are today rendering the final decision of this agency on the merits of the issues in this case that must be resolved under the education laws. We further emphasize that questions relating to the alleged violations of the New Jersey Employer-Employee Relations Act are not before us, but rather are to be resolved by PERC pursuant to the predominant interest determination previously made in this matter[2] once we have rendered our final decision in the case.

After careful review of the documentary and testimonial record, we concur with the Administrative Law Judge and the Commissioner that Mr. DiCerbo has not shown that the withholding of his increments was arbitrary or unreasonable. We further affirm that his conduct relating to the ski trip in January 1985 constituted conduct unbecoming a teacher so as to warrant the imposition of a penalty pursuant to N.J.S.A. 18A:6-10. We also concur that dismissal is not the appropriate penalty in this case, but that a monetary penalty beyond the loss of increments already effectuated by the Board is called for. However, as subsequently discussed, we conclude that such additional penalty should be less severe than the 120 days' loss of salary imposed by the Commissioner.

Initially, although the question is not directly before us in this appeal, we fully concur with the ALJ's determination that the record fails to establish that Mr. DiCerbo willfully failed to follow the Board's policy concerning field trips. As found by the ALJ, the Board did not enforce that policy during 1985-86 or any time previously, and the policy had not been made available to staff. Accordingly, Mr. DiCerbo's failure to conform with the policy does not control assessment of his conduct in this case. Rather, the failure of the Board to enforce its policy or even to make it available leads us to agree with the ALJ that the charges concerning Mr. DiCerbo's failure to obtain Board approval for the trip could not be sustained on the basis of requirements of the policy. Further, although we note that Mr. DiCerbo's conduct is distinguished from that of the foreign language teachers who had accompanied students on trips in the past in that they in fact acted

---

[2] We note that the predominant interest determination rendered pursuant to N.J.A.C. 1:1-14.5 and adopted by both the Commissioner of Education and the Chairman of PERC was not appealed.

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

as chaperones, the failure of the Board to require them to conform to the policy or to take disciplinary action against them does not mandate a conclusion that Mr. DiCerbo is not guilty of conduct unbecoming a teacher or preclude the imposition of a penalty.

We also concur with the Administrative Law Judge's determination not to permit testimony relating to the conduct the Board's vice-president in serving alcoholic beverages to students after football games. Whether or not the standard of behavior expected of Board members is the same as that expected of teachers, and whether or not the conduct of the Board's vice-president failed to conform to such standard on any occasion is not at issue in resolving whether Mr. DiCerbo's conduct relating to the ski trip constituted conduct unbecoming a teacher so as to warrant the imposition of a penalty on him. We further adopt the ALJ's determination concerning the procedural violations alleged by Mr. DiCerbo and the application of the doctrines of election of remedies and estoppel for the reasons expressed in the Initial Decision.

In assessing Mr. DiCerbo's conduct, we emphasize that although required to provide a role model for students and to conduct themselves so as to maintain the trust of students and parents, those employed as teachers within the public school system cannot be held responsible for monitoring the conduct of individuals who are students in every circumstance. We however conclude that in the particular circumstances present here, Mr. DiCerbo, as a teacher, had a responsibility to take steps to assure that the minor students who accompanied him on the weekend trip he had organized did not bring with them or consume alcoholic beverages. We find that his failure to take any steps to provide such assurance resulted, as the ALJ found, from a lapse in judgment expected of those who are members of the teaching profession and that his actions created the circumstances that permitted the students to bring with them and to consume alcoholic beverages on the trip. We therefore fully concur with the ALJ that Mr. DiCerbo's failure to exercise proper judgment in these circumstances permitted the students to bring alcoholic beverages on the trip and to consume those beverages during the trip.

The record shows that although Mr. DiCerbo perceived the trip as unrelated to his function within the public school system, the access given him by his employment as a teacher permitted him to organize students to take the trip. He utilized this access to solicit students by providing information on school premises during school hours notwithstanding that he did not do so while teaching his assigned classes. Moreover, although he did not perceive himself as a chaperone, some of the parents perceived him as such. We agree with the ALJ that in this context, Mr. DiCerbo must be held responsible for conduct that permitted alcoholic beverages to be available and consumed during the trip.

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

We perceive the distinction between the ALJ's characterization of Mr. DiCerbo's conduct and the Commissioner's determination that the record does not establish that he "permitted" students to bring alcoholic beverages on the trip to be largely semantic. We find that the Administrative Law Judge's Initial Decision makes it abundantly clear that while Mr. DiCerbo did not act affirmatively to provide alcoholic beverages and did not at any time tell the students that they could bring such beverages on the trip, his failure to take any steps to communicate clearly and explicity that this would not be tolerated even when the question was raised by the students, combined with his announcement that he was bringing beer, his failure to inspect coolers or bags at the inception of the trip, and the fact that his friends drank in front of the students during the trip permitted the presence on the trip of alcoholic beverages and their consumption by the students to occur. Further, we emphasize that the ALJ made no finding that Mr. DiCerbo was conscious of the fact that students were drinking on the trip to Lake Placid. Rather, she found he failed to fulfill his responsibilities in that he deliberately avoided any observation of the students during the trip. We fully agree that Mr. DiCerbo would have seen that students were drinking had he only looked and that he cannot avoid responsibility for his conduct by virtue of his choice to avoid looking. We therefore conclude, as did the ALJ and Commissioner, both that the withholding of Mr. DiCerbo's increments based on his conduct was neither arbitrary nor unreasonable and that his conduct in these circumstances constituted conduct unbecoming a teacher within the meaning of N.J.S.A. 18A:6-10.

We turn now to the question of the appropriate penalty to be imposed in this case. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) Although we find that Mr. DiCerbo's conduct constitutes conduct unbecoming a teacher, in assessing the nature and gravity of the offense, we cannot ignore that his conduct resulted from a lapse in the judgment expected of teaching staff members and that the record indicates that this is the first time that Mr. DiCerbo has failed to conform his conduct to that which is expected of teachers. Further, although we conclude that Mr. DiCerbo's conduct in these circumstances was not an insignificant departure from that expected of teaching staff members and that the consequences of his conduct were potentially serious, we cannot ignore the fact that the trip at issue was not a school sponsored function, in which context Mr. DiCerbo's affirmative obligations would have been clearly and unequivacably certain. Moreover, the record shows that even in this context, Mr. DiCerbo responded responsibly when one of the students became ill, and did act to stop the drinking on the trip back when he was forced by the bus driver to confront the issue. Finally, the record indicates that since his employment in 1969, Mr. DiCerbo has been a dedicated and conscientious teacher. After weighing all of the relevant factors, we conclude, notwithstanding the public policy concerning the consumption of alcoholic beverages by minors, that although Mr. DiCerbo's offense warrants the imposition of a penalty beyond the withholding of his increments already imposed by the Board, the appropriate penalty in this case is the loss of

You are viewing an archived copy from the New Jersey State Library.
increments he has already suffered plus the loss of an additional two months' salary. Therefore, for the reasons stated, we direct Mr. DiCerbo's immediate reinstatement to his teaching position with back pay for the period of his suspension minus two months' salary.

Finally, the New Jersey State Board of Education has by our decision today rendered the final decision of the Department of Education in this matter, and, accordingly, we direct that the record be transmitted to the Public Employment Relations Commission in conformity with N.J.A.C. 1:1-14.8.

July 1, 1987
Date of Mailing _____

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4360-86
AGENCY DKT. NO. 221-6/86

ALEXANDER REAVES,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CITY OF EAST ORANGE,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Melvin Randall, Esq., for respondent (Love & Randall, attorneys)

Record Closed: December 2, 1986 Decided: January 15, 1987

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

Alexander Reaves (petitioner) employed by the Board of Education of the City of East Orange (Board) as an administrative assistant and assistant principal for the past 20 years, claims the action of the Board taken by which a salary increment for 1986-87 was withheld from him is arbitrary, capricious and unreasonable in that the increment was withheld without a basis in fact. Petitioner seeks an Order from the Commissioner of Education by which the Board would be directed to grant him the 1986-87 salary increment otherwise withheld from him. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted August 18, 1986 and the matter was scheduled and heard October 23, 1986 at the Office of Administrative Law, Newark. The record closed December 2, 1986 upon receipt of the Board's letter memorandum in support of its position. A transcript of testimony at hearing is not part of this record.

New Jersey Is An Equal Opportunity Employer

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

BACKGROUND FACTS

The background facts not in dispute between the parties and as established by a preponderance of credible evidence are these. Prior to the commencement of the 1985-86 academic year, petitioner had been employed as an administrative assistant to the principal of East Orange High School for 20 years. On or about September 3, 1985 all administrative assistants in the East Orange school district were assigned the title of assistant principal upon the advice of the Essex County superintendent of schools. The title "administrative assistant" is unrecognized in State Board rules and regulations and its change to "assistant principal" was intended to conform the position title to State Board rules and regulations. Petitioner's duties as an administrative assistant to the principal were not significantly altered by his assuming the title assistant principal.

The principal of East Orange High School is Barbara Darden. Prior to Ms. Darden becoming the high school principal two years ago, she had been the principal of a middle school, an assistant principal, and a teacher in the East Orange school district. Ms. Darden has five assistant principals to assist her. Upon her assuming the principalship of East Orange High, Ms. Darden instituted a "sub-school" concept by which the various assistant principals were assigned responsibility for discrete areas of the high school facility. Four of the assistant principals, excluding petitioner, were assigned the responsibility of management of the so-called sub-school which included the evaluation of sub-school staff, discipline referrals, monitoring of instruction with chairpersons, and the initiation of child study team process. Petitioner, while not being responsible for the management of a sub-school, was responsible for the physical plant, housekeeping, maintenance, work orders, furniture, keys, equipment, inventory, pupil identification cards, lockers, parking, lunch tickets, bus drills, study hall, fire drills, curriculum, police referrals, general discipline and the supervision of teachers in mathematics, physical education and health, and special education, and the supervision of staff on supervisory duty. (R-7).

In a detailed evaluation of petitioner's performance for the period August 28, 1985 to March 31, 1986, Ms. Darden advised petitioner of the strong areas of his performance and the areas of his performance she considered unsatisfactory. (J-2). Ms. Darden, having reminded petitioner of the professional improvement plan they mutually prepared on April 1, 1985 for the 1985-86 year, concluded he failed to achieve his stated objectives. Ms. Darden concluded her evaluation of petitioner's performance by advising

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

him she was recommending that a salary increment should not be awarded him for 1986-87.

Obviously, the Board agreed with that determination for the reasons expressed by Ms. Darden in her written performance evaluation of petitioner and declined to award petitioner a salary increase. Petitioner raises no issue regarding the procedural requirements of N.J.S.A. 18A:29-14. Petitioner does contend, nevertheless, that Ms. Darden placed too many responsibilities on him to satisfactorily complete all the assigned tasks and that she required him to be not only an assistant principal but a department chairman for physical education and health. Petitioner contends that the scope of his assignment is unreasonable and, accordingly, that Ms. Darden's recomendation that he be denied a salary increment is arbitrary, capricious, unreasonable and must be set aside.

ISSUE

Teaching staff members, which by definition at N.J.S.A. 18A:1-1 includes petitioner as an assistant principal, are not automatically entitled to salary increments. The determination to withhold salary increments is a matter of managerial prerogative which has been delegated by the Legislature to local boards of education. Bernards Twp. Bd. of Ed. v. Bernards Twp. Educ. Assoc., 79 N.J. 311, 321 (1971). N.J.S.A. 18A:29-14 provides in part

> Any board of education may withhold, for inefficiency or other good cause, the employment increment or the adjustment increment, or both, of any member in any year by recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action together with reasons therefor, to the member concerned * * *

The determination of an employing board of education to withhold salary increments from a teaching staff member may not be reversed unless the action is found to be arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). The only question open for review when a board withholds an increment is whether the board had a reasonable basis for its factual conclusions. One who challenges the action of a board to withhold a salary increment carries the ultimate burden to demonstrate that the complained of withholding

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

was arbitrary, capricious, or unreasonable because the board did not have a reasonable basis for its factual conclusion and that he earned the salary increment. The scope of review under the Kopera standard is to determine whether the underlying facts were as those who made the evaluation claimed and whether it was reasonable to conclude as they did based upon those facts, bearing in mind they are the experts, that the affected person did not earn a salary increment. See, Elliott Pollack v. Ridgefield Park Township Bd. of Ed., 1985 S.L.D. - (St. Bd. of Ed., Feb. 8, 1985).

BASIS OF BOARD'S ACTION TO WITHHOLD THE SALARY INCREMENT

The evidence of record establishes the following facts upon which the Board determined to withhold a salary increment in 1986-87 from petitioner. Clearly, the Board relied upon Barbara Darden's evaluation of petitioner's performance for the period August 28, 1985 through March 31, 1986. A review of that evaluation and her supporting testimony discloses the following facts.

Ms. Darden found petitioner's areas of strength in his performance are in the following responsibilities: lockers, parking, supervision of staff on supervisory duty, bus drills, and fire drills. Deficient areas of petitioner's performance were identified by Ms. Darden to be in the following areas: physical plant, housekeeping, maintenance, work orders, furniture, keys, equipment, inventory, pupil identification cards, lunch tickets, and the supervision of physical education and health teachers regarding written evaluations of their performance he was to have submitted to her. In regard to Ms. Darden's concerns of petitioner's performance in the areas of physical plant, housekeeping, maintenance, and work orders, Ms. Darden had advised petitioner on September 19, 1985 of an eight step procedure regarding maintenance work orders. (R-1). Ms. Darden observed that throughout the course of the 1985-86 year petitioner, by ignoring the work order procedure, caused delays in ordering needed services to attend immediate needs. Ms. Darden also reminded petitioner that on January 31, 1986, she had requested him to review work order requests not yet filled and report to her by February 7, 1986. As of the date of the evaluation, March 31, 1986, petitioner had failed in that task.

In regard to Ms. Darden's concerns about petitioner's performance in the areas of furniture, keys, equipment, and inventory, petitioner failed in his responsibility to engrave all key items of equipment during the 1985-86 year. Consequently, items not engraved

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

remained in storage thereby depriving teachers the use of that equipment. Additionally, petitioner had lost his own personal set of keys to various offices, cabinets and rooms throughout the schoolhouse. Rather than immediately notifying Ms. Darden of the fact of that loss, petitioner caused the locks on the entrance door to the high school to be changed without Ms. Darden's knowledge. Ms. Darden attempted one day thereafter to enter the building through a locked door, used her keys to the building, and then discovered her key would not open the door. After she brought this incident to petitioner's attention she then learned for the first time petitioner had lost the keys to various rooms throughout the schoolhouse.

Regarding pupil identification cards, Ms. Darden reminded petitioner that all high school pupils were to have identification cards but that he had advised her after such cards were issued that 300 pupils were still not issued identification cards. Ms. Darden also noted that petitioner did not make himself available to pupils to secure replacement clips for the identification cards and that as a result the pupils went to her for assistance. Regarding lunch tickets, petitioner had the responsibility of distributing lunch tickets to pupils the Friday preceding the week the tickets were to be used. Petitioner kept lunch tickets to be distributed in a locked cabinet. In the performance evaluation, Ms. Darden noted the following concerns regarding lunch tickets:

> The initial processing of lunch tickets was completed in a satisfactory manner. You have been absent however on three Mondays, a fact that has created serious problems with lunch ticket distribution as the tickets were not distributed to students on the prior Friday as they should have been. You have secured the tickets in locked and inaccessible cabinets and as a consequence it was necessary to institute means to take care of problems related to student lunches * * *

It is noted in this regard that by independent memorandum (R-6) on March 31, 1986, Ms. Darden advised petitioner of the following:

> You are absent on today [March 31, 1986]. I have two concerns:
>
> 1. You did not advise me directly that you are absent for the day. I was in the building at 7:35 a.m. and could have been reached.
>
> 2. In your absence, lunch tickets, locked in your file cabinets, were not available to students. These tickets should have been distributed on the last school day of the previous week. In the absence of tickets, were were forced to proceed, without

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

> accurate accounting, in the lunch program for the day. This is a serious problem.

You are to:

a. Distribute tickets as planned on the last school day of one week - for the next week.

b. Devise and implement a back-up system for ticket distribution so that this does not occur again.

In regard to supervision of the physical education and health teachers, Ms. Darden advised petitioner in the performance evaluation of the following:

> In the absence of a Chairperson you were given responsibility for this Department, including the evaluation process. To date, evaluations of tenured teachers - due by March 30, 1986 - have not been completed or submitted to me. (You did complete the evaluation of the one non-tenured teacher on time.) I have no explantion from you as to the failure to complete this assignment on time nor an indication of when it will be completed.

It is noted that by memorandum (R-5) on March 7, 1985 from Ms. Darden all department chairpersons including petitioner were advised that "ALL Evaluations -Non-tenure - are due to me directly for review and typing * * * the same process will apply for Tenure Evaluations. The start-up due date is March 24, earlier if possible * * * ".

After reviewing the foregoing areas of perceived deficiencies in petitioner's performance, Ms. Darden then noted that petitioner's unsatisfactory performance regarding maintenance of the physical plant led to delays in meeting maintenance needs which creates "unpleasing conditions for students and faculty", that petitioner's failure to report the loss of his school keys to her is a serious matter as is his failure to engrave equipment for use by teachers which was a serious detriment to the operation of a multi-faceted classroom experience for pupils and teachers, that his delay in processing pupil identification cards seriously jeopardized the security system at the high school, his failure regarding prompt distribution of lunch tickets on the date due created "an unsettling and unfair effect on students and on lunch program operation", and that his failure to meet the written evaluation deadline was contrary to the requirement to review teacher performance at specific times in the school year.

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

Finally, Ms. Darden proffered petitioner five recommendations to improve his performance for 1986-87 including maintaining a diary of his daily and weekly activities, preparing a calendar of activities for 1986-87, keeping abreast of time management materials in professional journals, and consulting with her at frequent intervals to discuss his performance.

It is on the foregoing basis, then, that the Board determined petitioner's performance during 1985-86 did not warrant a salary increment for 1986-87. As noted earlier, petitioner does not dispute that the Board had the opportunity to review the evaluation of his performance as prepared by Ms. Darden nor does he dispute that he had the opportunity of meeting with the Board in an effort to dissuade it from Ms. Darden's recommendation that a salary increment not be granted him.

PETITIONER'S PROOFS

Petitioner, in support of his contention he was given an unreasonable amount of duties by Ms. Darden, explained that when his position title was changed from an administrative assistant to assistant principal he was given additional duties regarding maintenance, supervisor of the physical education and health teachers, he was placed in charge of the mathematics department and special education, and he was given the responsibility of keys. (P-1). Petitioner notes that the position "department head" has its own job description (P-2) which job he was expected to perform as an assistant principal. Nevertheless, petitioner maintains he did perform the duties set forth in the job description for department head for 1985-86 in addition to completing all duties of his position as assistant principal.

Petitioner notes that during 1984-85 he did not have to supervise the teachers in physical education and health. When that duty was assigned him in 1985-86 he received no additional help by way of secretarial assistance, space, or equipment. Petitioner, nevertheless, does not deny that assistant principals had a secretarial pool available to them and that no assistant principal had a personal secretary assigned.

Regarding Ms. Darden's evaluation of his performance, petitioner testified he did prepare work orders on a daily basis and prepares monthly summaries of all work orders initiated. While petitioner contends his individual work orders were prepared on time, his

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

monthly summary was not on time because of the additional responsibilities noted above he had for 1985-86 and the fact he had no additional assistance. Regarding keys, petitioner does admit he lost his keys to the schoolhouse and he admits that at least one key was a security hazard in that that key opened his office. Three lost keys were to file cabinets in his office while other keys opened the cafeteria and a sliding door partition. Petitioner does not dispute that he caused the locks on the entrance doors to be changed without the principal's knowledge.

Petitioner testified that all equipment in the school storerooms was engraved prior to the opening of school in September 1985 and submitted an inventory list in this regard. (P-4). However, Ms. Darden's concern is with the items delivered to the school after September 1985 which remained in the storeroom through March 1986 because they had not been engraved and, consequently, cannot be used by pupils. Petitioner did not address this concern during his testimony.

Petitioner testified regarding pupil identification cards that that task is monsterous. Several events caused a delay in properly issuing all pupil identification cards. The biggest delay was caused when the initial photographs of individual pupils were returned from the photographer without names to identify the pupils. Petitioner then had to return all photographs to the photographer in order to have them identified by pupil name. Upon the return of the photos, with names thereon, petitioner then had to see that the photographs were cut, placed in pouches, sealed, and then distributed to pupils. While petitioner admits a number of pupils never received identification cards, which he did not realize until March or April 1986, he subsequently learned that most of those pupils do not regularly attend school. Petitioner insists he did assist students in securing replacement clips for the identification cards when asked by them after school each and every day.

While petitioner admits that historically lunch tickets are to be distributed by him on Fridays, he was absent only on one Monday, not three as is asserted by Ms. Darden. The one Monday he was absent, petitioner admits he had not distributed the tickets the preceding Friday. When on Monday he was absent and he realized he did not distribute the lunch tickets, he telephoned another assistant principal, a Mr. Ross, and asked him to contact the cafeteria director to secure her permission to allow pupils to sign a list in order to receive their lunch and that on his return to school he would distribute the lunch tickets to the pupils. Ostensibly, the pupils would then take their lunch tickets to the cafeteria for lunch they had had that Monday. However, petitioner never explained this

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

plan to Ms. Darden and Mr. Ross did not carry out petitioner's request. Petitioner suggests that had Mr. Ross carried out his request the lunch ticket difficulty would not have been created.

Petitioner testified that he had completed each and every observation of teachers he was obligated to perform although he admits he had not prepared written evaluations. He explains that he could not prepare the written evaluations because he could not get a secretary to type them. Finally, petitioner testified his daughter typed some at home and other secretaries typed some others. Petitioner admits 17 written evaluations were overdue.

While petitioner's duties include the "supervision" of teachers in mathematics and special education, he is not obligated to provide any written evaluations of their performance nor he is obligated to observe their performance. Rather, as supervisor of mathematics and special education he is obligated to provide teachers with supplies and equipment and he is responsible for pupil discipline in those two departments.

Finally, petitioner testified that he is "stunned" regarding the evaluation of his performance by Ms. Darden and that he is personally hurt.

This concludes a recitation of petitioner's proofs in support of his argument that the Board acted in an unreasonable manner in withholding a salary increment from him in that the Board had no reasonable basis for its factual conclusion that he did not earn the salary increment.

FINDINGS OF FACT

The essential finding is made that petitioner's performance is deficient in the areas identified by Ms. Darden. I **FIND** that the evidence of record shows petitioner could have reasonably performed efficiently in those identified areas had he more efficiently used his time. That petitioner was to observe and evaluate the performance of teachers in physical education and health is no basis upon which to find petitioner was overburdened by assigned duties in this job. Each of the other four assistant principals had to manage sub-schools within the East Orange High School, a responsibility not given petitioner. Consequently, I **FIND** that the deficiencies in petitioner's performance

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

identified by Ms. Darden in the evaluation of his performance have a reasonable basis in fact in this record.

CONCLUSIONS OF LAW

Petitioner's proofs fall far short of establishing that the Board did not have a reasonable basis for its factual conclusion he did not earn a salary increment and the proofs fall far short of showing he earned the controverted salary increment. Ms. Darden's evaluation of his performance is detailed, supported by her testimony as well as the testimony of petitioner himself. Based on that evaluation Ms. Darden arrived at certain judgments. The judgments arrived at by Ms. Darden regarding petitioner's areas of deficiency are unassailable on the evidence in this record. The Board, relying upon the evaluation of petitioner's performance, arrived at the judgment petitioner did not earn a salary increment.

The standard of review here is to determine whether the Board had a reasonable basis for its factual conclusion. The evidence of record, taken as a whole, demonstrates the Board had a reasonable basis for its factual conclusion that petitioner did not earn a salary increment. Neither this administrative law judge, nor the Commissioner, nor the State Board of Education may substitute their judgment for either the Board or those who made the evaluation of petitioner's performance, but may only determine (1) whether the underlying facts were as those who made the evaluation claimed and (2) whether it was reasonable for them to conclude as they did based upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene. Kopera, 60 N.J. Super. at 296-97.

Petitioner's deficient performance regarding work orders, monthly summaries, keys, pupil identification cards, engraving equipment and timely submission of written evaluations are established by the evidence of record. Accordingly, the judgment of the Board must be **AFFIRMED.** It is the Board's determination to judge whether the performance of a teaching staff member is such that that member earned a salary increment. So long as that judgment is not shown to be based on nonexistant facts, and the withholding action is reasonable based on those facts, the Board's judgment must be **AFFIRMED.** Petitioner's argument that the Board failed to provide him a meaningful opportunity either to rectify his deficiencies or to convince his superior that his judgment

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

is erroneous is without merit. One, Ms. Darden discussed with petitioner her evaluation of his performance and her conclusion his performance did not merit a salary increment. Two, the State Board of Education has held that a board is not required statutorily to provide the opportunity for improvement by notice of its intended action to withhold a salary increment. Daniel Woodside v. Bayonne Bd. of Ed., 1985 S.L.D. - (St. Bd., Apr. 8, 1985). Petitioner was afforded all the process to which he is due.

Accordingly, the Petition of Appeal is **DISMISSED**.

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

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

January 15, 1987
DATE

Daniel B McKeown
DANIEL B. MC KEOWN, ALJ

JAN 16 1987

DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE JAN 21 1987

OFFICE OF ADMINISTRATIVE LAW

sc

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

ALEXANDER REAVES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,.	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner's exceptions mirror those arguments advanced in his letter memorandum submitted as a post-hearing submission. Citing Fitzpatrick v. Montville Board of Education, 1969 S.L.D. 4, 7, petitioner reiterates his argument that as a matter of fundamental due process, any petitioner who has had an increment denied is entitled to receive advance notice of his unsatisfactory performance so that he has a meaningful opportunity either "to rectify his deficiencies or to convince the superior that his judgment is erroneous." (Petitioner's Exceptions, at p. 2, quoting Fitzpatrick, at p. 7) Without his consent, petitioner avers, he was assigned two positions, that of Assistant Principal and Department Chairman. He argues that his supervisor's evaluation of him did not take into account that petitioner was "forced" to perform the job functions of two traditionally full-time positions. (Petitioner's Exceptions, at p. 2) Further, petitioner contends that this unilateral assignment to two positions was in violation of N.J.A.C. 18A:28-6, stating:

> It stands to reason that two individuals holding two distinct full-time positions could perform their respective responsibilities better than if one individual was assigned the responsibilities of two positions. Following this logic, the standard applied in a performance evaluation should be different for an individual assigned two full-time positions than it is for an individual performing only one full-time position.
> (Exceptions, at p. 2)

Additionally, petitioner maintains that his supervisor "chose to focus on the negative." (Exceptions, at p. 2) He repeats the arguments raised at hearing and in his post-hearing submission, among them the following:

1. The 300 students who did not receive I.D. cards were students "to whom no distribution was possible since they were not present [to] receive I.D. cards." (Exceptions, at p. 3)

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

2. Testimony and documentation were provided which demonstrated that the "vast majority of equipment had already been engraved in September, 1985. Another inventory list was presented which indicated that engravings took place in February, 1986." (Id., at p. 3)

3. Petitioner testified that he had called another assistant principal to instruct him on how to go about getting the lunch tickets distributed in his absence. "For whatever reason, the Assistant Principal did not distribute the tickets. Nevertheless, the Principal chose to hold Petitioner accountable." (Id., at p. 3)

4. Although petitioner had completed all evaluations in the Physical Education and Health Department, his supervisor determined that because a few of the evaluations were not typed, his performance in this regard was unsatisfactory. "Not only was no allowance made for the fact that this was an extra responsibility assigned to Petitioner without his consent, but further, his Supervisor made no allowance for the fact that no extra secretarial assistance was provided to Petitioner to complete this task." (Id., at p. 3)

Petitioner contends that the evaluation which led to his increment denial was arbitrary and capricious. He submits that the initial decision must be rejected and prays for full reinstatement of his increment for the 1986-87 school term.

Upon review of the record in this matter, the Commissioner is unpersuaded by petitioner's exceptions suggesting that the ALJ erred in determining that the withholding of petitioner's 1986-87 increment was an appropriate exercise of its discretion.

The Commissioner adopts as his own the findings of fact as set forth in the initial decision, as well as the ALJ's conclusions which stem from such findings. In so doing, the Commissioner notes that neither party to this dispute has sought to discredit those findings by specific reference to a transcript of the proceedings. In the absence of such transcript in the record, the Commissioner must rely upon the findings of fact as contained within the initial decision, as well as on the inferences drawn by the ALJ from such findings of fact. Moreover, having reviewed the evaluation tendered by the principal, which is a part of the record, the Commissioner finds that her comments represent a balanced, constructive evaluation. The Commissioner's conclusions from the record before him are in accord with the ALJ's that in light of the fact that each of the other four assistant principals had to manage sub-schools within East Orange High School, "the deficiencies in petitioner's performance identified by Ms. Darden in the evaluation of his performance have a reasonable basis in fact***" and thus were not disproportionately burdensome. (Initial Decision, ante)

As for petitioner's argument that the Board failed to provide him a meaningful opportunity either to rectify his deficiencies or to convince his superiors that his judgment was erroneous, the Commissioner concurs with the ALJ that this argument is without

You are viewing an archived copy from the New Jersey State Library.
merit. See Daniel Woodside v. Board of Education of the City of Bayonne, decided by the Commissioner November 19, 1984, aff'd with modification State Board, April 3, 1985 which states:

> ***When a board is acting properly to withhold an increment, it is not required statutorily to provide the opportunity for improvement by notice of its intended action.***
> (State Board's Opinion, at pp. 1-2)

Accordingly, the decision of the Office of Administrative Law is affirmed. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 20, 1987

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

ALEXANDER REAVES,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 20, 1987

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

For the Respondent-Respondent, Love and Randall
(Melvin Randall, Esq., of Counsel)

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

August 5, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4727-86
AGENCY DKT. NO. 131-4/84

CHARLES R. STOCKTON,
Petitioner,
v.
THE BOARD OF EDUCATION,
CITY OF TRENTON,
Respondent.

Mary Jane Cullen, Esq., for petitioner (Ruhlman, Butrym & Friedman, attorneys)

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

Record Closed: December 2, 1986 Decided: January 15, 1987

BEFORE **JOSEPH LAVERY**, ALJ:

This case is being considered on remand from the Appellate Division of the New Jersey Superior Court, which overruled a State Board of Education dismissal for untimely filing. The Court directed that the substantive merits of the controversy now be decided. The question for resolution on remand is whether petitioner was compensated appropriately and in full during the school year 1983-84. Petitioner insists that he was not; respondent Board asserts that he was.

Today's initial decision grants petitioner the relief he seeks.

New Jersey Is An Equal Opportunity Employer

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

PROCEDURAL HISTORY

This matter was initiated by the Commissioner of Education (Commissioner) through a remand filed with the Office of Administrative Law (OAL) on July 16, 1986 as EDU 4727-86.

The history preceding this remand is relevant. On April 23, 1984, petitioner filed a verified petition of appeal before the Commissioner. The Commissioner thereafter declared the matter a contested case pursuant to N.J.S.A. 52:14B-9 and 10, filing it with the Office of Administrative Law on May 16, 1984 as EDU 3492-84. The dispute was decided by this administrative law judge in an initial decision dated October 4, 1984, following motion for summary judgment. The merits were not addressed; instead, the case was dismissed for failure to comply with the 90-day time limit for appeal set forth at N.J.A.C. 6:24-1.2. The Commissioner in his decision of November 20, 1984, found the appeal timely and remanded for decision on the merits. The State Board of Education (State Board), in its decision of April 3, 1985, reversed the Commissioner and upheld dismissal of the petition. Finally, the Appellate Division in Stockton v. Bd. of Educ. of City of Trenton, 210 N.J. Super. 150 (App. Div. 1986) reversed the Board, upheld the Commissioner, and remanded for a decision on the merits.

It is in compliance with that last judicial instruction that the Commissioner of Education has remanded this case (EDU 4727-86). After a second prehearing conference, the prehearing order of September 8, 1986 afforded respondent Board an opportunity to argue on motion that the 90-day bar was still at issue. Briefs were submitted. An interlocutory order of November 6, 1986 then denied the motion, and limited the appeal to the continuing motion for summary judgment on the merits. Briefs on this substantive position of the case followed, the last of which was received on December 2, 1986. On that date the record closed.

ISSUES

The specifics of the issue for resolution were set forth in the prehearing order of September 8, 1986.

Whether petitioner was entitled:

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

(a) to remain at step 15 of the salary guide for Learning Disability Teacher Consultants (LDTC) for the remainder of the 1983-84 school year, and

(b) to be paid at the corresponding salary.

The Board contends that petitioner is not so entitled, and should be paid at step 14 of the salary guide.

Burden of Proof:

The burden of proof falls on petitioner, who must carry it by a preponderance of the credible evidence.

Undisputed Facts:

The facts on which this case turns are contained in a stipulation submitted by the parties on August 7, 1984, which accompanied the original motion for summary judgment. That stipulation is set forth verbatim below:

1. Charles V. Stockton is employed as a Learning Disability Teacher Consultant (LDTC) by respondent and is under tenure with respondent.

2. Charles V. Stockton was first employed by respondent as an LDTC in March 17, 1980. At that time he was placed at Step 11 of the Learning Consultants' salary guide.

3. During the 1980-81 school year, Charles V. Stockton was placed at Step 12 of the guide; and he advanced one step on the guide each year thereafter until 1982-83 when he was placed at Step 14.

4. On or about April 15, 1983, respondent sent a letter of intent to offer a contract for employment for the 1983-84 school year at an annual salary of $27,227.00, which corresponded to Step 15 of the guide. The letter of intent further noted that the salary was to be adjusted upon ratification of a new agreement.

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

5. Charles Stockton accepted the contract offered by respondent on or before May 20, 1983.

6. Commencing September 1, 1983, Mr. Stockton was employed at Step 15 of the original guide and was paid the corresponding salary.

7. A new agreement covering the period between September 1, 1983 to August 31, 1985, between respondent and the Trenton Education Association was adopted by respondent on or about October 4, 1983.

8. Upon adoption of the new agreement, Mr. Stockton was placed at Step 14 and began receiving the salary corresponding to that step, i.e. $27,751. His first paycheck at the adjusted salary was received on November 9, 1983. Petitioner immediately complained to the Personnel and Business Office of this placement.

9. The salaries corresponding to the steps at issue are:

1982-1983		1983-1984	
Steps	Salary	Steps	Salary
14	$26,576	14	$27,751
15	27,337	15	28,569

10. On or about December 16, 1983, petitioner's attorney informed the New Jersey Education Association of petitioner's circumstance as outlined above. Petitioner sent a copy of said letter to respondent.

11. By letter dated January 30, 1984, Charles R. Stockton contacted respondent, specifically Thomas Mitchell, Assistant Superintendent-Business Administrator, and protested the reduction in his salary and requested reinstatement of his salary at Step 15 with the increments granted under the new Agreement.

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

12. By letter dated February 8, 1984, Thomas Mitchell of respondent Board denied Mr. Stockton's request, stating he believed Mr. Stockton's 1983-84 salary had been correctly calculated and that he had been "over-paid in the last three school years, a total of $2,106." The Board itself did not formally consider or act upon Mr. Stockton's request for reinstatement of his salary at Step 15.

13. On April 23, 1984, Charles Stockton filed a petition of Appeal with the Commissioner of Education.

14. The matter was transmitted to the Office of Administrative Law as a contested case on May 22, 1984.

15. At the prehearing conference held on July 10, 1984, it was agreed that the matter would be decided on a stipulated record with letter memoranda from all parties to be submitted by August 20, 1984.

Although not entirely clear from the stipulations, the parties in their briefs agree that the payment was made by the Board in error. The court in Stockton v. Bd. of Educ. of City of Trenton, supra also found that this error arose during the school year 1980-81. At that time, when petitioner was employed, the Board incorrectly placed him at step 12, rather than step 11, as the negotiated agreement between the majority bargaining and the Board representative provided. This placement at one step higher in the salary guide went uncorrected until adoption of the negotiated contract on or about October 4, 1983 (stipulations 7 and 8, supra). It is from this correction that petitioner appeals.

Arguments of the Parties:

Petitioner's Argument:

Petitioner contends that once a school board establishes a teaching staff member's salary, it cannot at a later date reduce that salary in an attempt to correct its own error. Once established, the designated salary becomes a "vested right," protected by

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

the provisions of the Teacher Tenure Act. This theory has been validated in the instant case. The Appellate Division of Superior Court, in dictum, noted that the Board's placement of petitioner in a step lower on the salary guide was tantamount to violation of the Teacher's Tenure Act. Specifically, that action contravened N.J.S.A. 18A:6-10. In petitioner's view, this dictum commands respect even though not binding. Petitioner argues that the Board's error was unilateral, and the Board consequently must take responsibility for absorbing the cost of that mistake for the 1983-84 school year. Consequently, he is entitled to the $818 difference between that to which he was entitled in Step 15 and what he actually received at Step 14 for the 1983-84 school year.

The Board's Argument:

For its part, the Board asserts that those administrative decisions on which petitioner relies have factual elements which distinguish them from the present case. In those cases cited by petitioner: (a) the Board's errors were inadvertent; (b) the teachers involved were unaware of the mistake and received salaries for substantial periods of time; (c) the Board had fixed the salaries by resolution; and (d) the Board attempted to recoup overpayment by an actual reduction of salary.

In the instant appeal, a school official erroneously advanced petitioner to a higher step on the 1980-81 salary guide. This was not authorized, as the negotiated contractual agreement of that year concededly proves. For approximately three years thereafter, until the error was discovered in the 1983-84 school year, petitioner had the benefit of an overpayment. At no time during the 1983-84 school year, when the error was corrected, did petitioner receive the higher salary to which he lays claim. Neither was his salary reduced at any point. In fact, it was increased slightly. After having the benefit of a windfall for this extended period, the Board should not be deterred from a correction of an inequity. Petitioner denies 1983-84 received monies to which he had no lawful entitlement. Significantly, for the prior three-year windfall, no recoupment is being sought.

The Board insists further that petitioner is incorrect in relying on the Tenure Employee's Hearing Law at N.J.S.A. 18A:6-10 et seq. This legislation is meant to protect employees from intentional wrong-doing and arbitrary action. Here the law should not be

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

interpreted to protect an employee from a swiftly-corrected clerical mistake. The rationale underlying such an unreasonable proposal by petitioner suggests political pressure, rather than legal reasoning.

ANALYSIS

The administrative decisional law favors petitioner. Since as early as Harris v. Bd. of Ed., Pemberton Twsp., 1939 S.L.D. (decided October 29, 1982) it has been held that a teacher under tenure may not have his or her salary reduced except under the procedures set forth in the Tenure Statute (Id. at 165). Additionally, a Board cannot correct "administrative error" and reduce compensation of a tenured teacher without violating petitioner's rights under the Teachers' Tenure Act, Anson et al. v. Bd. of Ed. City of Bridgeton, 1972 S.L.D. 638. The tenured teacher's interest in salary is a "vested right". A mistake in the placement of a teacher on a salary guide, not of his or her making, cannot deprive a teacher of that right (Id. at 640). In particular, once a Board of Education establishes a teacher's salary, it cannot at a later date reduce that amount because of an error it originally made Agnes D. Galop v. Bd. of Ed. Hanover Township, 1975 S.L.D. 358, 364-365; aff'd. State Bd. of Ed. 1975 S.L.D. 366. Neither can a partial salary payment, administered because of the Board's error (here asserted as being in the amount of $818) reasonably be thought of as a "windfall" which threatens a viable education program, or thorough and efficient education in the Trenton School District. Similar salaries have been awarded because of like mistakes. Those awards have been upheld in the face of precisely the argument made by petitioner. Rivers v. Bd. of Ed. Mercer County Vo-Tech Schools, OAL Dkt. EDU 1368-83 (Nov. 30, 1983); adopted, Commr. of Ed. (Jan. 19, 1984); Tripp v. Bd. of Ed. South Orange-Maplewood, OAL Dkt. EDU 6615-83 (dec. December 20, 1983); adopted Commr. of Ed. February 6, 1984.

Further, in view of the preceding administrative determinations, the "windfall" from 1980 through 1983 may not be considered. The only issue here turns on what occurred during the school year 1983-84. Under the foregoing decisions, reduction of salary is an attack on a "vested right" protected by the Tenure Employees' Hearing Law at N.J.S.A. 18A:10-6. See also, Stockton v. Bd. of Educ. of City of Trenton, 210 N.J. Super. 210, 157 (App. Div. 1986). It is not enough for the Board to contend that the provisions of that law may only be invoked for wrongdoing and arbitrary action working to the

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

detriment of a board employee. Loss of salary for "mistake" of a school board could be a defense easily perverted, and used as a screen for abuse. It is unlikely that the Legislature intended to make so fine a distinction regarding motive when salary is withheld. The end result is the same. Teachers lose the compensation they contract for.

The Board is also not convincing when it states that petitioner did not lose, but in fact gained, money through the "adjustment" authorized by negotiated contract. Although the question need not be decided here, even if such a negotiated contract were held to supercede the individual salary agreement made independently by petitioner, it is obvious that the "adjustment" was intended across-the-board to increase salaries assigned to each step of the Guide. It was not intended to change individual teacher's placement on step (e.g., from step 15 to 14).

What the Board sought to accomplish here was a low-profile correction of mistake. The foregoing citations make clear such a course is precluded by law, at least under these circumstances, for the 1983-84 school year.

CONCLUSION

I **CONCLUDE**, therefore, based on the record as a whole, and the applicable case law that:

> petitioner, for the 1983-84 school year, was entitled to be paid at Step 15 of the salary guide. He should now be reimbursed by the Board for those monies amounting to the difference between that which he was paid, and that which he should have been paid had he remained at Step 15 of the salary guide. This difference may be calculated from the adoption of the new negotiated agreement on October 4, 1983 when his salary and step changed, to the end of the 1983-84 school year.

ORDER

I **ORDER**, therefore, that petitioner's appeal for relief sought, covering the 1983-84 school year, be, and hereby is **GRANTED**.

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

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

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

January 15, 1987
DATE

JOSEPH LAVERY, A.L.J.

JAN 16 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 21 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

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

CHARLES R. STOCKTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

The Board excepts to the recommended decision of the ALJ alleging that he has "precedentially" ruled that a board of education cannot correct a clerical mistake by a salary adjustment that would, in effect, reduce a teacher's salary. It argues, inter alia, that it is inconceivable that the Legislature intended to prevent the correction of an admitted clerical mistake when enacting the prohibition to the salary reduction provision in the Tenure Act. Further, it avows that the "vested right" concept cannot apply.

Upon review of the record in this matter, including the Board's exceptions, the Commissioner is in agreement with the ALJ's determination that petitioner should have remained at Step 15 of the salary guide for the rest of the 1983-84 school year as this was the step of the negotiated agreement at which he was offered and accepted employment and according to which he was paid from September to November 1983.

This is not to say, however, that a Board may never correct an error or mistake in salary or that a tenured teaching staff member erroneously/mistakenly placed on a salary guide forever more enjoys the benefits of said error or mistake. What it does mean is that, during a given school year, once an individual has been placed and paid at a given step of the salary guide, he or she may not be subject to any corrective action during that year, which reduces his or her salary or which places him or her at a lower guide step as occurred in this matter. Further, only a board of education may act to correct an error/mistake and it must provide reasonable notice to the individual that a correction is to be made As stated by the State Board in Conti and Cutler v. Bd. of Ed. of Montgomery, decided by the Commissioner June 10, 1985, rev'd State Board July 2, 1986:

> ***[T]he Commissioner has long held that a board does not violate the school laws when it acts to correct its mistake by maintaining a staff member's salary at the same level for the ensuing

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

year so long as no reduction of salary results. Honaker, supra; Massa, supra; Galop v. Hanover Tp. Bd. of Ed., 1975 S.L.D. 358, aff'd, 1975 S.L.D. 366; DeRenzo v. Passaic Board of Education, 1973 S.L.D. 236. We believe that the results in these cases properly recognize that, although an affected teacher is entitled to rely on a board's official action establishing his salary for a one year period, he is not entitled under the school laws to benefit further from the board's mistake by maintaining such favored position beyond that one year period. See Galop, supra, at 364-65.

***

[W]e emphasize that when such correction is necessary, it must be effectuated, as here, by official act of the board, with reasonable notice given to the affected teacher.

(Slip Opinion, at pp. 8-10)

Thus, if petitioner's placement on the negotiated salary guide was not in accord with the terms of the collective bargaining agreement, the Board could have take action to correct such but only in conformity with the principles expressed above in Conti and Cutler.

In the instant matter, however, the Board took no formal action to correct petitioner's supposedly erroneous guide placement subsequent to fixing his salary at Step 15 of the guide in April 1983 and paying him according to that Step in the beginning of the 1983-84 school year. Nor was he given any notice that such corrective action was to occur. Moreover, when the "corrective" action was unilaterally taken by someone other than the Board, the net result was a reduction in salary in that petitioner was paid a salary less than that designated for Step 15, the amount of which was the salary designated for Step 14.

Consequently, the Commissioner adopts the initial decision essentially for the reasons expressed therein but as clarified above. He directs the Board to carry out the ALJ's order for providing relief to petitioner as requested in the Petition of Appeal.

COMMISSIONER OF EDUCATION

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7656-86
(ON REMAND) EDU 2243-86
AGENCY DKT. NO. 61-3/86

BARBARA CREED, ANNA MARIE TALERICO, GERALDINE APPLEGATE, KAREN TENAI, SUSAN GUICE, ELENA BEST, MARTHA DINGLE, VERONICA LOGAN AND LONG BRANCH SCHOOL EMPLOYEES ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioners (Chamlin, Schottland, Rosen, Cavanagh and Uliano, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber and McOmber, attorneys)

Record Closed: December 2, 1986 Decided: January 15, 1987

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

STATEMENT OF THE CASE

This matter is on remand pursuant to the Commissioner of Education's (Commissioner) decision dated November 10, 1986, from an initial decision rendered by the Office of Administrative Law (OAL) dated September 29, 1986.

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

Petitioners, elementary school secretarial employees of the Board of Education of the City of Long Branch (Board), allege that the Board requires them to administer and provide nursing-type care to pupils on a regular basis in the absence of a school nurse, which they contend constitutes arbitrary, capricious conduct and an abuse of discretion by the Board. The Board denies the allegations, contending that its actions are permissible under New Jersey law and, further, that the Commissioner lacks jurisdiction over the complaint.

PROCEDURAL ASPECTS

Petitioners perfected their Petition of Appeal before the Commissioner on March 5, 1986. On March 27, 1986, the Board filed its Answer and subsequently, on April 1, 1986, the Commissioner transmitted the matter to the OAL for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On June 5, 1986, a prehearing conference was held at which the parties identified and agreed upon the issues and also agreed to submit cross-motions for summary decision, pursuant to N.J.A.C. 1:1-13.1 et seq. The parties submitted their respective cross-motions with the record considered closed on August 21, 1986. The undersigned issued an Initial Decision dated September 29, 1986, granting the Board's motion for summary judgment and denying petitioner's motion. The initial decision was transmitted to the Commissioner who, after receipt of written exceptions by the parties, rendered his decision of remand on November 10, 1986. A telephonic prehearing conference was held on December 2, 1986, where it was agreed that no additional submissions were required of the parties and the herein record was closed effective on that date.

FINDINGS OF FACT PURSUANT TO THE ORDER OF REMAND

The Commissioner, in his decision and order dated November 10, 1986, commanded that ". . . the instant matter is remanded for findings of fact and law consistent with this decision" (Commissioner's Decision at 18). Pursuant thereto, the uncontested facts upon which this court relied in granting summary judgment to the Board are set forth hereinbelow as follows:

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

Exhibit A, attached to petitioner's Certification and introduced as a joint exhibit, represents the schedule and assignment of the Board's school nurses for the 1985-86 school year. Exhibit A demonstrates, among other things, that on Monday, Wednesday and Friday a school nurse is on duty at the Elberon Elementary School between 8:30 a.m. and 11:30 a.m. On Tuesday and Thursday a school nurse is on duty at Elberon between the hours of 12:00 p.m. through 3:30 p.m. The school nurse assigned to the Elberon school divides the time between Elberon and the Garfield school, on alternating A.M. and P.M. schedules. A similar schedule for school nursing duty is extant for the Lenna W. Conrow and West End Schools.

Petitioner's Talerico (Elberon), Tenai (Garfield) and Dingle (West End) make the obvious observation in their certification, among other things, that on Mondays, Wednesdays and Fridays on-premises nursing is provided for two and one half hours for Elberon and two and three-fourth hours at Conrow. They assert that the school secretaries must, therefore, provide on-premises nursing assistance to pupils prior to the opening of school in the morning, during the school nurse's lunch hour and during the period of day when the school nurse is not scheduled at a schoolhouse. Notwithstanding this assertion, an exhibit offered by petitioners and upon which this tribunal relied demonstrates that teachers and building administrators are required to take immediate action in the event of a pupil accident or illness (Exhibit D). Under the Board's Procedure for Handling Accidents or Illness, the teacher in charge of the pupil so affected is required to:

Make the pupil as comfortable as possible
Move the pupil only as necessary
Administer First Aid if needed
Notify the bulding administrator and/or nurse

The building administrator is required to notify the nurse in the building or, where the nurse if out of the building, a school nurse who is on call to handle emergencies. In the event a school nurse is not readily available and where the situation calls for immediate attention, it is the building administrator who is required to examine the pupil forthwith and take the necessary and appropriate action. The procedure also provides for a nurse to be "on call" to handle emergency situations (Exhibit D).

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

The Board's Procedure clearly places the burden upon the building administrator in the event of a pupil accident or illness where the school nurse is not readily available (Exhibit D). To the extent the Procedure is an adopted policy of the Board, it is in substantial compliance with N.J.A.C. 6:29-2.3 Care of injured pupils.

Petitioner's Exhibit E, captioned Students Accidents: Procedures - Standing Orders, provides, in part as follows:

> In the event of an accident in a school facility or on school grounds, the procedures indicated below are to be followed. These procedures have been approved by the school physician for the Long Branch Public Schools. These directives are to be posted for permanent reference on all room bulletin boards. These practices may be carried out by all school staff members; the priority being the school nurse (if available), the school secretary and/or principal, and the teacher(s). (emphasis supplied).

Here, pursuant to the policy, the school secretary is placed on an equal footing with the building administrator in the absence of a school nurse to administer First Aid to injured pupils. However, the building administrator is not absolved of his or her responsibility under this Board adopted policy. The school secretary, as well as all other staff members, shares the obligation to provide First Aid treatment to injured pupils and/or to make provisions for those pupils who become ill during the school day where there is no school nurse readily available (Exhibit E). Petitioner's Exhibit C is similar to Exhibit E in most respects including the admonition that "these practices may be carried out by all school staff employees." (Exhibit C)

A document upon which this tribunal relied is identified as a job description for the position of Administrative Secretary in the Board's employ. Under the heading of "Responsibilities" is, among other things, the clear and unambigous language that a secretary is to perform limited nurse's duties when the [school] nurse is unavailable (Exhibit F also marked "Exhibit A").

With regard to Exhibit G, the memorandum in reference to School Health Aides dated April 30, 1982 and executed by the then Acting Commissioner of Education, petitioners' exhort this tribunal to reference its Verified Petitioner of Appeal and sections I and III of the memorandum; which were dutifully considered.

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

A review of the Petition of Appeal at paragraph No. 5 demonstrates that petitioners' assert:

> . . . each of the secretaries . . . has been instructed and is required, during the fulfillment of their clerical/secretarial duties, to provide regular and continual nursing-type care to the students in each of the grammer schools. These duties include administering first aid in the form of cleaning and attending to abrasions, wounds, and lacerations received by the children in question at a time when no nurse is present. In addition, the Petitioners are required to undertake to determine whether children have an elevated temperature, analyze injuries and determine if they are serious enough that they should contact the emergency nurse on call, dispense sanitary napkins to female students, determine if stitches are necessary to close wounds received on the playground, apply cold compresses and/or ice bags to injuries, and clean up and attend to children who have vomited on their school clothing.

These factual assertions were neither contested nor disputed, therefore, adopted, by reference, as facts not in dispute in the initial decision rendered by this tribunal dated September 29, 1986.

This memorandum, (Exhibit G), is concerned with the duties and responsibilities performed by school nurses and school health aides pursuant to statutes, the Administrative Code and under the direction of the local board of education's school medical inspector. Petitioners refer to Section I and subsections 1 and 10 of the memorandum which state, respectively, that the school nurse have traditionally:

1. Examine [d] every child to see if any physical defect exists (18A:40-4).

   and;

10. Care for sick and injured pupils and arrange for an appropriate course of action (N.J.A.C. 6:29-2.3).

In reference to section III of the memorandum, which is concerned with responsibilities of school health aides, petitioner's refer to subsections 1, 3 and 3 as follows:

1. Physically maintain health office and student rest area.;

3. Receive phone calls and refer them to the nurse.;

4. Type reports and letters as instructed by the school nurse.

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

These facts, together with petitioners' assertion that school secretaries are not school health aides, were adopted by the undersigned as uncontested facts and, therefore, not in dispute (Exhibit G at pp. 2 and 3, Petitioner's Certification at p. 9).

DISCUSSION

The initial decision rendered by this tribunal, dated September 29, 1986, granting the Board's motion for summary judgment and denying petitioner's motion for the same, grounded upon petitioner's failure to carry their burden of proof, remains unchanged by the recital of the facts herein as required by the Commissioner in his order of remand. The initial decision was based upon an analysis of the total record before this court which was comprised of the pleadings, the exhibits and petitioners' certification. Although all of the issues were addressed and disposed of in the initial decision, it is incumbent upon this tribunal to further discuss the basis for the conclusion that petitioner has failed to carry ite burden to prevail in the instant matter, in accordance with the Commissioner's order of remand.

The threshold issue is whether the Board's policy requiring school secretaries to perform nursing duties in the absence of a school nurse is arbitrary, capricious and/or represents an abuse of discretion by the Board. The above recited facts, relied upon in the initial decision dated September 29, 1986, clearly demonstrates that the Board has adopted policies for the care of the injured and ill pupils, pursuant to N.J.A.C. 6:29-2.3 which provides that:

> Boards of education shall adopt rules and a program of procedures for the care of pupils injured at school and shall require that such rules and programs be explained at the beginning of each school year to all employees and that copies be posted in each school at points conveniently accessible to the personnel.

Exhibits C, D and E substantially comport with the regulation to the extent they represent standing orders for all personnel to follow, and meet the requirement for posting. Petitioners do not claim otherwise. They do assert, however, that agents of the Board fail to comply with provision that the procedures, rules and programs be explained to them each school year. This argument is a form of de minimis non curat lex; where the

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

law does not care for, or take notice of, small or trifling matters. Consequently, petitioners' argument on this point is disregarded. As Exhibits C, D and E demonstrate, all school personnel are required to perform pursuant to the policies.

Petitioners complain they are overburdened with nursing-type duties in the absence of the school nures. The complaints, as found in the Petition of Appeal and the Certification, represent generalization of specific allegations of the purported duties performed by the secretaries in the absence of the school nures. Petitioners fail to support the allegations by way of production of records, memorandums or other documentation which would persuade this court and the Commissioner that the allegations are true, in fact. No proffer of accident reports, pupil illness reports, logs of telephone calls made and/or received by the school secretaries or other indicia, are produced to support the alleged burdensome activity. There is little doubt that petitioner's perform such First Aid functions as are required and necessary as well as attending to pupils who are taken ill during the school day. The extent to which these incidents arise in the absence of a school nurse or the unavailability of the "on-call" nurse, is of importance to support petitioners allegations and complaints. Petitioner's failure to produce such competent evidence, in light of prevailing decisional law, cannot result in a finding that the Board's activity is arbitrary, capricious or represents an abuse of discretion. Thomas, supra.; Smith, supra, Outslay, supra.

Having discussed the legal principles in the initial decision dated September 29, 1986, with respect to all issues presented, and adopted by reference here, there is no need to recite them again. Consequently, I **CONCLUDE** that petitioners have failed to demonstrate that the Board's actions to assign school secretaries certain nurse-type duties of a school nurse was either illegal, arbitrary, capricious or an abuse of discretion. Accordingly, petitioners' motion for summary decision is **DENIED** and summary judgment is hereby **ENTERED** and **GRANTED** in favor of the Board of Education of the City of Long Branch.

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

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

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

January 15, 1987
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

JAN 16 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 21 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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

BARBARA CREED ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

Petitioners first posit a procedural objection. Petitioners "believe that the ALJ misconstrued his function in considering cross-motions for summary judgment and as a result concluded that the failure to provide additional facts was a failure on the part of the Petitioners***." (Petitioners' Exceptions, at p. 3) They aver that "the responsibility to contest the contentions presented and produce appropriate responsive factual assertions, belongs to the Respondent***." (Petitioners' Exceptions, at p. 3)

Petitioners then submit two exceptions:

EXCEPTION NO. I

THE DECISION ON REMAND IS DIRECTLY CONTRARY TO ESTABLISHED PRINCIPLES GOVERNING THE RESOLUTION OF SUMMARY JUDGMENT MOTIONS.

Citing Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954), petitioners refer the Commissioner to their eleven-page certification in support of their Notice of Motion for Summary Decision, accompanied by seven exhibits, and aver that the facts of the matter are as set forth in these documents, and as supplemented by their memorandum of law, which also accompanied their Notice of Motion for Summary Judgment. Further, petitioners argue that the Board offered the ALJ "nothing in opposition to these assertions," and that, in fact, the ALJ, "conceded that the facts in the petition were neither contested nor disputed, and he therefore adopted them in his decision (P5)." (emphasis in text) (Petitioners' Exceptions, at p. 4) However, petitioners maintain, inter alia, that

> instead of recognizing the failure of the Respondent to come forward and answer the prima facie case that the Petitioners established, the ALJ determined that the Petitioners had failed to specify sufficient detail in their contentions.

You are viewing an archived copy from the New Jersey State Library.
In so doing, the Administrative Law Judge has turned the case law which has developed regarding summary judgment motions on its ear.

(Id., at p. 4)

Petitioners summarize their position in Exception I by stating:

> In essence, the remand by the Commissioner has demonstrated that the facts asserted by the Petitioners, and previously referenced as compelling by the Commissioner, constitute the entire factual background that was before the Administrative Law Judge. As a result, the Commissioner has little choice but to resolve this matter on the basis of the facts in the record, which are clearly contrary to the conclusion arrived at by the ALJ. His attempt to avoid the inescapable conclusions of the facts in the record, by imposing a standard for additional proofs, despite the absence of evidence submitted to contravene the extensive allegations advanced by the Petitioners, should be rejected with great alacrity. (emphasis supplied) (Id., at p. 5)

EXCEPTION NO. II

THE DECISION ON REMAND LEAVES MORE QUESTIONS UNANSWERED THAN RESOLVED.

Petitioners assert, inter alia, that the ALJ "has taken the position that the area being contested by the Petitioners is one in which a Board of Education has absolute unfettered and perhaps unchallengeable discretion." (Id., at p. 6) Further, it contends that the case law developed by the Commissioner regarding the instant matter involves temporary and occasional situations where a Board was required to act out of acute necessity. The case law does not provide the type of "infallible authority that is suggested herein, to support wholesale transfer of nursing duties to other staff members, as a matter of long-range policy." (Id., at p. 6)

Finally, in response to the ALJ's conclusion that while the Board has not complied with N.J.A.C. 6:29-2.3, this argument can be dismissed as de minimis non curat lex is without legal authority. Petitioners assert that a violation of the Administrative Code is not a situation of minimal importance. Further, they object to the ALJ's dismissing their claim while apparently accepting their complaints that the secretaries herein are being overburdened with nursing-type duties.

Petitioners request the Commissioner address the legal, factual and procedural issues raised in this petition, all of which, they contend, have been inappropriately resolved by the Office of Administrative Law.

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

The Board's reply exceptions reiterate its legal argument that "there is no requirement that a nurse be in every school in the district at all hours of the school day. In addition, it is clear that a board of education has the discretion to require other all (sic) school employees to substitute for a nurse in the nurse's temporary absence." (Reply Exceptions, at p. 2) It avers, inter alia, that

> There can be no dispute that the secretaries, as well as the building administrators and other individuals, provide first aid treatment in the absence of the nurse. Therefore, there is no disputing that secretaries, at times, tend to abrasions, take temperatures, dispense sanitary napkins to female students, apply cold compresses, and contact the nurse and/or janitorial staff when necessary. None of these functions, as discussed here or as plead (sic) in the Petition of the secretaries, is extraordinary in and of themselves. As the Administrative Law Judge correctly pointed out, the only way these part-time services would be extraordinary would be if their number was so large as to monopolize the secretaries' efforts. As the Administrative Law Judge also pointed out, there is no detailed proof to establish any extraordinary service by the secretaries beyond that which was contemplated by the policies of the Board of Education. (Reply Exceptions, at pp. 3-4)

As to Petitioners' Exception #1, the Board contends, inter alia, that "[a]s the Summary Judgment Rule provides, there needs to be no genuine issue as to any material fact for there to be a judgment as a matter of law. The Administrative Law Judge reviewed the law and determined which facts were material and whether there were any genuine issues surrounding those material facts.***" (emphasis in text) (Board's Reply Exceptions, at p. 4)

The Board argues that in this case it is petitioners' burden to show an arbitrary, capricious or unreasonable act by the Board of Education. "The Petitioner has not shown it as set forth by the Administrative Law Judge in his two Initial Decisions. There has been absolutely no proof with regard to material facts, and there has been no showing that the Petitioners are entitled to a judgment as a matter of law." (Board's Reply Exceptions, at p. 7)

As to Petitioners' Exception #2, the Board first argues that

> It is unfair to characterize the Administrative Law Judge's position in his initial decisions as being one where the Board of Education has an absolute, unfettered and unchallengeable position. This is not so. Quite clearly, the Administrative Law Judge reviewed the various exhibits, which the Respondent had submitted to

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

> the Petitioner previously, and found that the Board's policy was in compliance with the regulations concerning school nurses and their presence on school property. *** For the Administrative Law Judge to base his decision on these facts is not to simply support the Board of Education regardless of their policy.
> (Board's Reply Exceptions, at pp. 7-8)

Further, the Board disagrees with petitioners' attempt to distinguish the case law proffered in this matter on the basis that the cases cited involve temporary and occasional situations, while the instant matter involves a permanent and scheduled situation. The Board asserts that a review of Exhibit A clearly discloses that this permanent and scheduled situation does not contravene any law and is a workable situation because nurses are never far from any school. The Board also claims that petitioners' alternative, that there be a permanent nurse or health aide present in each school, is not required by law and that the circumstances cited by petitioners are not so severe as to warrant that type of presence.

In summary, the Board submits that the ALJ did a complete and thorough job, and that the "summary judgment mechanism insisted on by the Petitioner is fallacious. To win as a matter of law requires legal authority. No legal authority for the Petitioner's position has been cited." (Board's Reply Exceptions, at p. 8) The Board prays that the instant petition be dismissed because petitioners have failed to meet their burden in proving the Board was arbitrary, capricious or unreasonable in its actions or establishment of policies.

Having reviewed the matter carefully, the Commissioner must again reject the initial decision in this matter for the reasons that follow.

Pursuant to N.J.A.C. 1:1-13.2 summary decision may only issue under the following circumstances:

> 1:1-13.2 Motion and Proceedings Thereon; Reviewable by Agency
>
> (a) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought shall be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. The judge shall find the facts and state the conclusions in accordance with N.J.A.C. 1:1-16.3. A summary decision may be rendered on any issue in the contested case although there is a genuine factual dispute as to other issues. (emphasis supplied)

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

See also Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954) which states:

> Summary judgment procedure is designed to provide for prompt, businesslike and inexpensive method of disposing of any cause which discriminating search of merits in pleadings, depositions and admissions on file, together with affidavits submitted on motion, clearly shows not to present any genuine issue of material fact requiring disposition at trial. R.R. 4:58, 4:58-3 to 4:58-5; Fed. Rules Civ. Proc. rules 1 et seq., 56(c), 28 U.S.C.A.

The standard of review for deciding a matter of summary judgment was set forth in the Judson case as follows:

> The standards of decision governing the grant or denial of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact. At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one.
>
> Thus it is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact, 6 Moore's Federal Practice, par. 56.15(3). The phrasing of our rule, R.R. 4:58-3, slightly different from Federal Rule 56(c), underscores this in the requirement that the absence of undisputed material facts must appear "palpably." All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated, Templeton v. Borough of Glen Rock, 11 N.J. Super. 1, 4 (App. Div. 1950). And it is not to be concluded that palpably no genuine issue as to any material fact exists solely because the evidence opposing the claimed fact strikes the judge as being incredible. Arnstein v. Porter, 154 F. 2d 464, 469 (C.C.A. 2 1946). Issues of credibility are ordinarily for the trier of fact, and the judge does not function as a trier of fact in determining a motion for summary judgment. Where the judge questions the inherent credibility of the matter offered in opposition there are other alternatives to the rejection of the matter and the grant of the motion. Under R.R. 4:58-5 "leave to proceed may be given

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

unconditionally, or upon such terms as to giving security, or time or mode of trial, or otherwise, as may be deemed just."

> However, if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, 5 Vanderbilt L. Rev. 607, 613 (1952), "fanciful, frivolous, gauzy or merely suspicious," 6 Moore, Federal Practice, par. 56.13(3), he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. Taub v. Taub, 9 N.J. Super. 219 (App. Div. 1950); Lauchert v. American S.S. Co., 65 F. Supp. 703, 707 (D.C.W.D.N.Y. 1946). Nor is summary judgment to be denied if other papers pertinent to the motion show palpably the absence of any issue of material fact, although the allegations of the pleadings, standing alone, may raise such an issue. Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged. Wade v. Six Park View Corp., 27 N.J. Super. 469 (App. Div. 1953). (emphasis supplied) (at 74-75)

While the record indicates that in the instant matter, there were cross-motions for summary decision filed by the parties, said motions were filed by directive of the ALJ. See Pre-Hearing Order dated June 6, 1986 wherein it states under a subheading labeled MOTIONS:

> The parties will cross-move for summary decision, pursuant to N.J.A.C. 1:1-13.1 et seq.

See also the cover letter dated August 21, 1986 accompanying the Board's letter memorandum in support of its Notice of Motion for Summary Decision wherein it states:

> ***This Motion for Summary Judgment is made pursuant to the Pre-Hearing Order in this matter by which you directed the parties to cross-move for summary judgment pursuant to N.J.A.C. 1:1-13.1 et seq.

It is entirely clear from petitioners' moving papers accompanying their Motion for Summary Decision that they posed numerous material factual contentions. See Certification in Support of Petitioners' Notice of Motion for Summary Judgment dated August 4, 1986. See also Petitioners' Memorandum dated September 4, 1986. However, while Judson and N.J.A.C. 1:1-13.1 et seq. provide for granting summary judgment in the absence of facts averred in opposition, the

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

ALJ may do so only if the uncontradicted facts in papers relied upon by movant, in this case petitioner do not themselves otherwise show "the existence of an issue of material fact." (emphasis supplied) Judson, supra, at 75

Further, the ALJ's grant of summary decision to the Board was founded upon the following statements:

> Petitioners complain they are overburdened with nursing-type duties in the absence of the school nures (sic). The complaints, as found in the Petition of Appeal and the Certification, represent generalization of specific allegations of the purported duties performed by the secretaries in the absence of the school nures (sic). Petitioners fail to support the allegations by way of production of records, memorandums or other documentation which would persuade this court and the Commissioner that the allegations are true, in fact. No proffer of accident reports, pupil illness reports, logs of telephone calls made and/or received by the school secretaries or other indicia, are produced to support the alleged burdensome activity. There is little doubt that petitioner's (sic) perform such First Aid functions as are required and necessary as well as attending to pupils who are taken ill during the school day. The extent to which these incidents arise in the absence of a school nurse or the unavailability of the "on-call" nurse, is of importance to support petitioners' allegations and complaints. Petitioner's (sic) failure to produce such competent evidence, in light of prevailing decisional law, cannot result in a finding that the Board's activity is arbitrary, capricious or represents an abuse of discretion. Thomas, supra; Smith, supra, Outslay, supra.
>
> (Initial Decision on Remand, ante)

It is precisely because petitioners do posit such allegations that summary decision should have been denied and a full hearing scheduled in which to uncover, through testimony, production of records, memoranda, etc., the truth of its allegations.

Accordingly, the Commissioner must, yet again, remand the instant matter for a full hearing on the merits. The initial decision is rejected and the matter is remanded to OAL for action consistent with this decision and the Commissioner's decision dated

You are viewing an archived copy from the New Jersey State Library.
November 10, 1986 wherein he directed that it is "necessary that there be a careful recitation of the exact duties being carried out by staff in the district in the absence of the certified school nursing staff herein." (Slip Opinion, at p. 18)

COMMISSIONER OF EDUCATION

February 24, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6470-86
AGENCY DKT. NO. 332-9/86

GEORGE MC CLELLAND,
Petitioner,
v.
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MERCER COUNTY,
Respondent.

Linda E. Johnson, Esq., for the petitioner (Greenberg & Prior, attorneys)

David W. Carroll, Esq., for the respondent

Record Closed: December 15, 1986 Decided: January 29, 1987

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

PROCEDURAL HISTORY

This matter concerns the motion for relief from the final decision of the Commissioner of Education (Commissioner) or for a new hearing in the tenure matter that resulted in the removal of George McClelland, the petitioner, from his tenured position as a teacher at the Sharon Elementary School, In the Matter of the Tenure Hearing of George McClelland, School District of Washington Township, Mercer County, OAL DKT. EDU 5284-82 (Feb. 10, 1983), reversed by the Commissioner (March 25, 1983), aff'd. by the State Board of Education (July 6, 1983), aff'd. by the Appellate Division of the Superior Court (N.J. App. Div., July 20, 1984, A-152-83T2) (unreported) (tenure matter). The tenure matter concerned the charges filed by the respondent, the Washington

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

Township Board of Education (Board), alleging that Mr. McClelland had improperly touched female students on a number of occasions and that he had failed to cease touching students after he was so directed by his supervisor.

The Board opposes the motion and the matter was transmitted to the Office of Administrative Law for a determination, pursuant to N.J.S.A. 52:14F-1 et seq.

During the prehearing conference, which was held on October 23, 1986, I requested the parties to submit briefs regarding the procedure to be followed as well as the standard to be used to make a determination as to the motion.

After receipt of briefs from the parties, I informed them, by way of a telephone conference call on December 10, 1986, that I would issue an initial decision as to the motion based on the exhibits and briefs filed by the parties and the transcripts of the administrative hearing in the tenure matter which was held before Administrative Law Judge Eric G. Errickson (deceased) on December 2, 6, 7, 14 and 16, 1982. After receipt of the transcripts of this administrative hearing as well as a letter from David W. Carroll, Esq., on behalf of the Board, the record in this matter closed on December 15, 1986.

MOTION FOR RELIEF

By her motion, Linda E. Johnson, Esq., on behalf of the petitioner, argued that the tenure matter should be reopened based on the information contained in the affidavit of Thelma Bickford, the former assistant principal of the Sharon Elementary School, dated August 15, 1986 (P-2b). In this affidavit, Ms. Bickford stated that after her retirement, she reviewed some material relating to the tenure matter that she had taken along with her personal records when she retired. In reading the transcript of the deposition of her former supervisor, Madeline Redmond, the superintendent of schools and principal of the Sharon Elementary School, she discovered that Ms. Redmond had denied the existence of a tape recording of her interviews with the students who had complained about Mr. McClelland. Ms. Bickford stated that Ms. Redmond had asked her to tape the interviews and had the tape in her possession until after the hearing in the tenure matter. Ms. Redmond then allegedly gave the tape to Ms. Bickford who kept it and took it with her when she retired. Also, Ms. Bickford stated that she was instructed by Ms. Redmond and John A. Selecky, Esq. (deceased), the Board's attorney, not to mention the existence

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

of the tape during her deposition or at the hearing. In addition, Ms. Bickford stated that Ms. Redmond inaccurately stated in her deposition that all the interviewed students gave sworn statements.

Also in her affidavit, Ms. Bickford stated that her testimony was "clouded by Madeline Redmond's insistence that McClelland's conduct was improper and my desire to support her wishes and judgment in administrative matters" (P-2f at p. 6). In addition, Ms. Bickford stated:

> Although I testified that in March 1982, prior to Mr. McClelland's suspension, I saw Mr. McClelland seated at his desk with his hand under the back of a girl's sweater or blouse, I now feel that I misinterpreted what I saw due to the heightened emotional environment at the school. I do know that I was looking for such conduct on the part of Mr. McClelland, in an effort to assist Madeline Redmond and that as a result I, overreacted to what actually happened. I now believe that what was nothing more than innocent affection displayed by a teacher toward his students was grossly distorted to the point where it was implied that Mr. McClelland's intent was sexually oriented. As the nature of McClelland's conduct became suspect and the stories repeated over and over again, the conduct in question, was taken out of context and misconstrued. (P-2f at p. 6-7)

In support of his opposition to the motion, Mr. Carroll submitted the affidavit of Ms. Redmond in which she denied requesting Ms. Bickford to tape the interviews with the students, denied having the tape in her possession and denied that she had directed Ms. Bickford to deny the existence of the tape. Ms. Redmond stated she did not knowingly lie during her deposition when she said that she did not have any other materials, including tapes, in her possession (R-2 at p. 39). In addition, Ms. Redmond stated that not all the students interviewed signed written statements, and that she was accurate when she stated during her deposition that no student who was asked to give a statement refused to do so (R-2 at p. 89).

In this matter, I will not make any factual determinations and the decision as to the petitioner's motion will be based on the record in this matter. For the purpose of this motion, I will assume that the statements made by Ms. Bickford in her affidavit regarding her testimony during the tenure hearing are credible.

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

DEPOSITION OF MADELINE REDMOND

The deposition of Ms. Redmond took place on October 12, 1982, and she was questioned by Mr. Selecky, Esq., as the Board's attorney and by William S. Greenberg, Esq., who was Mr. McClelland's attorney for the tenure matter.

During the deposition, Mr. Selecky asked Ms. Redmond whether she had any other material, including tapes regarding to the tenure matter and Ms. Redmond said "I don't have any" (R-3 at p. 39, line 8). Later in response to Mr. Greenberg's questions as to whether there was anything else relating to the tenure matter, Ms. Redmond said "no" (R-3 at p. 40, line 1, R-3 at p. 60, line 25).

As to the matter relating to the statements of the students, during the deposition there was an extensive amount of questioning by Mr. Greenberg as to the number of students interviewed by Ms. Redmond and she gave the names of seven students (R-3 at pp. 57, 62-65), and the written statements of five of these students were marked for identification (R-3 at p. 79). Later there was the following discourse (R-3 at p. 89, lines 11-19):

> Mr. Greenberg: Did you ask anyone else besides the people who have made these statements to make a statement? Anyone who declined?
>
> Ms. Redmond: Did I ask them?
>
> Mr. Greenberg: Yes.
>
> Ms. Redmond: No. Who declined? No.
>
> Mr. Greenberg: Was anyone else approached or requested to make a statement who declined to make a statement?
>
> Ms. Redmond: No.

TENURE MATTER

Mr. McClelland was employed by the Board for 13 years as a teacher at the Sharon Elementary School and he was suspended in 1982 (J-1e at p. 39). During the tenure

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

hearing, fifteen witnesses, friends, parents, students and teachers testified on behalf of the petitioner and said that he was a good person and teacher who has an excellent rapport with the students.

At the tenure hearing, Ms. Redmond testified that in 1978, she cautioned Mr. McClelland not to touch female students after she had received a complaint from a parent (J-1c at p. 24), and in February 1982, she directed him not to touch students after she received another complaint (J-1c at p. 27). After the sixth grade students were shown a film entitled Girls Beware, which warned students about the dangers to teenagers who are too trusting, several girls spoke to their teachers about Mr. McClelland's actions while he was their teacher. After Ms. Redmond was informed about the concerns of these students, she and Ms. Bickford interviewed the students (J-1c at pp. 36-9), and she again spoke to Mr. McClelland (J-1c at pp. 29-30), who for a while considered resigning his position (J-1c at pp. 34-6). Later tenure charges against Mr. McClelland were prepared and were filed with the Commissioner.

Ms. Bickford testified that after she heard Ms. Redmond tell Mr. McClelland not to touch female pupils in February 1982 (J-1b at pp. 104, 141-2), and thereafter, she saw the petitioner's hand under the back of a girl's sweater or blouse touching her skin (J-1b at pp. 102, 134-9), and on another occasion, she saw him scratching a girl's back on top of her sweater or blouse (J-1b at pp. 103-4).

Also, five of Mr. McClelland's former female students stated that he touched them in the classroom. Three of these students testified that Mr. McClelland had inserted his hand underneath their clothing; S.N. said he touched her bear stomach (J-1a at pp. 58-9), J.M. said he touched her bear buttock (J-1a at pp. 113-4) and A.C. said he touched her bear back underneath her bra (J-1a at pp. 141-2). In addition, Julia Theoharous, a secretary, and Sally Ann Mesh, a substitute teacher, testified that they saw Mr. McClelland touch female students (J-1b at pp. 36-45, J-1b at pp. 66-75).

Mr. McClelland admitted touching students, such as back scratching and hugging, in a fatherly manner during his entire career as a teacher,but denied placing his hand beneath any students' clothes to touch them (J-1e at pp. 39-41), and he denied touching any students after he had had conversation with Ms. Redmond in February 1982 (J-1e at pp. 42-3).

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

As to the testimony of the Board's witnesses, Judge Errickson stated that he believed only a part of Ms. Bickford's testimony and did not accept her testimony that Mr. McClelland had touched the pupil's bare skin. Also, Judge Errickson stated that he did not believe the testimony of J.M. or A.C., and that although he believed S.N., Judge Errickson found that Mr. McClelland had touched her bare skin by accident when he reached over, as was his habit, to scratch her back (P-2a at pp. 11-13). However, Judge Errickson did believe Ms. Bickford's testimony that she saw Mr. McClelland touch students after he was admonished by Ms. Redmond notwithstanding the petitioner's testimony that he had ceased touching students.

In his decision, Judge Errickson recognized that it has been a tenant of the teaching profession that teachers are not to invade the privacy of a pupil and are to maintain an appropriate distance, and that such distance does not prevent a teacher from conveying to the pupils his/her warmth and concern. In addition, Judge Errickson stated that by keeping an appropriate distance a teacher "assures that when a 'catalyst' such as the film Girls' Beware comes into the picture, there will be no mistaken conclusions such as those which was drawn in this case by a number of female pupils" (P-2a at p. 14).

Judge Errickson then concluded that:

> Respondent unwisely disregarded the counsel of his principal and superintendnet. There was no showing, however, that his touching of any pupil was lecherous, deviant, covert, surreptitious, sexually oriented, vicious or cruel. The touching was not intended to be offensive nor is there convincing evidence on which to draw a conclusion that he was intentionally insubordinate. This absence of defiance and lack of intent to offend, together with the respondent's service of 13 years as a teacher in the district, are proper considerations when determining what penalty is appropriate. There is, in this case, a strong showing that respondent is a dedicated teacher who enjoys the respect of a large segment of his former pupils. His reputation among his peers is exemplary. [P-2a at p. 15]

Since Mr. McClelland did not comply with the warnings of his supervisor, Judge Errickson concluded that his continued touching of female students, even though done in a fatherly manner was conduct unbecoming a teacher and insubordination, and he determined that Mr. McClelland was not to be paid the 120 days of salary already withheld after the certification of the tenure charges. Judge Errickson also concluded that Mr. McClelland was to lose his annual salary increment and/or adjustment increment.

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

After reviewing the record, the Commissioner ordered Mr. McClelland to be removed from his tenure position (P-2b). In his decision, the Commissioner stated that Judge Errickson had erred in discrediting the testimony of J.M. and had failed to give proper weight to the testimony of Thelma Bickford. The Commissioner disagreed with Judge Errickson's conclusion that Mr. McClelland's touchings of students were just fatherly type gestures. The Commissioner determined that the respondent's apparent inability to restrain from touching female students was conduct unbecoming a teacher and that his refusal to accept the advice and admonition of Ms. Redmond to refrain from touching students constituted insubordination.

The State Board of Education affirmed the Commissioner's decision and made a minor modification as to the date of the dismissal (P-2c), and the decision was affirmed by the Appellate Division of the Superior Court (P-2d). In its decision, the Appellate Division indicated that the dismissal appeared to be a harsh remedy even though it was based on credible evidence, and expressed concern about the fact that the Commissioner and the State Board of Education had overturned the credibility findings made by an administrative law judge.

No petition for certification was filed in the tenure matter.

RULES REGARDING THE REOPENING OF CASES

The rules governing administrative proceedings provide for motions to reopen the hearing after an initial decision but do not set forth any standards for deciding such a motion, N.J.A.C. 1:1-16.4(e). In general, where the rules as to administrative proceedings are silent, reference can be made to the court rules to determine the proper procedure. R. 4:50-1 provides that a court may relieve a party from a final judgment or order for the following reasons:

(a) mistake, inadvertence, surprise or excusable neglect;

(b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49;

(c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of any adverse party;

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

(d) the judgment or order is void;

(e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have perspective application; or

(f) any other reason justifying relief from the operation of the judgment or order.

However, R. 4:50-2 provides that the motion for relief "shall be made within a reasonable time, and for reasons (a), (b) and (c) of R. 4:50-1 not more than one year after the judgment, order or proceeding was entered or taken." But it has been recognized by the courts in cases involving fraud that the one-year period does not run until the fraud or deceit is discovered, Hyland v. Kirkman, 157 N.J. Super. 565 (Ch. Div. 1978); Palko v. Palko, 73 N.J. 395 (1977). Since more than one year has lapsed since the final decision in the tenure matter, the only applicable provision appears to be R. 4:50-1(c) or (f).

It has been established by the Courts that subsection (f) of R. 4:50-1 is a catchall category which is intended to provide relief in exceptional situations in order to achieve equity and justice, Court Investment Co. v. Perillo, 48 N.J. 334, 342 (1966); and relief pursuant to subsection (f) has been granted even though other subsections of R. 4:50-1 more specifically cover the situation, Manning Engineering, Inc. v. Hudson Cty. Park Commission, 74 N.J. 113 (1977).

The standards set forth in R. 4:50-1 have been used by the courts in reviewing administrative decisions on motions to reopen and the courts have recognized the inherent right of administrative agencies to reopen their judgments for good cause and the need to reconcile the interest in finality of decisions with the avoidance of an unjust decision, Manning Engineering, Inc. v. Hudson Cty. Park Commission, supra; Beese v. First National Stores, 52 N.J. 196 (1968); Sec'y. of State v. GPAK Corp., 95 N.J. Super. 82 (App. Div. 1967); Ruvoldt v. Nolan, 63 N.J. 171 (1973); 1982 Final Recon. Adj. for Jersey Shore Medical Ctr., 209 N.J. Super. 79 (App. Div. 1986); In re Tuch, 159 N.J. Super. 219 (App. Div. 1978); however, the courts have not allowed an administrative matter to be reopened if the information sought to be introduced was available at the time of the initial hearing or could have been discovered at that time with due diligence, In re Marvin Gastman, 147 N.J. Super. 101 (App. Div. 1977); Quick Chek Food Stores v. Springfield Township, 83 N.J. 438 (1980), or in cases where the information would not materially affect the decision, In

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

the Matter of Hotel and Restaurant Employees and Bartenders, 203 N.J. Super. 297 (App. Div. 1985); Aiello v. Myzie, 88 N.J. Super. 1987 (App. Div. 1965), certif. den. 45 N.J. 594 (1965).

ARGUMENTS OF THE PARTIES

In her briefs, Ms. Johnson argued that the Board committed a fraud, through the actions of Ms. Redmond and Mr. Selecky, by not revealing and, in fact, by denying the existence of the tape of the student interviews, and that the denial of the existence of the tape by Ms. Redmond as well as her representation during the deposition regarding the written statements of the students raises questions regarding her credibility. Further, Ms. Johnson argued that by her affidavit, Ms. Bickford has retracted her testimony at the tenure hearing and that her testimony was the sole basis for the charge of insubordination since she was the only witness to testify that Mr. McClelland had touched a student after being instructed not to do so by Ms. Redmond, and that she was a material witness regarding the allegation of conduct unbecoming a teacher. Ms. Johnson argued that the tenure hearing was a travesty and a sham and that the petitioner is entitled, pursuant to N.J.A.C. 1:1-16.4(e) and R. 4:50-1(b) and (c), to an order granting relief from the final decision in the tenure matter.

In support of her position, Ms. Johnson stated that administrative agencies have the inherent authority to reopen or to modify decisions where there is good and sufficient cause to do so, Ruvoldt v. Nolan, supra, especially when there is new evidence that is likely to alter the decision and which could not have been discovered at the time of the hearing, In re Trantino Parole Application, 89 N.J. 347, 365 (1982); Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 110 (App. Div. 1975).

In his briefs, Mr. Carroll argued that the motion is not cognizable pursuant to N.J.A.C. 1:1-16.4(e) since it was filed after the final decision in the matter, and that this regulation is only intended to allow the reopening of the evidentiary portion of a hearing prior to the final decision of the agency head. In addition, Mr. Carroll argued that the motion is out of time pursuant to R. 4:50-1(b) and (c) and R. 4:50-2.

Mr. Carroll argued that the final decision in the tenure matter should not be reopened since there has been a full adversary hearing, and he distinguished the tenure matter from cases that were reopened and where the prior administrative action had not

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

been fully litigated. Beese v. First National Stores, supra; Ruvoldt v. Nolan, supra; Duvin v. State, 76 N.J. 203 (1978); Indursky v. Bd. of Trustees, Ret. System, 137 N.J. Super. 335 (App. Div. 1975).

Further, Mr. Carroll argued that even if there were a legal basis for reopening the tenure matter, there would be no reason to do so since the statements in the affidavit of Ms. Bickford, even if completely true, would not materially affect the outcome in the final decision. Aiello v. Myzie, supra; State v. Speare, 86 N.J. Super. 565 (App. Div. 1965), certif. den., 45 N.J. 589 (1965); Pavlicka v. Palvicka, 84 N.J. Super. 357 (App. Div. 1964).

In support of this argument, Mr. Carroll stated that in her deposition, Ms. Redmond did not deny the existence of a tape recording of her interviews with the students as represented by Ms. Bickford in her affidavit, and indicated that a reading of the transcript of the deposition shows that Ms. Redmond stated only that she did not have any tapes in her possession (R-3 at p. 39) and that she was never asked whether there was a tape. In addition, Mr. Carroll stated that contrary to Ms. Bickford's representation, the transcript of her deposition reveals that Ms. Redmond only said that statements were received from those students requested to give a statement. Therefore, Mr. Carroll questioned whether or not there is a sufficient basis to attack Ms. Redmond's credibility. In addition, he argued that Ms. Redmond's credibility was not crucial since her testimony at the tenure hearing was corroborated by the respondent's own testimony or by other evidence.

Secondly, Mr. Carroll stated that the information on the tape of the interviews with the students is not material since at the time of the tenure hearing Mr. McClelland's attorney knew the names of the students who had expressed a concern about the petitioner's action from several sources, and since now that the petitioner has heard the tape, he is not arguing that any new evidence was uncovered through the tape.

Thirdly, Mr. Carroll stated that Ms. Bickford's recanting of her testimony would not materially affect the outcome in the tenure matter since the crux of the case was the propriety of Mr. McClelland's touching students over a long period of time notwithstanding the admonishments of his supervisor to cease such activity.

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

CONCLUSIONS OF LAW

Having reviewed the arguments of the parties, I **CONCLUDE** that the Commissioner has the right to reopen the tenure matter notwithstanding the long lapse of time if there is good and sufficient reason to do so and if there is a likelihood that the reason will materially affect the final decision in the matter. Further, I **CONCLUDE** that N.J.A.C. 1:1-16.4(e) does not limit the time within which a motion to reopen must be filed.

In order to decide the petitioner's motion in this matter, it is necessary to evaluate what impact Ms. Redmond's affidavit would have on the final decision in the tenure matter. I agree with Mr. Carroll's argument that since there was no representation of any new evidence revealed by the tape of the student's interview, that the tape in itself would not have any material impact on the final decision in the tenure matter.

In addition, I also agree with Mr. Carroll's argument that Ms. Bickford's characterization in her affidavit of the statements made by Ms. Redmond are not consistent with a reading of the transcript of Ms. Redmond's deposition. Ms. Redmond did not deny a tape of the interview existed but only stated that she did not have one in her possession. At best there is a factual dispute between Ms. Redmond and Ms. Bickford as to who had the tape in her possession at the time of the deposition. In addition, Ms. Redmond did not state that all of the interviewed students gave written statements. Even assuming that Ms. Redmond was less than candid regarding the existence of the tape, which obviously could have an impact on her credibility, I have to agree with Mr. Carroll that Ms. Redmond's testimony at the hearing was not disputed by Mr. McClelland, except for her hearsay testimony as to what certain student told her, and therefore, even if the petitioner were successful in challenging Ms. Redmond's credibility, it would not materially affect the final decision in the tenure matter.

Lastly, there is a question as to what impact Ms. Bickford's change in testimony would have on the final decision in the tenure matter. As I read her affidavit, Ms. Bickford is not saying that she lied when she testified that she saw Mr. McClelland touch female students on two occasions after she heard Ms. Redmond direct him not to touch students, nor is she now saying that she did not see Mr. McClelland insert his hand underneath the student's outer garment. The only thing Ms. Bickford said in the affidavit is that she may have incorrectly implied that Mr. McClelland's action was sexually

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

oriented and that she now believes that Mr. McClelland was only displaying an innocent affection towards his student.

Judge Errickson in his initial decision rejected that portion of the testimony of Ms. Bickford and the three students that implied sexual touchings. In rejecting Judge Errickson's credibility findings as to Ms. Bickford and one of the students, the Commission obviously concluded that Mr. McClelland's touchings exceeded what could be categorized as a fatherly tap or pat. However, Mr. McClelland's motivation, whether fatherly or sexual, is not a controling factor in the decision in the tenure matter and both Judge Errickson and the Commissioner concluded that the petitioner had engaged in unbecoming conduct and was insubordinate because he had the habit of touching female students and he did not cease touching students after he had been admonished on several occasions by Ms. Redmond.

Further, even if Ms. Bickford changes her testimony as to her opinion regarding Mr. McClelland's motivation, a trier of facts, based on the testimony presented, could still determine that the petitioner's gestures were sexually motivated. Therefore, I **CONCLUDE** that the petitioner's pattern of behavior and his apparent inability or reluctance to change is the crux of the final decision, and that Ms. Bickford's change of testimony as to her evaluation of the petitioner's action would not materially affect the final decision in the tenure matter.

DISPOSITION

Therefore, I **CONCLUDE** that the petitioner has not presented good or sufficient reason to either reverse the final decision of the Commissioner and reinstate the petitioner to his teaching position or to order a new hearing in the tenure matter. Therefore, I **ORDER** that the petitioner's motion be **DENIED.**

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

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

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

January 29, 1987
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Jan 27 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 3 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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

GEORGE MC CLELLAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful, comprehensive review of the record in this matter, the Commissioner is in agreement with the ALJ's determination that the Commissioner has the right to reopen the tenure matter, notwithstanding the long lapse of time, if good and sufficient reason exists to do so and if there is a likelihood that the reason will materially affect the final decision. Moreover, he concurs with the determination of the ALJ that no information has been brought to the record which presents good or sufficient reason to either reverse the final decision in the tenure matter in question herein or to order a new hearing with respect to such. He finds the judge's analysis thorough, well-reasoned and correct and therefore adopts as his own the recommended decision of the ALJ denying petitioner's motion for the reasons expressed in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 4, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6758-85
AGENCY DKT. NO. 341-10/85

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Petitioner,

v.

JOHN EBERLY,

Respondent.

David W. Carroll, Esq., for petitioner

James F. Schwerin, Esq., for respondent (Greenberg and Prior, attorneys; William S. Greenberg, Esq., of counsel)

Record Closed: December 9, 1986 Decided: January 2[illegible], 1

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

STATEMENT OF THE CASE

The Board of Education of the Township of Ewing (Board), on September 30, 1985, by a majority vote of its full membership certified a charge of conduct unbecoming a teaching staff member against respondent to the Commissioner of Education (Commissioner), in accordance with N.J.S.A. 18A:6-11. In the same action, the Board suspended respondent from his teaching position without pay, pursuant with the provisions of N.J.S.A. 18A:6-14. The Board seeks respondent's dismissal from his tenured teaching position. Respondent denies the charge and seeks dismissal of the herein matter by way of two affirmative defenses.

New Jersey Is An Equal Opportunity Employer

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

PROCEDURAL ASPECTS

The Board filed its charge before the Commissioner on October 7, 1985. Respondent's Answer was filed on October 21, 1985. Thereafter, on October 24, 1985, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted on November 20, 1985, at which, among other things, the issues to be determined by this administrative tribunal were set forth; respondent was granted leave to propound a Motion to Dismiss grounded upon the equitable defense of laches together with a schedule for the submission of briefs; the discovery procedures were agreed upon; and hearing dates were scheduled for April 14 through April 22, 1986.

As a consequence of extensive motion practice by the parties the original hearing dates were adjourned and rescheduled for May 13 through May 23, 1986. (See, Decision on Motion and Order VI, decided April 21, 1986.) The hearing was conducted on those dates and at the conclusion of the oral testimony, the parties requested and were granted leave to submit post-hearing memoranda. The last submission was received on December 8, 1986. The matter was considered closed on December 8, 1986, upon the receipt from the Commissioner of the matter in John Eberly v. Board of Education of the Township of Ewing, Mercer County, OAL Dkt. No. EDU 9262-86, Agency Dkt. No. 372-11/86.

MOTIONS

The parties propounded 11 substantive and/or procedural motions prior to and/or during the hearing of this matter. Eight of the 11 motions required written opinions, all of which were executed by this tribunal prior to hearing. The eight decisions on motion are not recited here but, rather, are incorporated by reference as though each were set forth in full (See, Decision on Motion and Order, I through VII attached hereto).

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

BACKGROUND FACTS

A careful review of the entire record in this matter reveals certain undisputed and uncontested facts which are set forth hereinbelow and are hereby adopted as **FINDINGS OF FACT:**

I. CONCERNING THE CHARGE

This tenure proceeding was instituted by the Board, pursuant to N.J.S.A. 18A:6-10 et seq., by certification of a single charge against respondent, which reads as follows:

> During the year 1983 while acting in the capacity of Big Brother, John Eberly on several occasions had indecent sexual contact with S, a twelve year old boy under his charge.

The written charge, dated September 9, 1985, was filed with the Board by Superintendent of Schools Edith V. Francis. The Board, on September 30, 1985, took its formal action with respect to the charge, pursuant to N.J.S.A. 18A:6-11 and 14.

II. THE BASIS OF THE CHARGE

The alleged conduct which forms the basis of the Board's charge occurred in 1983, while respondent volunteered and served in the capacity of Big Brother to S.M., a minor child, under the direction and control of Big Brothers of Bucks County, Inc. (BBBC), a corporation of the Commonwealth of Pennsylvania. On or about September 16, 1983, P.M., S.M.'s mother, orally complained to an agent of BBBC, alleging that respondent had made improper sexual contact with S.M. P.M. requested that the Big Brother-Little Brother relationship between respondent and S.M. be immediately terminated (P-1, pp. 43-45, 50-55), and the BBBC complied. Subsequently, an agent of the BBBC organization reported P.M.'s allegations to the Bucks County Children and Youth Service Agency (C and Y). An investigator of C and Y conducted an investigation of the allegations (P-2, P-3) and filed the required reports to the appropriate law enforcement officials (P-3).

Subsequent investigation by law enforcement officers of the Bucks County District Attorney's Office resulted in: the execution of a Probable Cause Affidavit

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

requesting a warrant to be issued for respondent (P-11), the issuance of a four-count criminal complaint against respondent (P-12), an accusation and warrant for respondent's arrest (P-13), and the subsequent arrest and bailment of respondent (P-14). The four-count criminal complaint charged and alleged that respondent had engaged in activities which: (1) endangered the welfare of children, and (2) corrupted minors. Two counts (3 and 4) of indecent assault were filed (P-12).

Respondent was, at all times material, represented by legal counsel, Dennis V. Lanctot, Esq., licensed to practice in the Commonwealth of Pennsylvania. Respondent, with the full knowledge of his legal counsel, subjected himself to an interview by the investigating officer of Bucks County, Detective Stephen Battershell (P-7, 8, 9, 10). Respondent also voluntarily submitted to a polygraph examination, administered by Detective Harry Armitage, with the full knowledge of his then legal counsel (P-19, 20, 21, R-4).

On May 29, 1984, a hearing was scheduled in Bucks County in the matter of Commonwealth of Pennsylvania v. John Eberly, Information No. 0994, 1984. Respondent was prepared to move forward with his defenses to the charges; however, Assistant District Attorney Dianne Devlon offered, in the alternative, to place respondent in the Commonwealth's Accelerated Rehabilitative Disposition Program (ARD), the equivalent to New Jersey's Pretrial Intervention Program (PTI). Respondent, with the advice of counsel, accepted the offer for participation in ARD (P-17, P-18).

Notwithstanding that under the circumstances respondent was eligible for participation in ARD neither he nor his attorney was fully apprised of the reasons for the assistant district attorney's offer. The facts demonstrate that immediately prior to hearing on May 29, 1984, Assistant District Attorney Devlon counselled with S.M., respondent's accuser and the alleged victim, to review the charges against respondent and to ascertain the scope of S.M.'s testimony. S.M. testified before this administrative tribunal he had advised the assistant district attorney that he could not testify against respondent because he could not remember the incidents which gave rise to the criminal charges. Devlon neither disclosed nor advised respondent or his attorney of S.M.'s representations to her that S.M. would not testify against respondent either prior to or subsequent to her offer to have respondent participate in ARD. Absent Devlon's disclosure, respondent consented to enter the ARD program, the conditions to which are found in the Board's Exhibits P-17 and P-18. It is further noted here that under

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

Pennsylvania law, by agreeing to participate in its ARD program as a means of resolving the criminal charges, respondent did not admit to any guilt.

Subsequently, on or about June 12, 1984, W. Douglas LaCour, principal of the Board's Fisher Junior High School, received a telephone call from P.M., who reported that she was the mother of the victim of an alleged sexual abuse committed by respondent. P.M. misrepresented to LaCour that respondent had entered a guilty plea in the Bucks County Court in order to take advantage of the ARD program (P-26 and attachment). The principal reported P.M.'s telephone conversation to R. Donald Lawton, the then Assistant Superintendent of Schools, who advised LaCour to travel to Pennsylvania to discuss the matter with P.M. LaCour memorialized his conversation with P.M. in a confidential memorandum to Lawton, dated June 12, 1984, and forwarded a courtesy copy to Superintendent Francis (P-26, attachment). LaCour went to P.M.'s home and discussed the matter with her. P.M. gave LaCour a copy of a letter from the Bucks County district attorney stating the disposition of the criminal charges against respondent. P.M. told LaCour that respondent had failed a polygraph examination[1] (P-27).

Prior to P.M.'s telephone call to LaCour, Assistant Superintendent Lawton, a friend of respondent's family, advised Superintendent Francis of the problem involving respondent and an allegation of child molestation. Lawton advised Francis that respondent had a good record and that Lawton would stay on top of the matter. Subsequently, Lawton orally advised Francis of the telephone call received by LaCour from P.M. The superintendent did not recall receiving LaCour's letter dated June 12, 1984. Thereafter, Lawton reported to Francis that the criminal matter had been concluded, that there had been no proof or admission of guilt by respondent, that S.M. was reportedly not credible, and that there was no reason or basis to pursue the matter further (P-28).

In or about May 1985, Board member Ronald Gering provided Superintendent Francis with copies of: (1) the four-count criminal complaint against respondent (P-12); (2) the Bucks County Sentence Sheet (P-16); and (3) the Criminal Court Sheet (P-28). It was on the basis of this information that the Board, which had no previous knowledge of the criminal charges against respondent, turned the matter over to the Board attorney for

[1]No finding or evidence had been produced to support this assertion by a court of competent jurisdiction.

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

further investigation (P-29). As a consequence of the Board attorney's investigation, the Board certified the herein charge on September 30, 1985 (P-29).

III. S.M.'S BACKGROUND AND FAMILY RELATIONSHIPS

S.M. resides in Morrisville, Bucks County, Pennsylvania with P.M., the natural mother of S.M. and T.M. T.M. is S.M.'s younger brother. S.M.'s date of birth is April 29, 1971 and T.M. was born on November 5, 1972. P.M. was separated from her husband and natural father of S.M. and T.M. in or about 1975 when S.M. was approximately four years of age and T.M. was three years old. A divorce action was instituted and granted; however, P.M. does not recall the date or year the marriage was legally dissolved. The divorce was very hostile where, presumably, P.M. was granted full custody over her two sons. The father's present whereabouts are unknown to S.M. P.M. opined that S.M. believes that as a consequence of the father's leaving the household, the father has let S.M. down.

Subsequent to the separation of the husband and father, P.M. acquired employment as a security guard with General Motors Corporation (G.M.), Ewing Township, New Jersey. P.M. worked the midnight shift, six days per week while her mother, S.M. and T.M.'s grandmother, cared for the minor children. P.M.'s mother subsequently passed away (the date not disclosed on the record) which caused P.M. to transfer her employment status from security guard to that of production worker at G.M. The change in employment status provided P.M. more time at home with her two sons.

When S.M. was in the third grade of elementary school, he was still sucking his thumb and his schoolwork was very poor. He was tested by the school authorities for learning disabilities which proved to be negative. S.M. would daydream at school and not do his assigned schoolwork. The school authorities recommended that S.M. submit to psychological counseling to which P.M. agreed. In 1981, when S.M. was in the fourth grade, he commenced treatment with Dr. Alan Sohn, a licensed psychologist, on a weekly basis. The psychological counselling continued for approximately one year, during which Dr. Sohn suggested that S.M. needed a male figure in his life and recommended P.M. seek the help of the Big Brother organization to fulfill that need.

As a consequence of Dr. Sohn's recommendation, P.M. contacted the Bucks County Big Brother organization and subsequent to the necessary procedures, a "match"

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

was made with respondent and S.M. P.M. was aware, prior to the match, that respondent was reluctant to assume the obligation for S.M. and that respondent had been persuaded to do so by the BBBC. The match between respondent and S.M. occurred on March 17, 1982, and continued until August 1983, when it was terminated at P.M.'s request.

Dr. Sohn first became involved with S.M. as a private patient as a referral from S.M.'s school district in February 1981 with the psychological counselling continuing until June 1982. S.M. was having academic problems at school which were not a result of a learning disability but, rather, were because of his lack of motivation, coupled with some emotional problems. Dr. Sohn's assessment of S.M. was that S.M. was passive, non-assertive and not interested in school. S.M. had not developed coping strategies for dealing with the demands of school, i.e., class work, homework, class projects, etc. S.M. had appropriate peer relationships both in and out of school. Dr. Sohn opined that S.M. was indifferent towards his father, who was no longer a part of the household, due to minimal contact and also because the father would fail to keep promises to visit S.M. and his younger brother, T.M. S.M. wanted very much to have an adult relationship; however, he could not count on his father, who was generally unreliable (P-30).

Dr. Sohn characterized S.M. as an avoider, a denier. When problems arose, S.M., in his passive behavior mode, would either deny the existence of the problem or attempt to avoid it by having someone else deal with the problems; usually P.M., S.M.'s mother. Dr. Sohn characterized S.M.'s mother as caring and loving, however, over-protective. He opined that P.M. was too positive of a force in that she did not allow S.M. to develop his own strategies for coping with problem situations to the point that S.M. would lie. Dr. Sohn's notes describe, in part, a conference with P.M. where the psychologist stated, "S.M. lied to Mother three times this week. She says she was furious. However, she has begun to realize that she has to be tough" (P-30, p. 22).

Dr. Sohn's initial treatment was moderately successful where S.M. was motivated and developed strategies to deal with his school problems and where S.M. was no longer in danger of failing.

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

IV. THE T.M. INCIDENT

In or about August 1982, T.M., S.M.'s younger brother, was sexually molested by an adult male, Charles Grover, while the family was on vacation at a campsite near Cedar Run, Ocean County, New Jersey. T.M. was approximately ten years of age and S.M. was 13 years old at the time of the incident or incidents. Charles Grover (Charlie) would invite S.M. and T.M. to sleep overnight in Charlie's camper prior to a prearranged fishing trip early the following morning. Charlie was friendly towards the two boys; therefore, P.M. did not object to the arrangement. Charlie insisted that the boys sleep nude as Charlie would do. On one occasion S.M. testified that after the boys had gone to their respective beds, Charlie approached S.M. and placed his hands under the blanket attempting to touch S.M.'s penis. S.M., however, turned away from Charlie, facing the wall of the camper; whereupon Charlie left S.M. and approached T.M. S.M. turned his head toward T.M. and observed Charlie place his hand under T.M.'s blanket in the area of T.M.'s penis. S.M. then turned his attention away from Charlie and T.M. toward the wall of the camper and observed nothing more. Hereafter, S.M. refused to sleep in Charlie's camper; however, T.M. continued to do so. Neither S.M. nor T.M. revealed this incident to his mother, P.M.

One year later, in August 1983, the family returned to the Cedar Run campsite with P.M.'s sister, brother-in-law and a female friend of P.M.'s. It was on this occasion that P.M. first learned of T.M.'s encounter with Charlie the previous year. P.M. was interrogating T.M. as to whether T.M. was aware of anything untoward occurring between S.M. and respondent, Eberly. T.M. responded that he was not aware of any unacceptable behavior between the two; however, T.M. asserted that something had happened to him with Charlie. T.M. did not elaborate or give P.M. any details of the encounters between himself and Charlie. The details of the sexual molestation were subsequently revealed to P.M. by a Bucks County social worker who had interviewed T.M.

On the advice of the social worker, P.M. made contact with the Ocean County, New Jersey, Prosecutor's Office with charges subsequently brought against Charlie. On February 7, 1986, Charlie entered a plea of guilty without a trial, to the accusation of endangering the welfare of a child (N.J.S.A. 2C:24-4a) before the Honorable Peter J. Giovine, New Jersey Superior Court, Ocean County, Law Division-Criminal. State of New Jersey v. Charles Grover, S.B.I. 197 483B. Charlie, as a first offender, was sentenced to four (4) years' probation (non-incarceration), mandatory counselling, no contact with T.M.

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

and S.M., payment of his own doctor bills, $1,000 fine, VCCB Penalty of $250, and, dismissal of Indictment Number 256-84 (P-5).

T.M. did not testify at this hearing with respect to tenure charges against respondent.

V. RESPONDENT'S BACKGROUND

Respondent is a single male approximately 55 years of age. He commenced his employment with the Board in February 1969 as a teacher of social studies. He has, at divers times, been assigned to teach at the Board's junior high and high schools. Respondent has had an unblemished record during the course of his employment with the Board, never having been subject to any disciplinary action and having received his annual salary and/or adjustment increments at all times.

Respondent has been involved with the Board's organized athletic program, serving as assistant and head coach of the high school swim team and had some activity with the track team. He first became involved as an unpaid, but administratively approved, volunteer assistant swim coach. Subsequently, his position changed from an unpaid to a paid position. Respondent has served in the capacity of assistant and/or head swim coach for a period of ten years.

Respondent commenced his participation with the Big Brother organization in or about 1976, subsequent to his completion of an application which resulted in a background investigation and an interview conducted by members of the agency. Thereafter, respondent was matched with a 12-year-old male living in Morrisville, Bucks County, Pennsylvania. After serving as a Big Brother for one year, the recommended commitment period, respondent requested that the match terminate. Respondent was assigned a second Little Brother with that match also terminating after approximately one year. The second match was terminated at the request of the Little Brother's family. There were no complaints lodged with the Big Brother Organization concerning respondent's activities with these two matches. In 1980, respondent was matched with Richard Ghidro who was approximately 12 years of age at that time. This match continued for two years and was officially terminated after the Little Brother's mother remarried, a standard operating procedure of the Big Brother organization. Subsequent to the official termination of Ghidro match, the relationship between Ghidro and respondent

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

continued on a de facto Big Brother-Little Brother basis. Subsequently, a friend of Ghidro's, Scott Poland, joined in the relationship.

The activities in which respondent and the boys engaged included, among other things, attendance at sports events and movies in the Philadelphia and Bucks County area, attendance at various Big Brother activities, car rallies, picnics, camping trips and a trip to Maine where respondent's family had a summer home. The boys, either alone or together, would complete chores around respondent's home for which they were paid.

During the period Ghidro was officially matched with respondent, Ghidro requested permission to make over one of the bedrooms in respondent's house to have as his own. Respondent approved and it became a joint work project for the two. Ghidro continued to use the bedroom in respondent's home after the official match was terminated, with his mother's and respondent's permission.

As a consequence of respondent's continued relationship with Ghidro after the official termination of the Big Brother match, respondent advised the Big Brother organization that he no longer wished to be considered for a match with another Little Brother. Sometime thereafter, Ghidro appeared at respondent's home on a more frequent basis than before and respondent sensed that Ghidro was troubled about something. In a subsequent conversation with Mrs. Poland, Scott's mother, she opined that Ghidro's new stepfather was attempting to establish himself in the household and that there might be some resentment on the stepfather's part toward respondent. Respondent's relationship with the stepfather was friendly and cordial. However, the stepfather was known to be a strict disciplinarian, something Ghidro was not accustomed to because he had had a great deal of independence in the home inasmuch as he had been without a father since he was very young. Respondent took it upon himself to contact the Big Brother organization about Ghidro's difficulty in adjusting to the new situation. The caseworker, Leslie Wells McGrath, contacted Ghidro's mother to suggest family counselling. Subsequently, McGrath contacted respondent and suggested that if respondent would consider another match with a new Little Brother, it might alleviate whatever resentment, if it existed, between Ghidro's stepfather and respondent. Respondent considered McGrath's proposal and determined he would take on another match if it would help Ghidro. Consequently, the match between S.M. and respondent was made on March 19, 1982. Respondent maintained his close association with Ghidro and Poland during the S.M. Big Brother-Little Brother relationship.

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

The match between S.M. and respondent continued until about August 1983, at which time P.M. requested its termination and accused respondent of improper sexual contact with S.M. P.M.'s accusation forms the basis of the Board's tenure charges against respondent.

Respondent was in Maine with Poland, anticipating S.M.'s arrival, when he learned of the termination of the S.M. Little Brother relationship. By prearrangement, Poland had gone to Maine with respondent and S.M. was to follow. Subsequently, upon his return to Pennsylvania in August 1983, respondent was interviewed by members of the Big Brother organization and confronted with P.M.'s accusation of improper sexual contact with S.M., which respondent denied. As a consequence of P.M.'s accusations and subsequent events with the Big Brother organization and the Bucks County Children and Youth Services, respondent went into a state of depression and required the services of a psychiatrist, Dr. Raymond Reinhart. Dr. Reinhart's treatment of respondent continued from November 1983 until June 1, 1984, which included counselling and prescribed medication. Respondent was on a leave of absence from the Board's employ from about November 1983 until March 30, 1984, during the period of treatment by Dr. Reinhart.

FACTS IN DISPUTE

P.M. testified extensively at hearing asserting, among other things, that she had observed an incident in the spring of 1983 involving her son, S.M., and respondent. Respondent had been in P.M.'s house helping S.M. with his schoolwork. It was beyond S.M.'s bedtime and P.M. instructed S.M. to take a shower. P.M. stated that S.M. went into the bathroom as instructed and a few minutes later she observed respondent enter the bathroom. She asserted that respondent came out of the bathroom and said good night to P.M. and left the house. S.M. then appeared outside of the bathroom having completed his shower. P.M. asserted that she asked S.M. why respondent was in the bathroom with him and that S.M. replied that respondent washed S.M. in places S.M. could not reach in order to get completely clean. P.M. stated to S.M. that it was not right and that S.M. should not allow this to occur. P.M. asked S.M. how many times this had happened before, whereupon S.M. responded that he did not wish to talk about it.

Respondent denies this allegation, asserting that it never happened. P.M. never raised this question or issue with respondent at the time or at any subsequent time.

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

By prior arrangement and with P.M.'s approval, S.M. was to fly to Maine and spend the last two weeks of August 1983 with respondent at respondent's family's summer place. The arrangement involved respondent and Poland driving to Maine in early August where Poland would spend two weeks and then fly back to Pennsylvania. S.M. was then to fly to Maine, spend two weeks with respondent and respondent's family and then drive back to Pennsylvania with respondent before the commencement of the 1983-84 school year. Prior to respondent and Poland leaving, S.M. was informed that football and band practice, two activities in which he was interested, would start the second week in August 1983. Respondent asserted he would not be disappointed if S.M. decided to stay in Pennsylvania to participate in these activities rather than join respondent in Maine. P.M. insisted that S.M. go to Maine and asserted to respondent she would inform the school officials that S.M. would appear late for the activities.

In August 1983, while respondent was in Maine, P.M. and her two sons were vacationing at the New Jersey shore with P.M.'s sister, brother-in-law and a female friend of P.M.'s. On an occasion when P.M., T.M. and P.M.'s female friend were on the beach, P.M. asserted she asked T.M. if T.M. knew of anything going on between S.M. and respondent. T.M. responded that he did not; however, something had happened between T.M. and Charlie Grover. P.M. testified that she was extremely upset and did not want S.M. to go to Maine with respondent. P.M. did not talk with S.M. about any untoward behavior by respondent toward S.M. but, rather, asked T.M. to speak with S.M. P.M. asserted that T.M. did speak with S.M. and later reported to P.M. that something had gone on between respondent and S.M. P.M. then spoke with S.M. and, among other things, asked S.M. if he wished to terminate the Big Brother relationship with respondent; to which, S.M. replied that he did wish to terminate it. On the following day, P.M. telephoned caseworker McGrath and requested the termination of the Big Brother-Little Brother relationship between respondent and S.M.

Respondent admits that he and S.M. slept in and occupied the same bed at respondent's home. The first time this issue arose was in June on the first occasion that S.M. stayed overnight at respondent's home in order that they could get an early start the following morning to attend the annual car rally sponsored by the Big Brother organization. After they had arrived at respondent's home, respondent asked S.M. where he wanted to sleep and S.M. responded that he wished to sleep in respondent's bed with respondent. Respondent brought to S.M.'s attention that there were other beds and bedrooms in the house, with which S.M. was familiar; however, S.M. insisted on sleeping

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

with respondent. Respondent did not particularly like that arrangement; therefore, he took the mattress from Ghidro's bed and placed it on the floor next to respondent's bed. This arrangement continued when S.M. would stay overnight with respondent. On occasions, when S.M. retired before respondent, respondent would permit S.M. to fall asleep in resoondent's bed and then move S.M. to the mattress on the floor when respondent retired for the night. On other occasions, respondent would awake during the night time and find that S.M. had left the floor mattress to get into respondent's bed. Respondent would remove S.M. and place him on the mattress.

S.M. testified that on two occasions when he was in bed with respondent, respondent reached under S.M.'s bedclothes to touch his penis. Respondent denies the allegation, contending that S.M. was subject to fantasy, because it never occurred.

Respondent admits that he undressed S.M. on one occasion. Respondent and Poland, who was a member of a high school wrestling team, would frequent a Club Nautilus to exercise; respondent for the purpose of weight loss and Poland for muscle strengthening. S.M. asked to go along and was permitted to do so on two occasions. Subsequent to a workout, respondent and Poland showered at the Club Nautilus before going home; however, S.M. declined to join the two in the semi-public shower facility. Respondent, who believes in good body hygiene, understood S.M.'s reluctance. Upon arriving at respondent's home he inquired as to whether S.M. was going to shower there. S.M. indicated that he was not. Respondent believed that it was necessary for S.M. to bathe after such a strenuous workout because S.M. was sweating and had body odor about him. Consequently, respondent helped S.M. undress and sent him to shower and left him there. During the course of undressing S.M., respondent asserted that he did not touch any of S.M.'s private parts. Respondent testified that when he was at S.M.'s home helping S.M. with his schoolwork, he observed that P.M. had difficulty in getting S.M. to shower.

Respondent also admitted that he administered rubdowns to S.M. when S.M. was suffering from body cramps, or, alternatively, to relax him.

The course of events following P.M.'s termination of the Big Brother-Little Brother relationship are summarized as follows:

Upon his return from Maine in the latter part of August 1983, respondent attended a meeting at Big Brother's office where its director, John Hely was present

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

together with Leslie Wells McGrath, the caseworker, and Cindy Kowalewski, a representative of the Bucks County Children and Youth Services. Director Hely laid out the allegations to respondent as reported by P.M. that respondent had washed S.M. in the shower without a washcloth, unclothed S.M. and that S.M. had slept in respondent's bed. There was no accusation concerning respondent giving S.M. rubdowns; however, respondent volunteered this information.

In October 1983, there was a meeting with Ms. Kowalewski in respondent's attorney's office with respondent, his mother, his brother and sister-in-law in attendance. Pursuant to Pennsylvania law, the Bucks County Children and Youth Services are required to conduct an investigation where child abuse is alleged. As a consequence of Ms. Kowalewski's investigation, she filed what is known as a "30 Day Report" with the Pennsylvaina Department of Public Welfare. Thereafter, a Family Service Plan is developed for the accused child abuse offender and monitored by the Children and Youth Social Service Agency. The developed revised Family Service Plan for respondent included the following:

A.

1. Mr. Eberly, on his own initiative, has entered into treatment with Dr. Raymond B. Reinhart, Jr., M.D. and has scheduled an evaluation. Immediately.

2. Mr. Eberly will follow through on recommendations from the psychiatrist if deemed appropriate by the evaluation results. This action will apply immediately following the release of the evaluation report of Dr. Reinhart.

3. Mr. Eberly will agree to releasing verification of receiving treatment and of undergoing an evaluation, as requested by the "agency." Mr. Eberly will agree to cooperative communication between Dr. Reinhart and Ms. Ann Lynn to expedite a timely resolution of this matter. As soon as agreement is signed.

4. Mr. Eberly has not, and will not, have any further contact of any kind with the identified child. To take place immediately.

B.

1. The agency will communicate with the therapist in a cooperative manner in order to expedite a timely resolution of this matter. As soon as agreement is signed.

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

2. The agency will adjust, or terminate, this service plan based on the client's progress, therapeutic or evaluation input or six month plan review, whichever comes first.

3. The agency will give serious consideration to changing the "indicated" finding to "unfounded", based upon the results of the psychiatric evaluation and all other pertinent information, including the full cooperation of Mr. Eberly in the conditions and stipulations of this "revised plan"; and the agency will in fact change the finding to "unfounded" if the above information warrants it. To take place as soon as is reasonably possible.

4. The agency will provide Mr. Eberly with a copy of this plan and any subsequent reviews or proposals. The agency will also keep Mr. Eberly fully informed as to any communication between the agency and attorney Denis Lanctot, and/or between the agency and Dr. Reinhart. This is to mean either initiating or receiving communication regarding or relating to Mr. Eberly. To take place immediately.

Respondent was under the impression that once the terms and conditions of the Family Service Plan had been met, the matter would be closed. However, the matter was subsequently turned over to the office of the Bucks County District Attorney.

Detective Stephen Battershell, Bucks County District Attorney's Office, conducted the investigation with respect to the alleged child abuse. On December 2, 1983, by prearrangement, Battershell appeared at P.M.'s home to interview P.M. and S.M. In his interview with P.M., she reported to Battershell she had observed respondent enter the bathroom when S.M. went into shower. Subsequently, when S.M. arrived home from school and was introduced to Battershell and the purpose of his visit, S.M. immediately went to his basement bedroom and refused to talk with the detective. Battershell went to S.M.'s bedroom alone and sat with S.M. for approximately one to one and one-half hours, twenty to twenty-five minutes of which was to "break the ice" with S.M. The detective worked into his conversation some reference to taking showers. Subsequently, S.M. reported to Battershell, among other things, that respondent had washed S.M. on several occasions and fondled his private parts. S.M. also told Battershell that on one occasion upon returning from Club Nautilus, respondent told S.M. to take a shower and when S.M. refused, respondent removed all of S.M.'s clothes and made S.M. shower.

Detective Battershell arranged to meet with respondent at respondent's attorney's office on December 19, 1983. However, respondent was not present because, as

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

reported by respondent's brother, respondent was in a depressed state and under psychiatric care. A subsequent meeting was arranged for February 9, 1984.

On February 9, 1984, Battershell met at respondent's attorney's office with the attorney, respondent and respondent's brother present. The attorney advised Battershell that he and respondent had reached an agreement with the Bucks County Children and Youth Services concerning the matter between S.M. and respondent and that the matter was not to be pursued further. Battershell informed the attorney and respondent that the Children and Youth Services and the District Attorney's Office were two separate entities and that the district attorney's investigation would move forward, notwithstanding any agreements reached through the other agency.

Detective Battershell testified that he had taken this case over from Detective Mary Scott who had retired. Detective Scott's notes revealed she had contacted several Little Brothers assigned to respondent, one of whom was Ghidro. Battershell subsequently contacted Ghidro's mother, who reported there had been no problems with respondent.

Battershell testified that on the basis of his discussions with P.M. and S.M. on December 2, 1983, he had probable cause to place respondent under arrest on February 9, 1984. Battershell did not interview respondent on February 9, 1984, but, rather, offered to have respondent submit to a polygraph examination. Respondent and his attorney agreed to have respondent submit to a polygraph examination, which was administered on February 15, 1984 by Detective Harry Armitage of the District Attorney's Office. On the following day, February 16, 1984, Battershell interviewed respondent after talking with Detective Armitage. On February 16, 1984, the decision had already been made to bring criminal charges against respondent.

Detective Harry Armitage, who administered the polygraph examination to respondent on February 15, 1984, was permitted to testify at the herein tenure proceedings grounded upon a Decision on Motion and Order issued by this tribunal. Armitage was not permitted to testify with regard to the results of the polygraph examination or his professional opinion relative thereto. His testimony was limited to certain procedures with respect to the pre- and post-test polygraph examination of respondent.

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

Armitage testified that the polygraph examination consists of three parts, i.e., pre-test interview, interview (examination) and post-test interview. Prior to the polygraph procedure, Armitage had been in receipt of information concerning the allegations against respondent from Detective Battershell. Armitage, in the pre-test, explained the Consent Form to respondent which was signed and dated by respondent and his attorney. The Consent Form provides, among other things, that respondent was not required to submit to the polygraph test but did so with full knowledge and voluntarily. It also authorized the examiner (Armitage) to disclose all information, results, conclusions and/or opinions arising from the examination, together with a discharge from liability. Armitage also took respondent's medical history, administered respondent's Miranda warnings and wrote out in longhand the charges and/or allegations against respondent which formed the basis for Armitage's examination.

Subsequent to the polygraph examination, neither respondent nor Armitage signed the post-examination portion of the Consent Form, which provides as follows:

> This examination (test) was conducted at _____ on the above date. Having submitted myself freely to this examination (test), I hereby re-affirm my agreement as expressed above. I swear that during said examination (test), I was well treated and remained of my own free will, knowing that I could leave at any time I so desired. I also swear and certify that there were no threats, and/or harm done to me, or any promises made to me during the entire time I have been there, either in connection with the examination (test) or the signing of this form.
>
> _____ _____ _____ _____
> Witness Date Seal Signature of Examinee Date

At the conclusion of the polygraph test, which Armitage administered to respondent without anyone else present, Armitage opined to respondent that Armitage believed respondent to be deceptive on the examination. Armitage testified that he made no threats or promises to respondent. The detective also testified that he did not say to respondent that he would lock him up if he did not tell him what he wanted to hear.

Respondent testified to the contrary. Respondent asserted that Detective Battershell offered the polygraph examination to respondent as an ultimatum at the meeting with respondent's brother and attorney on February 9, 1984. Battershell asserted he would immediately place respondent under arrest unless respondent consented to the

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

polygraph test. Respondent agreed to the polygraph test because he was innocent and the examination would clear him of all of the allegations. Respondent testified that during the post-polygraph examination, Armitage opined that respondent's answers to the polygraph test were deceptive. Armitage stated that respondent was a nice guy who did not wish to harm anyone and that Armitage did not want to see respondent go to jail. Respondent asserted that if respondent cooperated with Armitage, then Armitage would speak with the judge. Armitage opined that respondent did not need treatment for his depression but rather, respondent needed treatment for his problem with boys. Respondent testified that Armitage said that respondent's fondling of S.M.'s genitals and buttocks was respondent's way of showing love to S.M. Respondent asserted that Armitage threatened that if respondent did not cooperate, Armitage would see that respondent would be sent to jail. Respondent, who was still under psychiatric treatment at the time of the polygraph test, asserted that he was frightened and terrified by Armitage's post-examination interview and could not recall his responses to Armitage's opinions and assertions. Respondent steadfastly denied the allegations which formed the bases of the criminal charges and the tenure charges.

S.M. testified that it was only after a month or two into the relationship with respondent that respondent began to wash S.M. while S.M. was in the shower. He asserted that the washing incidents occurred five or six times at respondent's home and S.M.'s home where respondent would stand outside of the shower, fully clothed, and reach into the shower to wash S.M.'s back, legs, buttocks and testicles but not S.M.'s penis. S.M. contradicted his mother's testimony when he testified that after the incident where P.M. asserted she had observed respondent go into the bathroom after she had directed S.M. to take a shower, S.M. asserted on this record that he told his mother everything about the incident when asked by P.M. The testimony of P.M. was to the contrary, where she testified that S.M. did not want to talk about the incident.

S.M.'s assertion about the time of the incident at his home was inconsistent and contradictory. In his deposition, S.M. testified that respondent came into the bathroom of his home in August 1983 (R-9, p. 25). S.M.'s testimony on this record reveals that he asserted the incident occurred in July 1983. P.M. testified that the incident occurred four or five months prior to August 1983, when S.M. was still attending school and respondent was helping S.M. with his schoolwork.

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

Further inconsistent testimony by S.M. was extant where Dr. Sohn reported that S.M. had stated: "With a great deal of reluctance, [S.M.] had mentioned to me that he had had some incidents with Big Brother [respondent]. He described incidents of being washed in the shower, being undressed by him and also being photographed by him [respondent] (Dr. Sohn's deposition, p. 30 at p. 34). S.M.'s testimony on the herein record reveals that S.M. stated that respondent never took photographs of him in the nude nor did he ever tell anyone that it had occurred (see also, R-5).

S.M. testified that respondent placed his hand on S.M.'s penis on two occasions: once while S.M. was sleeping in respondent's bed and once while S.M. was sitting on respondent's lap. S.M. testified that he continued to go to respondent's home subsequent to these two alleged touchings and subsequent to the five or six times respondent allegedly washed S.M. in the shower. S.M. testified that he did not return to Charlie Grover's camper after the incident with Charlie Grover in August 1982, where Charlie attempted to touch his penis and he observed Charlie touch T.M. S.M. testified that he never slept with T.M. at home; however, he stated on cross-examination that T.M. would sleep with him because he was frightened.

S.M. testified that he had heard his father threaten his mother's life. S.M. asserted that his father had betrayed him. S.M. further testified that he hated Charlie after the incident in August 1982; however, he did not reveal the incident to anyone or discuss it with T.M. subsequently. S.M. believed that Charlie had betrayed him. In addition, Dr. Sohn opined that S.M. ". . . distrusts me" (R-5).

Richard Ghidro, now 18 years of age, testified that he became respondent's Little Brother when he was approximately 12 years old. The Big Brother-Little Brother relationship lasted for three years and officially terminated when Ghidro's mother remarried. The relationship continued, unofficially, thereafter until the present. Ghidro spent most weekends at respondent's home and spent other days and nights with respondent on camping trips and at respondent's family's summer place in Maine. Ghidro asserted that at no time did respondent make any improper overtures or advances toward him during the official relationship or thereafter.

Ghidro attended the same school as S.M. and asserted that S.M. had the reputation as being weird. Ghidro also characterized S.M. as unclean, "sort of smelled

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

sometimes. His hair was always messy" (TR - May 22, 1986, p. 52). Ghidro referred to S.M. as a "dirt bag" (Id. at p. 64).

Ghidro testified, among other things, that on occasions when he, S.M. and Scott Poland would stay overnight with respondent, Ghidro would ask S.M. whether S.M. wished to use Ghidro's bed and bedroom. S.M. would reply that he preferred to sleep in respondent's room.

Scott Poland testified that he met respondent through his friend Richard Ghidro. Poland spent nights at respondent's home either alone or when Ghidro and S.M. were present. Poland also spent nights alone with respondent in hotels on the way to Maine, in Maine, and on the way back from Maine to Pennsylvania. Poland testified that respondent never attempted to touch Poland in a sexual manner or attempt to do anything to him while he was in a shower.

Both Ghidro's and Poland's mothers testified at these proceedings and asserted, among other things, that their sons' relationships with respondent were beneficial to the boys and they continued to allow them to have contact with respondent even after the allegations of misconduct had been asserted. Both mothers disbelieved the allegations against respondent.

Respondent presented 16 witnesses on his behalf who knew of the criminal and tenure charges against him and each testified as to respondent's good character, honesty and integrity. It was stipulated that an additional 15 witnesses who were on call or had volunteered to testify, but did not, would have testified in the same manner as those character witnesses who had testified in these proceedings. These witnesses included former students, two of whom are professional men and two who have not yet reached their majority. They testified that respondent helped them in their scholastic and athletic endeavors while attending the Board's schools. Four professional colleagues in the Board's employ came forward to testify that respondent was concerned with young people and spent extra after-school time with those pupils who needed special attention in their academic and/or athletic programs. None of these colleagues had heard any criticism of respondent concerning his relationships with pupils under his direction and control. In addition, two Presbyterian ministers testified as to respondent's good reputation in the community.

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

FINDING OF FACTS AND DISCUSSION

This matter turns on an assessment of the credibility of the witnesses; that is, who is to be believed and who is not to be believed. In assessing the measure of credibility, it has been well established that the party who has the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. The court, therefore, must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." Jackson v. D.L. & W.R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). The evidence is found to preponderate if it "establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940), citation omitted. Where the standard is reasonable probability (preponderance of the evidence), the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), certif. den. 31 N.J. 75 (1959), overruled on other grounds, 36 N.J. 497 (1962). A factor to be considered in a determination as to which party's version of an incident has the "reasonable probability of the truth" is that "[t]he interest, motive, bias or prejudice of a witness may affect his credibility and justify the jury, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952), citations omitted, certif. den. 10 N.J. 316 (1952). Further, "a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the total record before me and having given fair weight thereto, and having observed the witnesses and assessed their credibility, I **FIND** the testimony of P.M., S.M. and Detective Armitage to be incredible.

After an analysis of the testimony of these three witnesses on behalf of the Board, together with the application of the factors to be considered in assessing credibility set forth above, many inconsistencies and contradictions are found as follows:

P.M. testified she observed respondent enter her bathroom after directing S.M. to shower four or five months prior to her terminating the Big Brother-Little Brother relationship. She asserted that this incident caused her some apprehension concerning the

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

relationship. Yet, she never discussed the incident further with S.M. or raised the issue with respondent. In fact, P.M. permitted S.M. to continue to remain overnight with respondent at respondent's house. In addition, after the alleged incident, respondent invited S.M. to travel with and stay with respondent at his family's summer place in Maine, which P.M. encouraged S.M. to do.

P.M. testified that she learned of the alleged sexual abuse against T.M. by Charlie Grover in August 1983, when P.M. was interrogating T.M. about S.M. and respondent's relationship. The facts demonstrate that P.M. did not learn of the details or the extent of the T.M.-Grover abuse until after P.M. terminated the Big Brother-Little Brother relationship between respondent and S.M. Even after learning of Grover's alleged sexual abuse against T.M., the record demonstrates that P.M. was more concerned with S.M. than T.M.

The record shows that subsequent to T.M. informing P.M. that Grover had committed the alleged offense, and S.M. had nothing to say to P.M. about his relationship with respondent, P.M. became very upset and was crying when she sent T.M. to talk with S.M. Several factors must be considered in an analysis of this event and subsequent events where S.M. was reluctant to talk. First, P.M. was/is an overbearing mother. Second, S.M. was an avoider who tended to lie when problems arose. Third, S.M. distrusted men. On this occasion, in August 1983, and on subsequent occasions, P.M. pursued S.M. to reveal real or imagined improprieties committed by respondent. For example, when S.M. refused to give testimony against respondent of the criminal proceedings, P.M. pressed S.M. as to why he did not testify. P.M.'s testimony on this record shows her agitation with S.M. after the criminal proceedings had closed with respondent placed in the Commonwealth's ARD program, where she said:

> . . . Well, I spoke to [S.] when he come out of the Court. I went into the room and I said why [?], I said why [?], [S.], why [?]. He says I don't remember and I says you do. You won't talk and he wouldn't. He said I don't want to talk about it. We went home (TR, May 15, 1986, at p. 56).

Substantial questions as to S.M.'s credibility arise as a consequence of these two events: (1) Did S.M. lie to his mother in August 1983, for the reason that she was upset because S.M. would not talk to her about his relationship with respondent and he wished to avoid a confrontation with her? Or, (2) Was S.M. telling the truth when he

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

represented to the Assistant District Attorney and his mother at the criminal proceedings that he could not recall any instances of improper behavior by the respondent?

In a subsequent event, after P.M. had misrepresented to agents of the Board that respondent had been found guilty of the criminal charges, S.M. refused to talk to the Board's attorney about the alleged improper incidents with respondent or to testify against respondent. P.M. was upset and crying because S.M. refused to talk to the Board attorney. S.M. subsequently relented and agreed to testify against respondent. The question of credibility remains, i.e., whether S.M. was telling the truth to the Board attorney or, whether S.M. lied to avoid the wrath and hysteria of P.M.

Having observed the demeanor of P.M. and S.M. as they testified before this tribunal and having assessed that their testimony was inconsistent and contradictory, I **FIND** the assertions by both to be incredible and not be be believed. Jackson; Jaeger; Loew; Salimone; Congleton.

Similarly, I **FIND** the testimony of Detective Armitage to be incredible with respect to the post-polygraph admissions purportedly made by respondent. The evidence clearly demonstrates that neither Armitage nor respondent signed the post-polygraph Test Consent Form (p. 19), a fact not successfully explained by Armitage on the record. The execution of the post-test portion of the Consent Form is not merely ministerial in nature but, rather, provides substance to any and all post-test admissions made to the examiner by an examinee. The lack of proper execution defeats any and all post-test admissions purportedly made to Armitage by respondent and, therefore, is to be disregarded.

Notwithstanding that this tribunal found respondent's credibility to be wanting upon this limited issue of whether or not Armitage could be permitted to testify with respect to respondent's pre and post-test admissions, the facts now demonstrate that respondent's testimony was more credible than Detective Armitage's testimony. I so **FIND** and **CONCLUDE.**

CONCLUSIONS

Having carefully considered, at length, the total record before me, I **CONCLUDE** that the Board has failed to carry its burden, by a preponderance of the reliable and credible evidence, that the tenure charge against respondent is true in fact.

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

The Commissioner has said on numerous occasions that he is ". . . assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks. . . ." In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County, 1966 S.L.D. 77, aff'd State Board of Education 106, aff'd Dkt. No. A-515-66, New Jersey Superior Court, Appellate Division, December 1, 1967 (1967 S.L.D. 351). This is a matter which requires the Commissioner's assiduous protection.

ORDER

Accordingly, it is **ORDERED** that the herein tenure charges against John Eberly be and are hereby **DISMISSED WITH PREJUDICE.**

It is further **ORDERED** that the Board of Education of the Township of Ewing forthwith reinstate John Eberly to his former teaching position together with all back pay withheld, fringe benefits, annual salary and/or adjustment increments and all other emoluments due and owing as a consequence of these proceedings.

By way of this initial decision, respondent's annual salary and/or adjustment increment is restored, thereby disposing of the matter in John Eberly v. Board of Education of the Township of Ewing, Mercer County, OAL DKT. No. EDU 8262-86.

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

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

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

22 January 1987
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

JAN 2 2 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 2 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN EBERLY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
EWING, MERCER COUNTY.	:	
_____	:	

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

The Board raises three main points in its exceptions. They are summarized below.

POINT I

THE COMMISSIONER OF EDUCATION, NOT THE ALJ, IS THE PRIMARY FACTFINDER, AND THE COMMISSIONER HAS BROAD AUTHORITY, BASED ON THE ENTIRE RECORD, TO ADOPT, REJECT OR MODIFY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE ALJ.

Citing, among other cases, In re Suspension of License of Silberman, 169 N.J. Super. 243 (App. Div. 1979), aff'd o.b. 84 N.J. 304 (1980); Public Advocate Dept. v. Public Utilities Bd., 189 N.J. Super. 491 (App. Div. 1983); and In the Matter of the Tenure Hearing of George McClelland, School District of the Township of Washington, Mercer County, decided by the Commissioner March 25, 1983, aff'd with modification State Board July 6, 1983, aff'd Superior Court July 20, 1984, the Board contends it is the Commissioner's duty "to independently decide this case based on the entire record." (Board's Exceptions, at p. 6) It argues that the instant matter requires specific findings of fact with explanations as to how the ALJ dealt with conflicting evidence. "The ALJ in his recommended decision failed to do so, and the Commissioner now bears that responsibility." (Id., at p. 2) The Board also cites Quinlan v. North Bergen Tp. Bd. of Ed., 73 N.J. Super. 40, 51 (App. Div. 1952) and Winston v. South Plainfield Bd. of Ed., 125 N.J. Super. 131, 139-140 (App. Div. 1973), aff'd 64 N.J. 582 (1974) for the proposition that the State Board is to make independent findings of fact.

The Board avers that the proposition that the ALJ's findings must be affirmed, if supported by "substantial credible evidence in the record," has been expressly rejected by our courts. It cites Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 454-453 (App. Div. 1982) for this position. The Board submits that "[t]he 'substantial credible evidence in the record' standard is applicable to appellate court review of a final agency decision, but not to an agency's review of an ALJ decision." (emphasis in text) (Board's Exceptions, at p. 3) Rather, the Board avers that the

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

appropriate standard of review to be applied herein is embodied by N.J.S.A. 52:14F-7(a) and also N.J.S.A. 52:14B-10(c) which states in part that following his own review of the entire record, the Commissioner shall "adopt, reject or modify the recommended report and decision." (Board's Exceptions, at p. 2)

Also regarding Point I of its Exceptions, the Board states that Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) and Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973) speak to the standard of judicial review of a final agency decision, not to agency review of a recommended ALJ decision. However, the Board recognizes that the Close and Mayflower Securities cases are

> proper citations for the proposition that "due regard" be given to the opportunity of the ALJ to observe the witnesses' oral testimony, but not for the proposition that the ALJ's credibility determinations and findings of fact should be affirmed so long as supported by "substantial credible evidence in the record."*** (emphasis in text) (Board's Exceptions, at p. 6)

POINT II

> THE ALJ'S DECISION IS FUNDAMENTALLY FLAWED BECAUSE OF THE FAILURE TO EVEN MENTION, MUCH LESS DISCUSS, A SUBSTANTIAL BODY OF THE EVIDENCE; BECAUSE OF THE FAILURE TO MAKE SPECIFIC FINDINGS OF FACT AS REQUIRED BY LAW; BECAUSE OF INCONSISTENCIES BETWEEN THE FINDINGS IN THE WRITTEN DECISION AND THE FINDINGS MADE ORALLY AT THE HEARING; BECAUSE OF ERRORS IN THE DECISION'S RECITATION OF THE EVIDENCE, AND ULTIMATELY, BECAUSE AN INDEPENDENT REVIEW OF THE RECORD LEADS TO RADICALLY DIFFERENT CREDIBILITY DETERMINATIONS THAN THOSE RECOMMENDED IN THE DECISION.

The Board avers that "the recitation of the evidence in the initial decision contains so many omissions and distortions that one has to question the objectivity of the entire written decision." (Board's Exceptions, at p. 11) Absent from the initial decision, it is argued by the Board, among other things, is a discussion of the reports of Ms. McGrath from Big Brothers Organization, as well as that of Cindy Kowalewski from Children and Youth Services (CYS), the agency charged by Pennsylvania law with the responsibility for investigating cases like the instant matter. (P-3; P-4) The Board argues, inter alia, that "[w]hile not conclusive, the views and objectivity of these professionals are certainly as evidential as the view of Dr. [Reinhart] regarding his patient's credibility. And it is far more probative than the views of Mrs. [G.] and Mrs. [P.] recited by the ALJ at page 20.***" (Board's Exceptions, at p. 10)

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

The Board contends another significant omission in the initial decision is the ALJ's

> one-sided presentation of the testimony regarding [S.M.'s] failure to testify at the Pennsylvania preliminary hearing on March 9, 1984. *** The testimony of [S.M.'s] psychologist, Dr. Sohn, as well as the testimony of Detective Battershall (sic) about the trauma of a child testifying in a child molestation case, fully explains [S.M.'s] initial unwillingness to testify, but the ALJ did not even set forth [S.M.'s] explanation, much less evaluate his credibility on this issue.
> (Board's Exceptions, at pp. 10-11)

Similarly, the Board excepts to the absence of discussion by the ALJ of the testimony of Dr. Sohn, Leslie McGrath and Detective Battershell. Neither, the Board argues, "is there any discussion of respondent's credibility and the evidence of his many prior inconsistent statements." (emphasis in text) (Id., at p. 11) The Board suggests that the initial decision "foresakes (sic) an evaluation of the factual evidence for an unwarranted psychological foray into personality theory***." (emphasis in text) (Id., at p. 12)

The Board contends that "the ALJ's theory of the case seems to be that Mrs. [P.M.] meant well, but her overbearing personality and specific pressure on [S.M.] to tell her something led [S.M.] to make up a story about respondent. But this theory doesn't impeach her credibility, only [S.M.'s]***." (emphasis in text) (Board's Exceptions, at pp. 12-13) The Board claims that Mrs. P.M.'s testimony is thoroughly credible on each of the following facts:

1. Sometime in the Spring of 1983, Mrs. [P.M.] saw respondent follow [S.M.] into the bathroom when [S.M.] went in to take a shower. She testified that school was still in session and respondent was over to help [S.M.] study. T I 37-38. Mrs. [P.M.'s] testimony on this is consistent with her August 1983 statements to Leslie McGrath. P-1, p. 51. It is further corroborated by [S.M.'s] testimony, and even by respondent's August 1983 interview at Big Brothers, where he admitted, after earlier stating "that under no circumstances did he ever go into the bathroom with [S.M.]," that "one time he went into the bathroom to review with [S.M.] for a test." [P-1 at 88, 90; T II 75, 78]

2. Mrs. [P.M.] was troubled by this incident, and at some point asked [S.M]. about it. The only factual dispute is when she asked [S.M.] about it. In August 1983, she told Leslie McGrath that she felt uncomfortable

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

about her observation at the time of the incident, but did not ask [S.M.] about it until more recently (i.e. after the abuse of [T.M.] by Charles Grover came to light). P-1 at pp. 51-53; T II 39, 42. At the trial she testified that she had asked [S.M.] immediately after Eberly left the house. T I 38. It is hardly surprising that, three years after the incident, she could have mistaken the exact date of her conversation with [S.M.] This is not a question of credibility (i.e. lying) but of memory of details. It is submitted that her earlier, contemporaneous account is more probably correct, and that the conversation with [S.M.] occurred several months after the shower incident, as she had related to Leslie McGrath. The Commissioner should so find.

3. Mrs. [P.M.'s] recollection and testimony as to the substance of her conversation with [S.M.] was consistent throughout. [S.M.] told her that respondent comes into the shower to help him wash because, he says, "to get me cleaner." P-1 at p 53; T II 42 (as related to Leslie McGrath in August 1983); see also P-6 (as related to Detective in December 1983) and T I 37-38 (her testimony in court). The Commissioner should find this as a fact.

4. Mrs. [P.M.] took no action on this information until August 1983. This fact is uncontested. The ALJ implies that this is an inconsistency or contradiction or somehow discrediting to her testimony. On the contrary, the most it shows is a mistake in judgment. As found above, she saw Eberly go into the bathroom in the spring of 1983 and was suspicious, but she didn't know respondent was actually washing her son's body until August 1983! Her observation from the spring stuck on her mind and troubled her, but she really didn't have enough other information to go on at the time, and was otherwise very pleased with the relationship.

5. Mrs. [P.M.'s] testimony about her conversation at the beach with [T.M.] in August 1983, when she first got the shocking news that [T.M.] had been molested, is inherently credible and consistent with her prior account to Leslie McGrath. Compare T I 92 to 95 with P-1, p 52.

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

6. [T.M.] was indeed molested by Charlie Grover, P-5 in evidence. Mrs. [P.M.] did not "plant" anything in [T.M.'s] mind.

7. Mrs. [P.M.] was upset the night she came back from the beach in August 1983, and with good reason. She had just found out one or both of her sons had been molested. She was also upset in March 1984 when [S.M.] refused to testify. Again with good reason, for she believed in good faith that [S.M.] had been molested but for some reason had just refused to testify. Nothing in her frank admission that she was upset at these times impairs her credibility, however. Indeed, it shows her openness, frankness and concern.

8. The ALJ also states that Mrs. [P.M.] was more concerned with [S.M.] than [T.M.], even after learning of the details about [T.M.] and Charles Grover. The record does not support as such a judgmental comparison of how she felt about her children. And what relevance does it have as to her credibility? The fact is that the social worker, Cindy Kowalewski, had wisely advised her: "I feel you can't handle going through two of these experiences at the same time. It will be too much for you." T I 112. The social worker advised going through with [S.M.'s] case first, before dealing with [T.M.]

9. Mrs. [P.M.] did not misrepresent to school district officials that respondent had pleaded "guilty." The ALJ twice refers to such purported misrepresentation. At pages 5 and 23. There is no testimony to support this claim. On the contrary, it is uncontroverted that on or about June 12, 1984, upon receiving a letter from the District Attorney's office summarizing the disposition of charges against respondent, Mrs. [P.M.] called the principal, Douglas LaCour, read the letter over the phone to him, and invited him to come over and pick up the letter! He did so. P-26 and P-27. that hardly bespeaks an intent to mislead LaCour, since she read and then gave to him the official DA letter describing the exact disposition of the charges. While LaCour's June 12 memo to Lawton suggests that she may have orally stated or inferred that respondent pleaded guilty, that would have

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

> been an understandable mistake. A lay person who learns that a criminal defendant has agreed to 24 months probation, required psychiatric counseling, payment of court costs, no contact with the victim, cooperation with CYS, and no participation with Big Brothers might well conclude that respondent pleaded "guilty." There clearly was no intent to misrepresent since she gave LaCour the official letter from the D.A. The Commissioner should disapprove the ALJ's finding in this regard. (emphasis in text)
> (Board's Exceptions, at pp. 13-15)

The Board further notes that the ALJ stated that he was also basing his decision on his observation of the demeanor of Mrs. P.M. and S.M. The Board advances that "this is conclusory bootstrapping, however, and is valueless without elaboration of its factual basis. See State, Dept. of Health vs Tegnazian, supra, 194 NJ Super at 446 (App. Div. 1984)." (Id., at p. 15)

As to S.M.'s testimony, the Board urges the Commissioner to find that S.M.'s testimony was credible and consistent over a long period of time. It proffers the following facts in support of its position:

1. [S.M.'s testimony] testified that respondent often assisted him in dressing and undressing is consistent with all of his prior statements, and is corroborated by respondent. Clearly [S.M.] was not lying when he so testified.

2. [S.M.] testified that he slept in respondent's bedroom. Eberly admits this.

3. [S.M.] testified that he would go to sleep on a mattress on the floor, and would wake up along side respondent in bed. He doesn't know how he got there. He has never varied in his statements or testimony on this issue over three years. See records of CYS, McGrath and Battershall (sic), P-2, P-1, p. 66 and P-7. Respondent has admitted that [S.M.] slept in his bed, and has offered a series of increasingly convoluted explanations of how this came about. See Board's Post Hearing Brief at pp 56-57, 60.

4. [S.M.] testified that respondent frequently followed him into the bathroom and washed his ([S.M.'s]) private parts. [S.M.] testified that respondent "told me he could wash him in places I couldn't see or reach." His

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

testimony at the hearing is fully consistent with all of his prior statements to Leslie McGrath, CYS and Detective Battershall (sic), and also with his deposition testimony. See Post Hearing Brief, pp 32-33 for citations to record.

5. [S.M.] testified that, on one occasion, the shower washing occurred at home. He recalled his mother asking him about why respondent followed him into the bathroom and he replied that respondent helped him wash. Mrs. [P.M.'s] testimony and prior statements corroborate this.

6. [S.M.] told Detective Battershall (sic) that several times "Jack put his hand under his underpants, touched his penis and said he was checking to see if he had a fever." P-6 His testimony at the hearing was to the same effect. This allegation is corroborated by respondent's own statements on two occasions, once to Detective Armitage and again, on a different occasion, to Detective Battershall (sic). See P-10 and P-21. Respondent's repudiation of his admissions to both Battershall (sic) and Armitage is a bit much. The only way his story can be believed is to conclude that everyone else is lying. The proposition is absurd. (emphasis in text)

(Board's Exceptions, at pp. 15-16)

The Board excepts to the ALJ's reliance upon R.G.'s slang descriptions of S.M. instead of relying upon the testimony and opinions of Dr. Sohn, a more credible witness, in the Board's opinion. The Board cites Dr. Sohn's overall conclusion that S.M. was a truthful child, citing P-30 for this statement. Significantly, the Board claims, "both [R.G.] and [S.P.], who were strongly allied with respondent at the hearing, acknowledged that in all the time they had spent with [S.M.], they had never known him to lie or make up stories. Tr VI 64 to 65; 78." (Board's Exceptions, at p. 18)

The Board finds most indefensible the ALJ's conclusions that Detective Armitage's testimony was incredible when weighed against respondent's testimony. (Initial Decision, at p. 23) The Board concurs with the ALJ's oral decision on the admissibility of respondent's post-examination statements, which found Armitage more credible than Eberly on the issue of what transpired at the lie detector interview. The Board submits that "the judge's credibility assessment at that time, on the issue of whether Armitage made threats, was right on the mark." (Board's Exceptions, at p. 19) The Board is at a loss to understand, without further elaboration from the ALJ, his summary conclusion that "the facts now demonstrate

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

that respondent's testimony was more credible than Detective Armitage's testimony***." (Board's Exceptions, at p. 19, quoting Initial Decision, ante) The Board finds "woefully inadequate" the ALJ's rejecting the testimony of Detective Armitage and holding, in effect, that Armitage fabricated a confession by respondent based on the uncontested fact that the post-polygraph portion of the consent form was never signed. (Id., at p. 19) The Board finds "[i]t is incredible to throw out key evidence because a single 'i' was not dotted by Detective Armitage." (Id., at p. 20)

The Board claims that respondent's post-hearing briefs contain no proposed findings of fact which fairly deal with all of the evidence in this case, nor does the initial decision. The Board submits the initial decision is not sustainable and must be rejected by the Commissioner.

POINT III

THE COMMISSIONER SHOULD MAKE INDEPENDENT FINDINGS OF FACT CONSISTENT WITH THESE EXCEPTIONS AND THE BOARD'S BRIEFS BELOW.

Based on the briefs and exceptions filed by the Board, the Board submits that the charge of unbecoming conduct should be upheld, and respondent dismissed from his tenured position under N.J.S.A. 18A:6-10 and 18A:28-5.

Respondent filed extensive replies to the above exceptions. Respondent initially states that the determination of this matter turns upon the credibility of the testimony for each party. Respondent avers:

> In the final analysis the primary emphasis must fall upon the testimony of the only witnesses who had first hand knowledge of the events at issue, the teacher, John Eberly, and the boy S.M. If S.M. is found not to be credible the only reasonable conclusion is to dismiss the charges and order Mr. Eberly to be reinstated to his tenured position. (Reply Exceptions, at p. 1)

Respondent submits two further reply exceptions which are summarized below.

POINT 1

THE COMMISSIONER WILL ORDINARILY DEFER TO THE CREDIBILITY FINDINGS OF THE ADMINISTRATIVE LAW JUDGE WHO PRESIDED AT THE HEARING.

Respondent rebuts the Board's citation of cases on the issue of the standard of review of an appellate court reviewing an agency determination. He suggests first, however, that

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

> It is a long standing and well settled rule that the standard to be applied by the Commissioner in reviewing the credibility findings of the Administrative Law Judge is whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility. McKnight v. Board of Education of the Mercer County Vocational-Technical Schools, Commissioners decision, decided January 27, 1986, In re Tenure Hearing of Driscoll, Commissioner's decision March 2, 1982, [St. Bd. Aff'd September 8, 1982, Super. Ct. aff'd October 25, 1983], Williamson v. Board of Education of the Town of Phillipsburg, Commissioner's decision August 26, 1981. (Reply Exceptions, at p. 2)

Further, respondent distinguishes the Silberman, supra, and Public Advocate, supra, cases from the instant matter, suggesting that neither involved credibility determinations. Respondent argues that the well-settled rule mentioned above regarding credibility determinations is not in conflict with the statute the Board relies upon nor has it been overruled by the Appellate Division cases cited by the Board. Respondent suggests it is clear from N.J.S.A. 14B-10(c) that the ALJ's initial decision and recommendations are the basis upon which the Commissioner conducts his review and reaches his conclusions. He further contends, "No trier of fact could base a credibility determination entirely upon the demeanor of the witness. It is impossible to separate demeanor from the other factors which affect credibility as they become apparent during the course of the hearing." (Reply Exceptions, at p. 4)

The Board's statement of the holding of Quinlan, supra, and Winston, supra, is misleading, respondent argues, in that it appears to place an affirmative duty on the Commissioner to make independent findings of fact. Respondent states as follows:

> Both of these cases say that the State Board has the ultimate duty to decide school law controversies. Further, the State Board is not precluded from making its own independent findings of fact. Contrary to the implication of the Board's statement of the holding of these cases, there is no affirmative duty on the State Board to make independant (sic) findings of fact. (emphasis in text) (Reply Exceptions, at p. 4)

Respondent submits that the rule of deference to the ALJ's findings on credibility remain viable and is the rule which must govern the Commissioner here. "The Commissioner may make different findings on credibility only if he finds that the ALJ's conclusions are not supported by sufficient credible evidence in the record." (Reply Exceptions, at p. 5)

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

POINT II

THE ADMINISTRATIVE LAW JUDGE'S FINDINGS ARE SUPPORTED BY THE RECORD AND EXPLAINED IN HIS INITIAL DECISION.

Respondent reiterates the statement of the ALJ that the Board bears the burden of proving the tenure charges by a preponderance of the evidence. Respondent claims that since the ALJ specifically found the three primary witnesses against him to be lacking in credibility, the Board, accordingly, could not carry its burden of proving the charges by a preponderance of the evidence.

More specifically, respondent contends that contrary to the Board's assertion, the ALJ did consider the primary inconsistency in respondent's testimony. He discredited Detective Armitage's specifically, respondent argues, and states that "[t]he voluntariness of statements allegedly made by Mr. Eberly to Detective Battershell was affected by the same factors that make his 'confession' to Detective Armitage unreliable." (Respondent's Exceptions, at p. 8) Further, claims respondent, the testimony of Ms. McGrath and Detective Battershell is unimportant if S.M. cannot be believed. Any knowledge Ms. McGrath and Detective Battershell may have is derived completely from statements made to them by S.M. and P.M. "It was the task of [the] ALJ to decide the credibility of S.M. and P.M. and not to rely on the hearsay testimony of McGrath and Battershell. In addition their testimony was merely repetitive of the testimony of other Board witnesses." (Respondent's Exceptions, at p. 8) Respondent asserts that regardless of the objectivity of Ms. McGrath and Ms. Kowalewski, the ALJ owes no deference to their conclusions.

With regard to the testimony of S.M.'s psychologist, Dr. Sohn, it is clear that the ALJ considered his opinion carefully, advances respondent. Regardless of Dr. Sohn's opinions concerning the reasons for S.M.'s failure to testify on the day of the hearing of the criminal matter in Pennsylvania, the fact remains that S.M. did not testify on that day. Respondent argues that this fact is probative of S.M.'s credibility. Further, respondent does not question P.M.'s love of her son, but suggests that every trier of fact must make a "***psychological foray into personality theory" where "there is a question of bias and motive." (Reply Exceptions, at p. 10, quoting Board's Exceptions, at p. 12) Respondent contends it is the mother's very concern for her son that makes her testimony less credible. "There has never been any claim that she pursued these charges out of ill will toward Mr. Eberly or that she intentionally misrepresented facts." (Id., at p. 11) Further, respondent states that it is unclear what additional observations of demeanor the ALJ should be required to make. Respondent observes that demeanor is a "difficult concept to quantify and must be based in some part on the intuitive impressions of the observer. The initial decision is not merely conclusory but clearly states the factual basis for the determination." (Id., at pp. 11-12)

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

Respondent replies to the Board's reliance upon the ALJ's ruling that the testimony of Detective Armitage would not be suppressed for purposes of the hearing as a final adjudication of respondent's credibility. His rebuttal follows.

> The issue of post-test admissions was first raised by the Respondent in a pre-trial motion to suppress the testimony of Detective Armitage. The ALJ's ruling on that motion was that he would conduct a hearing on the admissibility of the testimony at the time the full hearing was scheduled. He would then make an oral ruling on the record. The applicable law and the ALJ's ruling are set forth in his Decision on Motion and Order III, which is a part of the record. The Respondent Mr. Eberly would bear the burden of proving that the post-test admissions were coerced or made under duress in order to prevent their admissibility. See page 23 of Decision on Motion and Order III. The ALJ noted in that decision that the standard for admissibility was a lower one for administrative hearings [than] for a criminal trial.
>
> After hearing the testimony of Detective Armitage and Mr. Eberly on the issue of coercion and duress, Judge Law ruled that he would admit Detective Armitage's testimony. It was his finding that Mr. Eberly had not carried his burden to prove coercion based upon Judge Law's assessment of his credibility. T IV 67. The evidence of the post-test admissions was allowed.
>
> The ALJ made it clear at the end of the hearing that his determination on the motion was not a conclusive determination of Mr. Eberly's credibility. T VII 121. In his Initial Decision the ALJ explained why, after hearing all the testimony, he found Detective Armitage not to be credible. It is important to remember that Mr. Eberly carried the burden on the motion to suppress and the Board carries the burden on the tenure charges. It is also important to remember that the standard of admissibility in an administrative hearing is lower than that in a criminal hearing and that the ALJ may give whatever weight is appropriate to evidence which is admitted. The conclusion that Detective Armitage was not credible based upon all the evidence is not inconsistent with the ALJ's earlier ruling. (Reply Exceptions, at pp. 12-14)

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

Respondent concludes by saying that the ALJ found as a fact that the essential witnesses on behalf of the Board were not credible. "He has explained the reasons for his conclusions and his careful review of the record is apparent from his Initial Decision." (Id., at p. 15) He avers that under the applicable standard of review his findings on credibility are entitled to deference by the Commissioner. Respondent requests that the Commissioner reject the exceptions filed by the Board and affirm the initial decision.

Initially, the Commissioner notes that the New Jersey State Department of Education, along with all other New Jersey State agencies, is a quasi-judicial administrative tribunal. To that extent, while the agency head, in this case the Commissioner of Education, may use his/her discretion to make different findings of fact regarding credibility, he/she need only do so if it is found that the ALJ's conclusions are not supported by sufficient credible evidence in the record. Parker v. Dornbierer, 140 N.J. Super. 185 (App. Div. 1976) held, in pertinent part:

> ***We are mindful that the standard of judicial review of factual determination made by an administrative agency is rather narrow, i.e., whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility. See, e.g., Jackson v. Concord Co., 54 N.J. 113, 117-118 (1969).*** (emphasis in text) (at 188)

Thus, while the Commissioner is not precluded from making independent findings of fact, there is no affirmative duty to do so.

The Commissioner finds Silberman, supra; Public Advocate Department, supra; and McClelland, supra, distinguishable from the instant matter. As noted by respondent in his reply exceptions, neither Silberman nor Public Advocate Department dealt with credibility determinations at all. "In Silberman, the Hearing Examiner was a retired criminal judge who applied what amounted to a criminal standard of proof to reach his conclusions. In Public Advocate Department, the ALJ's recommendations were too broadly written and contained policy statements that the agency did not endorse." (Reply Exceptions, at p. 3) The Commissioner further agrees with respondent's statement that "the well settled rule [regarding credibility determinations] is not in conflict with the statute [the Board relies upon] nor has it been overruled by the Appellate Division cases cited by the Board." (Reply Exceptions, at p. 3)

In McClelland, the Commissioner did overturn the credibility findings of the ALJ. However, he did so based on his differing interpretation of factual circumstances which were not in question. Herein, there are very real factual questions, and the Commissioner can find no basis in the record to convince him, by a

You are viewing an archived copy from the New Jersey State Library.
preponderance of the credible evidence, to disagree with the position taken by the ALJ who was in a better position to adjudicate the credibility factors that contributed to his understanding as to establish what actually transpired between S.M. and respondent.

Having reviewed the respective arguments of the parties in the instant matter, it is the Commissioner's judgment that the pivotal issue in this matter turns upon the findings of fact as they relate to the credibility of the witnesses who testified at the hearing. Upon applying the above-cited standard of review to the instant matter, and for the reasons that follow, the Commissioner rejects the arguments advanced by the Board in its post-hearing submissions and exceptions, which along with those of respondent are incorporated herein by reference.

As to the Board's allegation that "***the recitation of the evidence in the initial decision contains so many omissions and distortions that one has to question the objectivity of the entire written decision" (Board's Exceptions, at p. 11), the Commissioner has carefully reviewed the testimony, the documents and the voluminous briefs relative thereto submitted as exhibits. He finds no basis therein for overturning the credibility determination that formed the foundation of the ALJ's decision. It is important to emphasize that the burden of persuasion for proving the tenure charge herein rests with the Board by a preponderance of the credible evidence. The ALJ's decision addressed the testimony of the three main witnesses against respondent and deemed it to be incredible. Absent substantial evidence in the record contrary to the findings of the ALJ, the Commissioner will not disturb the ALJ's determination. Herein, Judge Law's considered findings, based on his first-hand opportunity to evaluate the demeanor and testimony of all of the witnesses, led him to the conclusion that the position taken by S.M., as well as that of his mother, P.M., and also that of Detective Armitage was fraught with "inconsistencies and contradictions." (Initial Decision, ante) The Commissioner's careful study of the record likewise revealed inconsistencies on the part of all of the primary witnesses. However, in the Commissioner's judgment, the inconsistencies in respondent's testimony were more readily attributable to the specific circumstances in which he found himself and were not of such a nature as to cast doubt on his credi- bility as determined by the ALJ. For example, that respondent in discussing what transpired during the post-polygraph interview conducted by Detective Armitage, was later able to recall only a few of his responses, but stated he will recall "until the day I die" (Tr. III-41) the statements allegedly made by Detective Armitage during the course of their meeting, is entirely understandable under such obviously trying circumstances. Such a lapse of memory is in no way dispositive of his credibility on the merits of the matter.

Further, the Board's exception that the ALJ elaborated on respondent's credibility only as it regards the post-polygraph examination conducted by Detective Armitage is not, in itself, a significant omission, in light of the fact that the ALJ deemed the detective incredible. The Commissioner finds merit in the pre-

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

liminary statement tendered by respondent in his reply exceptions that "[i]n the final analysis the primary emphasis must fall upon the testimony of the only witnesses who had first hand knowledge of the events at issue, the teacher, John Eberly, and the boy S.M. If S.M. is found not to be credible the only reasonable conclusion is to dismiss the charges and order Mr. Eberly to be reinstated to his tenured position." (Respondent's Reply Exceptions, at p. 1) Since the Commissioner's careful study of the record finds no basis for overturning the credibility determinations made in the initial decision, he finds that the Board has failed to meet its ultimate burden of persuasion.

Notwithstanding the above, some elaboration on the Board's exceptions is appropriate. The Commissioner has reviewed the exhibits marked P-3 and 4, the reports of Ms. Kowalewski and Ms. McGrath, as well as the reports submitted by other professionals in this matter, including P-32, 34 and 35. Notwithstanding the fact that these reports could be construed to attribute motives to the actions of respondent at variance with the findings of the ALJ, any such contrary conclusions are based upon personal hypotheses or theories as to respondent's actions or motives for which there is no factual basis in the record. For example, Ms. McGrath, the Big Brothers case worker, states in the last paragraph of her report, (P-69) that she "could conjecture" that Mr. Eberly was contemplating molesting S.M. because S.M. was a vulnerable and "passive" child as compared to his other youthful charges, whom he was never accused of sexually molesting. Such testimony is entirely unreliable evidence as to the credibility of respondent herein. Not only is such conjecturing predicated on hearsay, but respondent's untainted prior behavior with the other Little Brothers or former students could just as easily be construed as proof of his innocence of any sexual motive toward <u>any</u> child.

Moreover, that such reports were filed closer to the time that the events were alleged to have occurred is not significant if, in fact, they are not reliable indicia of the facts. Concerning respondent's alleged prior inconsistent statements and statements over time, the Commissioner finds inconsistencies in both S.M.'s, and respondent's recollection of events, as did the ALJ. He is not convinced, however, that the Board has proven by a preponderance of the credible evidence that S.M.'s testimony is more consistent than that of respondent.

The Commissioner agrees with the Board's statements made at page 10 of its exceptions that "[w]hile not conclusive, the views and objectivity of these professionals are certainly as evidential as the view of Dr. Reinhardt (sic) regarding his patient's credibility. And it is far more probative than the views of Mrs. [G.] and Mrs. [P.] recited by the ALJ at page 20. They knew next to nothing about the specifics in this case." The Commissioner finds, however, that the professionals knew little more than either Mrs. [P.] or Mrs. [G.]. He finds and determines that there is no basis in the record to attribute more credibility to these individuals than to respondent and, thus, affirms the ALJ's findings in

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

this regard. The same is true of the testimony proffered by Dr. Sohn and Detective Battershell.

Concerning P.M.'s testimony, the Commissioner has devoted considerable time to perusing the record before him for any evidence that would lead to a conclusion different from that suggested by the ALJ. He finds no such compelling credible evidence. On the contrary, he is compelled to agree with the ALJ's observation that one must question the credibility of a mother, who, concerned for her child's safety, would continue to permit overnight visits or even contemplate permitting that child to vacation out-of-state with an individual about whom she was suspicious.

The Commissioner is in accord with the ALJ's determination made on motion to permit the testimony of Detective Armitage as to the pre- and post-polygraph statements of respondent, for the reasons stated in his Decision on Motion and Order III. The Commissioner's reading of the transcripts is entirely in agreement with respondent's that the ALJ's determination on the motion, though, was not a conclusive determination of respondent's credibility. (See Tr. IV-62-68 and Tr. VII-120-121.) The Commissioner's study of the record is in accord with the ALJ's that respondent's testimony at hearing was, indeed, more credible than that of Detective Armitage. Thus, although admissible, the information proffered by Detective Armitage as to what respondent was alleged to have said during those interviews is to be discounted, absent convincing evidence to the contrary.

Additionally, the Commissioner has carefully studied P-10, a report written on February 16, 1984, the day after the polygraph test, by Detective Battershell at respondent's counsel's office. The report addresses the interview that took place between Detective Battershell and respondent. While the Commissioner cannot agree with respondent that the same conditions existed during this interview that were deemed to have prevailed on the day of the polygraph test, he is not persuaded that the information taken down by Detective Battershell is to be accorded any more weight than that proffered by any of the other professionals herein and, furthermore, does not in and of itself provide conclusive evidence of any wrongdoing on respondent's part. Once again, the Commissioner might just as readily conclude that respondent was, during this interview, proffering helpful information in an attempt to convince Detective Battershell of the innocence of his behavior toward S.M., whatever that behavior might have been and, does not represent a confession as intimated by the Board.

Moreover, the Commissioner agrees with respondent's statement made in his reply exceptions that "what the Board characterizes as an 'unwarranted psychological foray into personality theory' *** is nothing more than the evaluation every trier of fact must make where there is a question of bias and motive." (Reply Exceptions, at p. 10, quoting Board's Exceptions, at p. 12) Further, without more specific evidence provided by the Board from the record as to what additional observations of demeanor the Commissioner should

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

make, he will rely upon the findings of the ALJ in this regard. The ALJ believed the respondent. He did not believe P.M., S.M. or Detective Armitage. It was the ALJ who was in a position to hear the witnesses and to judge their credibility. See Parker v. Dornbierer, supra. See also Shirley McKnight v. Board of Education of the Mercer County Vocational Technical Schools, Mercer County, decided by the Commissioner January 27, 1986.

Accordingly, for the reasons stated in the initial decision as supplemented herein, the Commissioner affirms the recommended decision of the Office of Administrative Law, as well as the eleven Decisions on Motion related to these tenure charges. The Commissioner directs that the herein tenure charges against John Eberly be dismissed with prejudice. It is further directed that the Board of Education of the Township of Ewing forthwith reinstate John Eberly to his former teaching position, together with all back pay withheld, fringe benefits, annual salary and/or adjustment increments and all other emoluments due and owing as a consequence of these proceedings. The Commissioner further directs that respondent's annual salary and/or adjustment increment be restored, thereby disposing of the matter in John Eberly v. Board of Education of the Township of Ewing, Mercer County, OAL DKT. NO. EDU 8262-86.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 6, 1987

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

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN EBERLY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION ON MOTION
EWING, MERCER COUNTY.	:	
	:	

For the Petitioner, David W. Carroll, Esq.

For the Respondent, Greenberg & Prior
(Karen L. Jordan, Esq., of Counsel)

This matter was opened before the Commissioner on March 30, 1987 by counsel for the Board through a Motion for a Stay of the Commissioner's decision as it affects the suspension of John Eberly, respondent herein and tenured teaching staff member of the Board herein, following the Commissioner's decision dated March 6, 1987, which reinstated respondent with full back pay and emoluments effective the samesaid date; and

The arguments of the parties have been made in their respective briefs; and

The Commissioner noting the Board's argument that the Commissioner's directive that respondent be reinstated to his teaching position with back pay and all increments restored should be stayed pending a State Board decision on the appeal itself

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

pursuant to N.J.A.C. 6:2-1.6 and N.J.S.A. 18A:6-14, the latter of which states in pertinent part:

> Should the charge be dismissed [by the Commissioner] and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. (Board's Letter Brief in Support of Stay, at p. 2); and

The Commissioner also noting the Board's argument that because the above statute expressly authorizes a board to suspend a teacher from his teaching duties pending a hearing and determination of the charges pursuant to N.J.S.A. 18A:6-10 et seq., it is also clear from N.J.S.A. 18A:6-14 that the local board has the right to continue that suspension pending an appeal of the Commissioner's decision in the matter; and

The Commissioner also noting the Board's argument that the stay should be granted inasmuch as no harm inures to respondent herein since the statutory scheme also provides that the teacher is protected by the continuation of his salary during the appeal of the Commissioner's decision and, further, that if the stay is denied there will be detrimental and disruptive impact on the education of the students in respondent's classes, the school and the district as a whole; and

The Commissioner also noting the Board's argument that nothing in the language of the statute supports a conclusion that the suspension and salary rules change when the suspension is continued on appeal and further, that while respondent can readily be made whole monetarily if he prevails on appeal, if the stay is

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

denied it would be much more difficult for the Board to recoup monies which were paid to respondent if he prevails on appeal, unless, in the alternative, such monies are escrowed pending the outcome of said appeal; and

The Commissioner noting respondent both opposes the Request for Stay, arguing that the Board has failed to meet the appropriate standard for granting a stay and at the same time disputes the Board's interpretation of N.J.S.A. 18A:6-14; and

The Commissioner having reviewed the respective arguments of the parties and the standard of review as to granting or denying the stay and also having considered the exact language of N.J.S.A. 18A:6-14, which states:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless

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

and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension; and

The Commissioner expressly noting that since the Legislature used the phrase, "Should the charge be dismissed and the suspension be continued," and since it is clear upon a reading of the entirety of N.J.S.A. 18A:6-14 that the originator of such a suspension is the board, it is the intent of the Legislature that the board of education is empowered to decide whether to continue the suspension of the tenured teacher in question during the pendency of appeal of a decision of the Commissioner of Education reinstating said tenured teaching staff member; and

On the other hand, the Commissioner noting that a close examination of the prior sentence of N.J.S.A. 18A:6-14 states, "Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension"; and

Notwithstanding that the Legislature grants a board the right to continue a suspension until exhaustion of appeals, the statute also provides within the same sentence that the "full pay or salary of such person shall continue until the determination of the appeal." (emphasis supplied) A close reading of the statute convinces the Commissioner that "full pay" must be construed by virtue of the previous sentence to interpret "full pay" to mean as that sentence provides "from the first day of such suspension" (emphasis supplied); and

The Commissioner having determined that such disposition provides proper recognition of a final decision of the Commissioner

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

of Education as a binding determination pursuant to N.J.S.A. 18A:6-25, thus, entitling a teaching staff member against whom tenure charges are dismissed by the Commissioner to the monetary benefits of such determination except as otherwise provided in N.J.S.A. 18A:6-14; now therefore

The Commissioner directs that should the Board herein determine to continue the instant suspension, it is nevertheless required to compensate respondent herein the full amounts due him as a result of the final decision of the Commissioner dismissing the tenure charges against him, including the 150 days' pay withheld during his initial suspension, as well as any benefits and emoluments that flow from full restoration of salary, less mitigation; and

Further, while the Commissioner finds no necessity to comment on the Board's prerogative as to continuing its suspension of respondent during appeal, the Board's request for a stay of monetary reimbursement or, in the alternative, escrow of such monies, is denied.

IT IS SO ORDERED this 13TH day of April 1987.

COMMISSIONER OF EDUCATION

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

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN EBERLY, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
EWING, MERCER COUNTY.	:	
	:	

Decision by the Commissioner of Education, March 6, 1987

Decision on motion by the Commissioner of Education, April 13, 1987

Decision on motion by the State Board of Education, July 1, 1987

For the Petitioner-Appellant, David W. Carroll, Esq.

For the Respondent-Respondent, Greenberg, Kelly and Prior (Karen Jordan, Esq., of Counsel)

This is a case involving tenure charges of unbecoming conduct based on allegations of improper sexual contact by Respondent, a tenured teacher of social studies, in his service as a "Big Brother" to S.M., a minor child. Based on inconsistencies and contradictions in the testimony of the witnesses, as well as on his observation of their demeanor, the Administrative Law Judge (ALJ) found that the charge was not supported by a preponderance of credible evidence, and ordered dismissal of the charge with prejudice. The Commissioner "affirmed" the recommended decision with supplementation.

In "affirming" the ALJ's determination, the Commissioner judged that "...the pivotal issue in this matter turns upon the findings of fact as they relate to the credibility of the witnesses who testified at the hearing." Commissioner's decision, at 45. In reaching his decision in the matter, the Commissioner, relying on Parker v. Dornbierer, 140 N.J. Super. 185 (App. Div. 1876), found "...no basis [in the record that he reviewed] for overturning the credibility determination that formed the foundation of the ALJ's decision." Commissioner's decision, at 46. In reaching this conclusion, the Commissioner emphasized that "[a]bsent substantial credible evidence in the record contrary to the findings of the ALJ, the Commissioner will not disturb the ALJ's determination."

We reverse and remand since we determine that the Commissioner applied the wrong standard of review to the findings of the ALJ. In the Matter of the Tenure Hearing of Patrick Caporasa, Docket #A-4558-85T6 (App. Div. March 19, 1987). As emphasized by

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

the court in Caporasa, the Commissioner is charged with the responsibility of making final decisions in contested cases when acting pursuant to N.J.S.A. 18A:6-9. That responsibility requires that he determine the facts, as well as make conclusions of law. In Re Uniform Adm. Procedures Rules, 90 N.J. 85 (1982). Accordingly, the Commissioner's responsibility for review is not identical to an appellate court. Caporasa, supra.

Further, we emphasize that although the Commissioner should accord due consideration to the fact that the ALJ had the opportunity to observe the parties and their witnesses, c.f. Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 42, 50-54 (1962), Board of Education of the Village of Ridgewood v. Barry Deetz, Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 321 (1986), the Commissioner is not required to adopt the ALJ's assessments of the substance of the witnesses' testimony or his evaluation of objective factors bearing on credibility, such as relationships between parties and witnesses. Board of Education of the Village of Ridgewood v. Barry Deetz, supra.

Moreover although the Commissioner may properly adopt the findings of the ALJ, he must read and consider all evidence presented, including the relevant portions of the transcript. In the Matter of Raymond Morrison, 216 N.J. Super. 143 (App. Div. 1987).[1] Our own review of the transcripts revealed that a significant portion of the testimony of S.M. was not included in the transcripts reviewed by the Commissioner. We direct on remand that the Commissioner review all material portions of the transcript in accord with the principles ennunciated in In the Matter of Raymond Morrison, supra.

August 5, 1987

---

[1]We note that the responsibility of the Commissioner in reviewing the transcript may be fulfilled through "responsible delegation." In the Matter of Raymond Morrison, supra, at 158.

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

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN EBERLY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION ON REMAND
EWING, MERCER COUNTY.	:	
	:	

For the Board, David W. Carroll, Esq.

For the Respondent, Greenberg & Prior (James F. Schwerin, Esq., of Counsel)

This matter has been reversed and remanded to the Commissioner of Education from the State Board of Education, decided August 5, 1987, which determined that the Commissioner applied the wrong standard of review to the findings of the ALJ, citing In the Matter of the Tenure Hearing of Patrick Caporaso, School District of the Township of Belleville, Essex County, decided by the Commissioner October 15, 1985, aff'd State Board May 7, 1986, rev'd/rem'd to the Commissioner N.J. Superior Court, Appellate Division March 19, 1987, Docket No. A-4558-85T6. In that case the Court held that the Commissioner and the State Board of Education erred in applying that standard of review of contested cases enunciated by the Court in Mayflower Securities v. Bureau of Securities, 64 N.J. 85 (1973). In remanding the instant matter the State Board emphasized that

> ***although the Commissioner should accord due consideration to the fact that the ALJ had the opportunity to observe the parties and their witnesses, c.f. Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 42, 50-54 (1962), Board of Education of the Village of Ridgewood v. Barry Deetz, Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 321 (1986), the Commissioner is not required to adopt the ALJ's assessments of the substance of the witnesses' testimony or his evaluation of objective factors bearing on credibility, such as relationships between parties and witnesses. Board of Education of the Village of Ridgewood v. Barry Deetz, supra. (Slip Opinion, at pp. 2-3)

On remand the State Board also directed that "the Commissioner review all material portions of the transcript in accord with the principles ennunciated (sic) in In the Matter of Raymond Morrison [216 N.J. Super. 143 (App. Div. 1987)]." (Id., at p. 3)

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

Consequently, the Commissioner has undertaken another review of this matter in conformity with directives embodied in the State Board remand. In doing so the Commissioner relies on the cases cited by the State Board and also on the standard of review of contested cases set down by the New Jersey Supreme Court in In re Masiello, 25 N.J. 590 (1958) which reads in pertinent part as follows:

> [The Commissioner] "[i]n reaching his determination *** must *** give due weight to the nature of the findings below, although his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated." Laba v. Board of Education of Newark, supra, 23 N.J. at page 382. More definitively, this means that the burden of the Commissioner is to weigh the evidence and to make an independent finding of fact on the record presented; and in the process of reaching that finding, he should give due regard to the opportunity of the hearer below to observe the witnesses and to evaluate their credibility. Cf. R.R. 1:5-4(b). (at 606)

For the purpose of this review of the record of this contested matter, the Commissioner also relies on the specific provision of N.J.S.A. 52:14B-10(d) which states in pertinent part:

> ***The final decision may incorporate by reference any or all of the recommendations of the administrative law judge.***

Initially the Commissioner notes that the Board's exceptions to the initial decision and its appeal brief filed before the State Board of Education, along with the reply briefs thereto submitted by respondent, are incorporated herein by reference as part of the record before him in his review on remand.

In its Exceptions Brief the Board first avers:

> THE COMMISSIONER OF EDUCATION, NOT THE ALJ, IS THE PRIMARY FACTFINDER, AND THE COMMISSIONER HAS BROAD AUTHORITY, BASED ON THE ENTIRE RECORD, TO ADOPT, REJECT OR MODIFY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE ALJ. (at p. 2)

Under this exception, the Board argues that the Commissioner applied an appellate standard of review of a final agency decision, not an agency's review of the ALJ's decision in his consideration of the ALJ's decision below. The Commissioner finds and determines that Point I of the Board's exceptions pertaining to the appropriate standard of review applicable to the Commissioner's review of the initial decision has been resolved by the Appellate

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

Division's decision in In re Caporaso, supra, which issued from the Appellate Division after the Commissioner rendered his decision in the instant matter. Consequently, the aforestated case citations now form the basis for the Commissioner's review of the instant matter.

The Board's Point One also contends that N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-16.3(e) require that "the Commissioner receive[s] and review[s] the entire record, of which the ALJ decision is only a part." (emphasis in text) (Id., at p. 2) Concerning this argument and the notation of the State Board in its remand regarding the completeness of the transcripts that were before the Commissioner in rendering his decision dated March 6, 1987, said review was entirely in compliance with the above-stated statute and code. Black's Law Dictionary, rev. 4th ed. 1968, defines "record" as follows:

> ***[T]he history of the proceedings on the trial of the action below, (with the pleadings, offers, objections to evidence, rulings of the court, exceptions, charge, etc.,) in so far as the same appears in the record furnished *** in the paperbooks or other transcripts.***
> (emphasis supplied) (at 1438)

Notwithstanding the technical basis for the remand from the State Board herein due to the Commissioner's citing the wrong case for the standard of review appropriate to such matters, the Commissioner carefully reviewed each and every document and transcript furnished him in the record of the matter before the ALJ, as well as all arguments posited in each brief submitted by the parties. Moreover, this second independent review, as well as that review conducted by the Commissioner in the preparation of his decision dated March 6, 1987, is in accord with the dictates of Morrison, supra. Therein the Appellate Court emphasized the responsibility of the parties to provide to the reviewing authority those transcripts to which they wish his/her attention to be drawn. The Court stated:

> ***Morrison should have provided the Commission with the portions of the transcript relevant to the exceptions which he filed so that it could have reviewed them. Since he failed to do so, no duty arose for the Commission (or its delegate) to review them before deciding on a course of action regarding the findings and recommendations of the ALJ. (at 159)

The Commissioner notes that a transcript of an entire day's testimony was neither listed on the inventory sheet forwarded to him from OAL nor was it in the record presented to him for review. Upon his independent inquiry, which he was not required to undertake, (Morrison, supra) he received a copy of the transcript of the

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

hearing of May 15, 1986 from the reporting service, albeit with some pages missing. The substance of that "missing" testimony of S.M. referred to in the State Board's decision, including that which the Board considered relevant to its exceptions, was available to the ALJ and to the Commissioner however through the post-hearing submission of the Board, the sworn deposition of S.M., taken two weeks before the hearing at OAL, which it is noted is also cited in the Board's post-hearing papers, and also through the documents proffered as exhibits in the case. See also B.C., on his own behalf and on behalf of his minor son, C.C. v. Board of Education, Cumberland Regional School District and New Jersey State Interscholastic Athletic Association, N.J. Superior Court, Appellate Division September 23, 1987, Docket No. A-5637-85T8.

Notwithstanding the above and the missing pages having since been supplied by Board counsel, the Commissioner will now consider the remaining arguments posited by the parties in this matter.

Point Two of the Board's Exceptions Brief states:

> THE ALJ'S DECISION IS FUNDAMENTALLY FLAWED BECAUSE OF THE FAILURE TO EVEN MENTION, MUCH LESS DISCUSS, A SUBSTANTIAL BODY OF THE EVIDENCE; BECAUSE OF THE FAILURE TO MAKE SPECIFIC FINDINGS OF FACT AS REQUIRED BY LAW; BECAUSE OF INCONSISTENCIES BETWEEN THE FINDINGS IN THE WRITTEN DECISION AND THE FINDINGS MADE ORALLY AT THE HEARING; BECAUSE OF ERRORS IN THE DECISION'S RECITATION OF THE EVIDENCE, AND ULTIMATELY, BECAUSE AN INDEPENDENT REVIEW OF THE RECORD LEADS TO RADICALLY DIFFERENT CREDIBILITY DETERMINATIONS THAN THOSE RECOMMENDED IN THE DECISION. (at p. 7)

Citing State, Dept. of Health v. Tegnazian, 194 N.J. Super. 435, 450 (App. Div. 1984), quoting with approval from Steward v. Sec. of Health, Ed. & Welfare, 714 F. 2d 287, 290 (3d Cir. 1983), the Board avers that case law requires that both the ALJ and the Commissioner set forth

> ***"not only an expression of the evidence [they] considered [which] supports the result, but also some indication of the evidence which was rejected. In the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored."*** (Board's Exceptions, at p. 7)

The Board charges that:

> [T]he ALJ cannot disregard evidence, and where there are conflicts it is the fact finder's duty to set forth both sides and then resolve the

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

> conflicts through appropriately detailed findings. Id., 194 NJ Super at 446-447, 448-449. (Id., at p. 7)

The Commissioner does not agree. To require the Commissioner to explicate each and every basis for his determinations, whether it be in affirming, rejecting or modifying the findings of the ALJ, would eviscerate the role of the Office of Administrative Law as fact finder and, also, would be unduly burdensome to the efficient management of cases before the Commissioner. The Court in Morrison, supra, suggests a balance be struck:

> In Public Advocate Dep't. v. Public Utilities Bd., 189 N.J. Super. 491 (App. Div. 1983) the Hackensack Water Company filed a petition for a rate increase with the Board of Public Utilities. The case was heard by an ALJ who issued an initial decision. Thereafter, the Board issued a final decision which differed from the ALJ's decision in many significant respects. Id. at 498. On appeal, Rate Counsel contended that "an administrative agency, when rejecting the findings of an administrative law judge, must, in specific terms, point out where it disagrees with the ALJ and why." Id. In rejecting this argument there we held that the head of an administrative agency need not specifically address each and every point of disagreement. Rather, the "decision must demonstrate that the agency gave attentive consideration to the ALJ's recommendation as part of the record and address itself to the key items of evidence which were crucial to its decision..." Id. at 506 (citing New Jersey Bell Tel. Co. v. State, 162 N.J. Super. 60, 77 (App. Div. 1978)). (emphasis supplied) (at 158)

The Court in Morrison further stated that where a party elects to cite to the transcript in excepting to the initial decision, the agency must be provided with those parts of the transcript referred to in exceptions. The agency "must then review those portions [of the transcript] which relate to material issues which are raised by the exceptions." (emphasis supplied)(at 157-158) That the Board herein disagrees with the extent of the ALJ's and the Commissioner's recitation and discussion of the material issues in the initial decision is found to be unreasonable because neither the ALJ, nor the Commissioner in his independent review of the ALJ's findings, is required to set forth each and every portion of the record upon which determinations were based so long as those conclusions they did reach were supported by a preponderance of the credible evidence and did dispose of the material issues. The Commissioner is satisfied that the ALJ's initial decision in this

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

matter fully met the above requirements. Notwithstanding this finding and for the sake of further clarification, the Commissioner provides still further explication of the review of the initial decision that lead to his affirmance of it in his decision dated March 6, 1987 as follows.

As an example of its allegation in Exception II that there are "glaring omissions in the initial decision" the Board excepts to the ALJ's analysis of respondent's prior statements, averring that it was not detailed in evaluating the witnesses' credibility. The Board suggests consideration of said statements is "crucial." It further argues that

> a key part of the Board's case, and a key test of respondent's credibility, are the incriminating admissions and prior inconsistent statements of John Eberly, including at one point, an actual confession.***
>
> Some of respondent's prior statements are important in that they directly support the charges; others are important, not so much as direct proof, but as checks on the consistency of respondent's story over time.***
>
> (Exceptions, at p. 8)

The Commissioner notes for the record that neither the Board's exceptions nor respondent's replies thereto are consistent in citing specific segments from the transcripts of the hearing in support of its arguments. Rather, they sometimes refer the Commissioner's attention to the post-hearing submission of the parties wherein such transcript citations may or may not have appeared. This, the Commissioner finds, is not in keeping with the dictates of Morrison, supra.

The Commissioner notes that the Board avers a confession was made by respondent to Detective Armitage during the post-polygraph interview. It is further alleged that on the next day, at an interview conducted by Detective Battershell, who based his interview questions on the statements respondent allegedly made to Detective Armitage the day before, respondent made further incriminating admissions.

Respondent denies categorically any wrongdoing. (See Tr. V-81) Respondent avers any admissions or inculpatory statements were coerced. (Tr. III-40-41) It is also evident that the testimony of Detective Armitage is directly contrary to that of respondent. Detective Armitage testified that he did not coerce respondent but rather "continued confronting him with the truth***." (Tr. IV-39)

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

Like the ALJ, the Commissioner found the testimony of Detective Armitage to be incredible with respect to any confessions purportedly made by respondent. It is clearly established in the record that Mr. Eberly was in such a depressed state at the time of the polygraph test as to require psychiatric care and medication. (Tr. III-64; Tr. II-118-119) Both factors could have affected the results of the test. Moreover, while respondent has stated he recalls little of the post-test replies he gave, he "will remember until the day I die" (Tr. III-4) that Detective Armitage "badgered and pressured" (Id. at 73), "threatened" (Id. at 48) and coerced him during that segment of the test. In rebuttal to these allegations of coercion, Detective Armitage testified, "I continued confronting him with the truth***." (Tr. IV-39) Upon his independent review of the testimony of both witnesses and the ALJ's findings, the Commissioner is convinced, as was the ALJ, that the ring of truth as to the conditions that actually prevailed during the post-test interview lies in respondent's statements as to what transpired during that polygraph test and interviews.

This conclusion is bolstered by the fact that the post-test consent form was not signed. It is undisputed that the polygraph examination included a consent form which provided that respondent was not required to submit to the polygraph but did so with full knowledge and voluntarily. It is further undisputed that respondent did not sign the post-examination portion of the Consent Form, which provided:

> This examination (test) was conducted at _____ on the above date. Having submitted myself freely to this examination (test), I hereby re-affirm my agreement as expressed above. I swear that during said examination (test), I was well treated and remained of my own free will, knowing that I could leave at any time I so desired. I also swear and certify that there were no threats, and/or harm done to me, or any promises made to me during the entire time I have been there, either in connection with the examination (test) or the signing of this form.
>
> _____ _____ _____ _____
> Witness Date Seal Signature of Examinee Date

(See Tr. III-47) (Initial Decision, ante)

Notwithstanding the contention of the Board that said signature is not required by law, the Commissioner strongly agrees with the ALJ that the absence of respondent's signature on the post-test consent form is fatal to the admissibility of any testimony or evidence concerning that portion of the test which respondent avers to have been coerced. The Commissioner dismisses as being without merit the Board's argument that "it is incredible

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

to throw out this key evidence because a single 'i' was not dotted by Detective Armitage." (Exceptions, at p. 20) Rather, the Commissioner agrees with the ALJ who stated:

> Similarly, I FIND the testimony of Detective Armitage to be incredible with respect to the post-polygraph admissions purportedly made by respondent. The evidence clearly demonstrates that neither Armitage nor respondent signed the post-polygraph test Consent Form (p. 19), a fact not successfully explained by Armitage on the record. The execution of the post-test portion of the Consent Form is not merely ministerial in nature but, rather, provides substance to any and all post-test admissions made to the examiner by an examinee. The lack of proper execution defeats any and all post-test admissions purportedly made to Armitage by respondent and, therefore, is to be disregarded.
>
> Notwithstanding that this tribunal found respondent's credibility to be wanting upon this limited issue of whether or not Armitage could be permitted to testify with respect to respondent's pre and post-test admissions, the facts now demonstrate that respondent's testimony was more credible than Detective Armitage's testimony. I so FIND and CONCLUDE. (emphasis supplied)
>
> (Initial Decision, ante)

Similarly, the Commissioner questions the reliability of the testimony of Detective Battershell and the exhibit marked P-10 in evidence. P-10 represents not a certified stenographic transcription of the questions and answers adduced at the interview, conducted at respondent's then-counsel's offices the day after the polygraph test, but rather Detective Battershell's own investigative report stating his recollection of the questions and answers posed to respondent on February 16, 1984, the day after the polygraph test was administered. The Commissioner finds such report, while admissible, of little probative value, first, because respondent's attorney, Ms. Lanctot, the only other eyewitness, was not called on either side as a witness to attest to the veracity or falsity of the document's content. Moreover, Detective Battershell's knowledge like that of Ms. McGrath and Ms. Kowalewski is essentially hearsay based upon that which P.M., S.M. and Detective Armitage told him. For these reasons the Commissioner finds and concludes that such document and testimony do not constitute reliable evidence of admissions on respondent's part.

The Board's Exception II to the initial decision further avers that the analysis of the testimony of and documents brought to the record by the other collateral witnesses for the Board, that of Dr. Sohn, Leslie McGrath, and Bucks County Children and Youth Services was either scant or omitted.

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

The Commissioner concurs emphatically with the Board's own statement at page 47 of its appeal brief "mere opinions of professional and lay witnesses who were not present, about what happened alone between [S.M.] and respondent, and about which one of them is lying, are not particularly probative or entitled to much weight.***" (emphasis in text) The Board suggests that the testimony of the professionals whom it called as witnesses, allegedly to counterbalance testimony by character witnesses called by respondent, such as Mrs. Poland and Richard Ghidro, contains "important evidence on relevant facts of which they had direct personal knowledge***" that are significantly probative "on the ultimate issues in dispute." (Board's Appeal Brief, at p. 48) In the Commissioner's opinion, this argument is of dubious merit. The Board suggests the following are "facts" that impact on the ultimate issues of the case.

> For example, Leslie McGrath, the social worker who matched [S.M.] and respondent and met frequently with both of them and with [his mother P.M.], both before and after the allegations came [to] light, kept detailed records of the relationship, and her records contain important contemporaneous statements by [S.M.], by respondent and [P.M.] both before and at the time the allegations came to light. Those statements strongly negate any ill will, bias or motive to lie on the part of either [P.M.] [or] [S.M.]; and clearly establish that both genuinely liked respondent and that respondent too was impressed with [P.M.] as a mother. P-1 at 29-30; 33-34; 37-38; T II 23 to T 11 27. It is further clear from these records that even after the incidents came to light, [P.M.]'s first and only desire was to terminate the relationship. She had no thoughts of anger or punishing respondent until much later, when she realized how much [S.M.] had been hurt emotionally by the indecent touchings. Compare P-1 at 44-45, 55 with P-1 at 101; see also T I 85-23 to 24 and P-27.
>
> (Board's Appeal Brief, at p. 48)

The Board suggests "the views and objectivity" (Exceptions, at p. 10) of these witnesses are evidential in determining credibility facts. The Commissioner would suggest that the Board is inferring from such testimony its version of the facts from the opinions of witnesses who, as he stated in his earlier decision knew little of the actual circumstances between S.M. and respondent. He reiterates that which he suggested in his decision dated March 6, 1987 regarding the testimony of such "professionals," that is, that while both sides brought forward witnesses who had no "axe to grind" (Board's Exceptions, at p. 10), neither were their opinions more than conclusions based upon personal hypotheses or theories as to respondent's actions and motives since there were no eyewitnesses to

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

the allegations made by S.M. against respondent. He so finds recognizing that such evidence and testimony is largely hearsay and thus of little probative value in assessing credibility. (See also Commissioner's Decision, ante.)

By way of clarification of this point, the Commissioner notes that both Dr. Reinhart, respondent's psychiatrist, and Dr. Sohn, S.M.'s psychologist, testified that they believed their respective clients were telling them the truth in relating their interpretations of the facts underlying the charges herein. Both professionals were convinced of the veracity of their client's statements.

Dr. Reinhart stated:

A A psychiatrist has no absolute way of determining that his patient is telling the truth. But I do believe that in the course of on-going treatment of a patient a psychiatrist does have opportunity to make valid determinations about his patient. In this instance I feel strongly that this man has been candid and totally honest in his presentation of himself to me. (Tr. V-34-35)

Dr. Sohn stated:

Q You accepted what S.M. told you in terms of his being truthful about what happened with the Big Brother?

A Yes.

Q You didn't challenge it in any way?

A Challenge it meaning did I talk to him about it and try and pursue whether this really happened or not?

Q Yes.

A We talked about it in the very beginning in that regard and I judged based on not just what he said but how he was acting that something had occurred. (Tr. IV-99-100)

However, at deposition, Dr. Sohn further stated:

A What I mean is that [S.M.] was quite often the victim in the sense that he would not -- he did not see himself as a person in control of his

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

life. Things just happened to him rather than him accepting responsibility, feeling that there was some control that he had over things.

Q I show you some more notes dated 1/28/82. There's a line across the middle of the page.

I'm going to ask you to read that into the record, the part below the line.

A "[S.M.] lied to Mother three times this week. She says she was furious. However, she has begun to realize that she has to be tough." (P-30, at p. 22)

Thus, while the testimony of Dr. Sohn indicates that he believed, in 1982, that S.M. was being truthful with him, there is basis to believe that S.M. on more than one occasion lied as an avoidance technique. Further, by 1983, Dr. Sohn's testimony becomes increasingly unreliable in that S.M. himself denied information proffered in Dr. Sohn's testimony, that is, that respondent took nude pictures of S.M. (See R-9, at p. 35) S.M., by contrast, denied ever having said that to Dr. Sohn:

Q Did you ever tell anybody that John Eberly took pictures of you when you were naked?

A No.

Q Never?

A Never.

Q Did he ever take pictures of you when you were naked?

A No. (R-9, at p. 35)

Thus, while the Commissioner attributes little weight to the testimony and documents proffered by the collateral witness as to whether the conduct averred by S.M. to have taken place between him and respondent did in fact occur, the Commissioner did consider and weigh such testimony as that of Dr. Sohn in evaluating bias, motive and reliability of the testimony of the principal witnesses, including S.M. and P.M. In this regard, he finds that Dr. Sohn's testimony establishes that S.M.'s testimony as to what happened is less reliable than that of respondent because S.M. apparently had a history of lying.

As to the testimony of P.M., the Commissioner has again carefully perused the record for indicia that would lead him to a credibility finding different from that of the ALJ. He is convinced the ALJ's evaluation of her credibility is accurate. In addition to the reservations expressed in his earlier decision concerning why a

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

mother, concerned for her child's safety, would continue to permit overnight visits or even contemplate permitting that child to vacation out-of-state with an individual about whom she was suspicious, the Commissioner juxtaposes the inquiry, why would respondent risk suspicion as to his motive in walking into the family's bathroom while S.M. was showering having walked right past his mother upstairs to the bathroom if his intentions were anything other than innocent? Neither has it escaped the Commissioner's attention that S.M.'s younger brother had been molested by another individual after respondent was alleged to have improperly touched S.M. in the shower. That the mother of both children did nothing by way of action or allegation against respondent until after the incident concerning T.M. leads the Commissioner to question the mother's judgment concerning respondent's behavior toward S.M. Was she overwrought, suspicious of all male contacts with her sons following the episodes between T.M. and Charlie Grover? (See Initial Decision, ante; see also Tr. I-46-47.)

Further, of particular concern in the record was the mother's nearly hysterical, "overbearing" character. (Initial Decision, ante) The Board itself acknowledges in its exceptions that "there is evidence that [P.M.] was an overbearing mother." (Exceptions, at p. 12) S.M.'s own psychologist, Dr. Sohn, testified in deposition that part of S.M.'s problems in 1982 were related to his mother's overprotectiveness. (See P-30, at pp. 17-18.) In speaking of P.M.'s relationship with S.M., Dr. Sohn stated:

> A ***She had great difficulty believing that [S.M.] needed to do things on his own and always wanted to rescue him as I indicated previously. She could not come to grips with that notion that she had to turn it over to [S.M.] and what I did with Mother was to emphasize the avoidance that [S.M.] used, his way of not owning a problem by telling her that he would not tell her the truth about what was needed to be done in school and he was lying to her. In that way, it would get her to be more motivated to force him to do what was necessary.
>
> Q I want to make sure I'm getting this straight.
>
> Are you in effect telling me that he was lying to her by not telling her about his problems in school, that kind of thing or is that --
>
> A I was using that -- I was saying that to her. He was avoiding and just not doing them. I wanted it to come across as strong as I could to her to motivate her. (P-30, at pp. 20-21)

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

Dr. Sohn further testified as follows:

> A With a great deal of reluctance, [S.M.] had mentioned to me that he had had some incidents with Big Brother John. He described incidents of being washed in the shower, being undressed by him and also being photographed by him.
>
> Q Photographed dressed or undressed?
>
> A Undressed.
>
> (P-30, at p. 34)(See also Tr. IV-103.)

The Commissioner finds such inconsistencies not only cast doubt on the credibility of Dr. Sohn and of S.M. but also raise questions as to the bias, motive or interest of P.M., an area the Board avers lacked careful analysis in the ALJ's and Commissioner's decisions. The Commissioner finds, without engaging in a "psychological foray into personality theory" (Board's Exceptions, at p. 12), that P.M. may very well have compelled S.M. to make state- ments that either embellished what may have been innocent gestures on respondent's part or in fact were blatant falsehoods to accom- plish the purposes, goals and duties she felt as an "overprotective" mother.

Accordingly, the Commissioner must agree with the ALJ that little weight is due the testimony of the professionals in the matter called to testify as to their opinions of what transpired between S.M. and respondent. Upon his independent review of the record, the Commissioner further finds P.M. incredible as well as Detective Battershell and Detective Armitage.

Having thus reduced the matter to a comparison of the testimony adduced from S.M. and respondent, the Commissioner finds that respondent's version of the facts is the more credible.

He reiterates the above analysis of the collateral witnesses in support of this conclusion. The testimony of P.M. and Dr. Sohn casts doubt on S.M.'s emotional stability as well as that of the mother. Dr. Sohn's testimony further indicates that S.M. was known to lie. On the other hand, the Commissioner finds convincing the testimony of Richard Ghidro, another of respondent's Little Brothers, wherein he stated that it was, in fact, S.M. who preferred and requested to sleep in respondent's bedroom instead of in one of the rooms occupied by the other boys which is in accord with respondent's testimony. (See Tr. VI-51-53.)

> Q Did you ever talk to [S.M.] at all about where he might sleep in the house?
>
> A Yes.

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

Q Was there a room in that house that was -- you considered your room?

A Yes, there was.

Q And did the subject of whether [S.M.] could use that room ever come up between you and [S.M.]?

A Yes.

Q Can you recall that occasion, how it came about?

A Yes. Me and Scott were sleeping over and we were sleeping on the couches downstairs and [S.M.] was sleeping upstairs and I asked him if he wanted to use my bedroom and he said, no I will sleep in John's room.

Q You made it clear to him that was fine with you if he used your room?

A Yes.

Q And he turned you down?

A Yes.

Q Was there any more to the conversation than that?

A Well, me and Scott asked him why? He didn't give us an answer and that was it.

***

Q Did you ever get any notion about whether [S.M.] had a problem about sleeping alone or anything like that?

A Only from the fact he didn't want to sleep in my bedroom and he said he wanted to sleep in John's room. I figured he might be scared.

(Tr. VI-51-53)

S.M.'s testimony conflicts with Richard Ghidro's, both at the deposition and at the hearing:

Q Now, you slept in his room, is that right?

A Yes.

Q Did you want to sleep in his room?

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

A Well, yes, but I wanted to sleep another place, but he told me I couldn't.

Q Where did you want to sleep?

A Rich Ghidro's room.

Q I see.

THE COURT: Who?

THE WITNESS: Ghidro.

Q Did you ever talk to Rich about sleeping in his room?

A No.

Q Never?

A No.

Q Did you ever ask or speak to Mr. Eberly about sleeping in his bed, Mr. Eberly's bed?

A I'm not -- I don't think so, but I'm not sure about that.

Q How did it come about that you slept on the mattress?

A He asked me where I wanted to sleep and I -- he said I will bring out a mattress for you to sleep on the floor. So, I said okay.

Q Now, every time you slept over there you would start the night sleeping on the mattress?

A Yes.

Q Never started the night going into his bed, Mr. Eberly's bed?

A No.

Q Never?

A No. (Tr. I-149-150)

At deposition, S.M. testified:

Q When you stayed over at Mr. Eberly's house, did he ever offer you the use of Richard's room?

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

Do you know what room I am talking about when I say Richard's room?

A Yes.

Q Was this available to you as far as you know?

A Yes.

Q You could have slept there if you wanted to?

A He said it was Rich's room so I could have slept there but I wanted to, I asked him about it.

Q Did you ever ask Rich about whether that was his room and he would object to you sleeping there?

A No, I never asked Rich.

Q Mr. Eberly, how many times did you ask him and did he tell you that you couldn't use that room? Every time you slept there?

A No, I asked twice or three times.

Q Always the same response?

A Yes.

Q You can't use that room?

A Yes.

Q What did he say?

A He told me it's Rich's room and I couldn't use it, so I had to sleep on the floor.

(R-9, at pp. 69-70)

Respondent's testimony was consistent with Richard Ghidra's:

***I believe we went upstairs, again [S.M.] had been at my house and was familiar with it, and I asked [S.M.] where he wanted to sleep?

Q What did he say?

A He indicated that he wanted to sleep in my room in my bed.

Q He knew about the other bedrooms upstairs?

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

A Yes. I called it to his attention that night again.

Q Did you make those, either of them or both, available to him?

A Yes. My indication to him was he could sleep wherever he wished.

Q Were there any other options available to him?

A Yes. There was a room with a bed in it that Rich used when he was there and again the hide-a-bed couch downstairs.

Q What did he tell you?

A He told me that he wanted to sleep in my bed. (Tr. V-119)

The Commissioner finds again in this instance that respondent's recitation of the facts was more reliable than S.M.'s, particularly where respondent's testimony is corroborated by another witness, Richard Ghidro.

The Commissioner finds further erosion in the reliability of S.M.'s testimony in his blatant admission at hearing that he lied on the occasion when he was to testify against respondent in the criminal proceedings wherein he stated:

THE WITNESS: Yes, I did not remember then. After we got all done she got all the answer[s] to her questions she told me I did not have enough information to go into trial.

THE COURT: But you told the woman you could not remember?

THE WITNESS: Yes.

THE COURT: Is that correct?

THE WITNESS: Yes.

THE COURT: Was that the truth?

THE WITNESS: Yes. Well, no, it was not the truth.

THE COURT: It was not the truth?

THE WITNESS: Yes.

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

THE COURT: So, when you told the woman that you could not remember the fact is that you did remember, is that what you're saying at this point?

THE WITNESS: Yes.

THE COURT: Thank you, no further questions.
(Tr. I-185)

On the other hand, except where the Board avers that respondent "confessed" before Detective Armitage or made "admissions" before Detective Battershell that respondent had given rubdowns to S.M. while the child was without clothing, a point that S.M. himself denies (Tr. I-153), or that he fondled S.M.'s genital area under the pretext of checking for a temperature or to see if he were wet, the testimony of respondent has been at all junctures one of denial as to any improper touching whatsoever.

Q Did you ever touch [S.M.'s] genitals?

A I did not touch [S.M.'s] genitals at any time for any reason.

Q Did you ever touch [S.M.'s] privates by checking to see if he had wet the bed while he was asleep?

A I did not touch [S.M.'s] genitals, privates or whatever else you want to call them for any reason at any time.

Q When Detective Armitage wrote down that you had said that, that was an untrue statement?

A Call it what you may.

JUDGE LAW: Well, he is asking you, sir.

MR. SCHWERIN: Can we have clarification? Untrue that he did it or untrue that he said it.

MR. CARROLL: Untrue he did it.

A Untrue that he wrote it down?

Q Did you do it?

A Did I do it? Of course not.

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

Q And did you on another occasion while rubbing [S.M.], while rubbing his stomach because he complained of stomach problems accidentally hit his genitals?

A No.

Q That never occurred?

A No.

Q And you never told Detective Armitage that?

A I did not as far as I can recall.

Q And on February 16th did you tell Detective Battershell in response to a question about fondling [S.M.'s] genital area that you touched him to see if he was wet?

A I believe -- all right let me back up.

I have no recollection of those questions being asked me or my response to that particular question that meeting with Detective Battershell. I believe I so previously stated. (Tr. V-178-179)

Having determined that the testimony of both Detective Battershell and Detective Armitage is incredible, that S.M.'s testimony is more fraught with inconsistencies than respondent's and in light of the possible bias and motive discussed above in the testimony of P.M., the Commissioner adopts, based on his independent perusal of the record, the determinations of the ALJ as stated in the initial decision as amplified by the Commissioner's earlier decision dated March 6, 1987 and as supplemented herein.

The Commissioner would add that this is a case involving much conflicting testimony. Because the allegations concern incidents that occurred without eyewitnesses, the matter is made more difficult. In evaluating the testimony and evidence, it must be borne in mind that the burden of proof in a tenure matter lies with the Board to establish by a preponderance of credible evidence in the record that respondent is guilty of conduct unbecoming a teaching staff member. The ALJ below found that the principal witnesses on behalf of the Board were not credible. After conducting what now amounts to two independent reviews of the record and based upon all of the above, as well as that discussion expressed in his March 6, 1987 decision, the Commissioner is firmly convinced, as was the ALJ, that the Board has failed to meet its burden.

In a matter of this kind where credibility determinations are significant in assessing and assigning weight to testimony and documents proffered by a great number of witnesses, the Commissioner

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

has been mindful of his duty to give deference to the ALJ's findings, in that he had a first-hand opportunity to observe witnesses and to evaluate their credibility. See In re Masiello, supra, at 606. See also Quinlan, supra. He is also mindful of respondent's eighteen years of unblemished service in the teaching profession in New Jersey since 1969.

Accordingly, for the reasons stated in the initial decision as supplemented and modified concerning the appropriate standard of review herein, the Commissioner affirms the recommended decision of the Office of Administrative Law, as well as the eleven motions related to these tenure charges. The Commissioner directs that the herein tenure charges against John Eberly be dismissed with prejudice. It is further directed that the Board of Education of the Township of Ewing forthwith reinstate John Eberly to his former teaching position, if it has not already done so, together with all back pay withheld, fringe benefits, annual salary and/or adjustment increments and all other emoluments due and owing as a consequence of these proceedings. The Commissioner further directs that respondent's annual salary and/or adjustment increment be restored, thereby disposing of the matter in John Eberly v. Board of Education of the Township of Ewing, Mercer County, OAL DKT. NO. EDU 8262-86.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 21, 1987

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

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN EBERLY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION ON MOTION
EWING, MERCER COUNTY.	:	
	:	

For the Board, David W. Carroll, Esq.

For the Respondent, Greenberg & Prior (Karen L. Jordan, Esq., of Counsel)

This matter having been opened before the Commissioner on November 24, 1987 by counsel for the Board through a Motion for Stay of the Commissioner's Decision on Remand dated October 21, 1987, which reaffirmed his original decision in this tenure matter dated March 6, 1987 and again ordered respondent reinstated to his tenured teaching position with back pay and all increments restored effective October 21, 1987; and

The Commissioner noting the Board's previous Motion for Stay concerning the same issues on which the Commissioner rendered a Decision on Motion dated April 13, 1987 denying said Stay and on which the State Board of Education in a Decision on Motion dated July 1, 1987 granted the Ewing Township Board's Motion to Stay, reversing that portion of the Commissioner's decision of April 13, 1987 which directed payment of salary to respondent for the first 120 days of his suspension plus one month's salary withheld by

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

authority of the ALJ due to delays in hearing attributable to respondent but which further denied respondent's cross-motion for reversal of that portion of the Commissioner's April 13 Decision on Motion which permitted the Board to continue respondent's suspension during the pendency of the appeal to the State Board; and

The arguments of the parties on the instant Motion for Stay having been made in their respective briefs; and

The Commissioner noting the Board's argument that N.J.S.A. 18A:6-14 and 18A:6-9 require, during the pendency of an appeal to the State Board of a Commissioner's decision dismissing tenure charges, that respondent's salary should be continued along with his suspension but any other back pay should be stayed pending a final decision of the State Board, thus preserving the status quo pending the appeal; and

The Commissioner noting the Board's contention that should respondent prevail on appeal he can readily be made whole, including the five months' pay and a restoration of his increments, whereas if the stay is not granted and the Board ultimately prevails on appeal with a penalty of dismissal, respondent will have been unjustly enriched, necessitating arduous recoupment proceedings; and

The Commissioner noting the Board's conclusion that particularly in light of the State Board's July 1, 1987 Decision on Motion, the Commissioner should now stay his directive that respondent be paid all back salary and withheld increments, pending appeal; and

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

The Commissioner additionally noting respondent's argument that the Commissioner's decision in this matter should be enforced; and

The Commissioner noting respondent's argument that the doctrine of the law of the case should not control the Commissioner's decision on this Motion for Stay pending appeal because circumstances have changed inasmuch as the Board's earlier Motion for Stay and the Commissioner's Decision on Motion thereto were based on the Commissioner's determination of the case in chief dated March 6, 1987 and further that since July 1, 1987, the date of the State Board Decision on Motion, the case in chief has been remanded to the Commissioner for reconsideration using a different standard of review, thus requiring that this application for Stay of the Commissioner's Decision on Remand be considered anew; and

The Commissioner noting respondent's argument that the construction of the statute in question, N.J.S.A. 18A:6-14, as applied by the Commissioner in his earlier stay, is in conflict with at least two other provisions of school law, averring first that it is not clear whether the Board has authority to continue a suspension once there has been a final determination by the Commissioner of Education since only the Commissioner has authority to issue a final decision pursuant to N.J.S.A. 18A:6-9 and 6-25, and averring, moreover, that these two statutes require that a final decision is binding unless it is reversed on appeal and further because the language concerning the Board's ability to continue a suspension on appeal is permissive, not mandatory; and

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

The Commissioner noting respondent's argument that the Board cannot meet the standards for a Stay of the Commissioner's decision as set forth in such cases as Walldov v. Board of Education of the Township of East Brunswick, decided by the Commissioner May 10, 1985, Decision on Motion October 31, 1985, aff'd State Board November 6, 1985, dis. N.J. Superior Court, Appellate Division February 26, 1986 in that it is unlikely that the Board will succeed on the merits of its appeal since the Commissioner has twice exonerated him and that no irreparable harm will result to the district's educational program or otherwise in reinstating respondent in the middle of a school year nor in paying him back wages; and

The Commissioner noting respondent's argument that any harm to the Board is less than the harm to respondent if he is once again denied reinstatement, averring that it is unreasonable of the Board to insist that he be denied the benefit of a second Commissioner's decision in his favor and that there would be no harm to the public interest should the directive of the Commissioner be enforced; and

The Commissioner further noting respondent's conclusion that the Board's Motion for a Stay of the Commissioner's decision be denied; and

The Commissioner taking official notice of and incorporating herein the Petition of Appeal filed by Mr. Eberly on November 19, 1987 challenging the denial of his increment for the 1987-88 school year, the sole basis for which, he avers, is the pendency of the aforesaid tenure proceedings; and

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

The Commissioner noting Mr. Eberly's argument therein that the denial of the 1987-88 increment while tenure charges are pending amounts to a double penalty for the same alleged offense; and

The Commissioner noting Mr. Eberly's suggestion that the Commissioner's Decision on Remand dated October 21, 1987 in the instant tenure case be amended to add a provision restoring Mr. Eberly's increment for the 1987-88 school year, thus including this increment issue as part of the final decision of the Commissioner or on any appeals the Board of Education might pursue; and

The Commissioner further noting the Board's Answer to said Petition of Appeal averring that the grounds and proofs on the tenure charges are sufficient as a matter of law to uphold the Board's action to withhold Mr. Eberly's increment for 1987-88 and further agreeing to the suggestion of Mr. Eberly that an order issue from the Commissioner modifying the Commissioner's October 21, 1987 Decision on Remand provided that the order also make clear that the Board's previously filed Notice of Appeal and Motion for a Stay are applicable with respect to all increments withheld, including the 1987-88 school year; and

The Commissioner having reviewed the standard of review as to granting or denying a stay as well as having reviewed the exact language of the statutes in question; and

Inasmuch as the State Board, in its Decision on Motion in this matter dated July 1, 1987 reversed that portion of the Commissioner's Decision on Motion in this matter dated April 13,

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

1987 that directed payment of salary to respondent for the first 120 days of his suspension plus one month's salary withheld by authority of the Administrative Law Judge because of delays in hearing attributable to respondent and granted same, albeit without explanation as to the merits of the arguments raised by the Commissioner, thus providing no direction as to its rationale for its reversal, the Commissioner feels bound to grant the stay herein based upon the State Board's earlier precedent; and

The Commissioner further denies the suggestion of the parties to amend his Decision on Remand dated October 21, 1987 to add a provision restoring Mr. Eberly's increment for the 1987-88 school year because he explicitly anticipated and directed in the same decision that

> ***the Board of Education of the Township of Ewing forthwith reinstate John Eberly to his former teaching position, if it has not already done so, together with all back pay withheld, fringe benefits, annual salary and/or adjustment increments and all other emoluments due and owing as a consequence of these proceedings***
> (emphasis supplied) (Slip Opinion, at pp. 26-27)

thus including the restoration of any increments withheld for the 1987-88 school year; and

It is further noted that should the Commissioner's Decision on Remand be upheld by the State Board, all salary, emoluments and benefits for which Mr. Eberly would have been entitled had he not been the subject of the instant tenure charges will be restored by operation of statute N.J.S.A. 18A:6-14; now therefore

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

The Commissioner directs a Stay of his Decision on Remand dated October 21, 1987, pending appeal to the State Board, in conformity with the State Board's Decision on Motion dated July 1, 1987 concerning the instant appeal.

IT IS SO ORDERED this 8th day of December 1987.

COMMISSIONER OF EDUCATION

December 8, 1987

DATE OF MAILING - DECEMBER 8, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4338-86
AGENCY DKT. NO. 193-5/86

HARRY J. COTYK,
Petitioner,
v.
ESSEX COUNTY VOCATIONAL
BOARD OF EDUCATION,
Respondent.

Wayne J. Oppito, Esq., for petitioner

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

Record Closed: December 17, 1986 Decided: February 2, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

Harry J. Cotyk (petitioner) employed by the Essex County Vocational Board of Education (Board) as a cooperative industrial education coordinator claims the action of the Board taken by which a salary increment for 1986-87 was withheld from him is arbitrary, capricious and unreasonable in that the increment was withheld without a reasonable basis in fact and it was withheld in violation of the Board's own policy regarding evaluation of its professional staff. Petitioner seeks an Order from the Commissioner of Education by which the Board would be directed to grant him a 1986-87 salary increment. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted August 18, 1986 and the matter was scheduled and heard

New Jersey Is An Equal Opportunity Employer

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

November 6, 1986 at the Office of Administrative Law, Newark. The record closed December 17, 1986 upon receipt of the Board's letter memorandum in support of its position. A transcript of testimony at hearing is not part of this record.

ISSUE

On April 30, 1986, the superintendent advised petitioner in writing (J-6) as follows:

> Please be advised that on Monday, April 28, 1986 the Board of Education voted to withhold your salary adjustment and employment increment for the 1986-87 school year. Accordingly, your salary for the 1986-87 school year will be the same as the 1985-86 school year.
>
> The reasons for the withholding of the salary adjustment and employment increment are unacceptable classroom management and instruction, inability to demonstrate success in your methodology and techniques of job placement for students.

Teaching staff members, which by definition at N.J.S.A. 18A:1-1 includes petitioner as a cooperative industrial education coordinator, are not automatically entitled to salary increments. The determination to withhold salary increments is a matter of managerial prerogative which has been delegated by the Legislature to local boards of education. Bernards Twp. Bd. of Ed. v. Bernards Twp. Educ. Assoc., 79 N.J. 311, 321 (1971). N.J.S.A. 18A:29-14 provides in part:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment or the adjustment increment, or both, of any member in any year by recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action together with reasons therefor, to the member concerned
> * * *

The determination of an employing board of education to withhold salary increments from a teaching staff member may not be reversed unless the action is found to be arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). The only question open for review when a board withholds an increment is whether the board had a reasonable basis for its factual conclusions. One who challenges the action of a board to withhold a salary

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

increment carries the ultimate burden to demonstrate that the complained of withholding was arbitrary, capricious or unreasonable because the board did not have a reasonable basis for its factual conclusion and that he earned the salary increment. The scope of review under the Kopera standard is to determine whether the underlying facts were as those who made the evaluation claimed and whether it was reasonable to conclude as they did based upon those facts, bearing in mind that they are the experts, that the affected person did not earn a salary increment. If petitioner establishes the Board acted without a reasonable basis, such proof gives rise to the presumption he earned the controverted increment.

FACTS

The facts not in dispute between the parties and as established by a preponderance of credible evidence are these. The Board of Education operates five "campuses" or schoolhouses; Sussex Avenue, North 13th Street, Bloomfield, Irvington, and West Caldwell. During petitioner's 19 years employment with the Board, he had been a machine shop teacher and for the past 11 years he has been one of five cooperative industrial education coordinators employed by the Board. He is presently assigned to the Sussex Avenue schoolhouse where he was transferred in 1983 from the North 13th Street school which he had served as coordinator from 1975 to 1983. The Sussex Avenue school is located in downtown Newark. Petitioner, as cooperative industrial education coordinator, is obligated to coordinate efforts between school and industry to place senior pupils in part time jobs. He is also obligated to attract students to the cooperative industrial education program, teach related vocational subjects, and to locate potential positions of employment for seniors at local employers.

Dr. William Harvey, who assumed the superintendency of the Essex County Vocational Schools on January 1, 1984, testified that the Essex County Vocational School system serves the whole of Essex County with the purpose of educating young people to be contributing members of society by teachers training them in saleable skills. In this regard, Dr. Harvey testified that cooperative education is extremely important because the pupils in this program participate not only in schools but in gainful employment. Dr. Harvey explained that not only does cooperative industrial education assist pupils in the theorical learning process, it also provides them with the opportunity of acquiring and keeping jobs.

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

Dr. Harvey noted that when he became superintendent in January 1984, a critical problem he had to face was that only 25 percent of the senior pupils were being placed in jobs. Dr. Harvey found this percentage to be unacceptable in light of the purpose of the schools. During May 1984, Robert Fishbein was engaged by the Board to be the director of supplemental services. One of his major tasks, aside from his tasks in special education, pupil attendance, guidance, media and interscholastic activities, was to strengthen the cooperative industrial education program in terms of having more senior pupils placed in jobs. Fishbein, with the approval of the Board and the superintendent, prepared a five year plan (see J-13) by which senior job placement expectations were raised from the then existing 25 percent level to 50 percent for 1984-85, 60 percent for 1985-86, 70 percent for 1986-87, 80 percent for 1987-88, and 90 percent for 1989-90.

Fishbein provided assistance to all cooperative industrial education coordinators by way of meetings and workshops to implement this five year plan. He instituted a monthly reporting system in 1984-85 by which all cooperative industrial education coordinators reported to him the success rate of senior pupils being placed in gainful employment. At the very beginning of 1984-85 when the 50 percent quota was established as the standard to be met, Fishbein met with petitioner and all other coordinators and expressed concern over the then existing low rate of placement. Accordingly, all coordinators knew of the increasing quotas of senior pupil placements which had to be met over the next five years. In fact, going into the 1984-85 academic year, petitioner's rate of placement of seniors at the Sussex Avenue facility was among the lowest placement rates of the five schoolhouses and was a source of concern to both Fishbein and Dr. Harvey. His professional improvement plan for 1984-85 provided that petitioner should strive to establish new contacts for placement, aim to increase placement of seniors, and plan to teach five instead of two period of related vocational subjects to cooperative industrial education pupils. (J-15).

During the 1985-86 academic year, petitioner and all other cooperative industrial education coordinators knew they were bound by the 60 percent senior pupil job placement standard. They also knew that failure to achieve 60 percent pupil placement may result in no salary increment. On December 4, 1985, petitioner wrote to Fishbein and advised in part as follows:

> In my opinion specific objective number 1 discussed at our meeting on November 22, 1985 (60% placement of senior class) is unrealistic.

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

> I am being held accountable for the teaching done in the shops, the ability and/or desire of the students to learn, the attitude of the students and other factors over which I have no control.
>
> To withhold my increment for the actions of others is unfair to say the least.
>
> This is my eighteenth year with Essex County Vocational Schools and my eleventh year as a C.I.E. coordinator. During my seven years as coordinator at the North Thirteenth St. School I placed more students than any other coordinator in our system at that time * * *
>
> (J-2)

Dr. Harvey admits that the North 13th Street school coordinator always has a high rate of senior job placements. Nevertheless, his goal is to ensure that senior pupils in the cooperative industrial education program throughout the district receive skills necessary to acquire employment, secure employment, and learn how to retain employment.

During the course of 1985-86, Fishbein met with all coordinators regarding the then applicable 60 percent placement quota necessary for them to reach. He met individually with petitioner in September and again November, 1985 and he had group meetings with the coordinators in January, March and May 1986. The principal of the Sussex facility, Andre Haug, met with petitioner on November 7 and 22, December 7, 1985, March 8, April 7 and thereafter to follow up on Fishbein's meetings with petitioner and his quota. During the course of the 1985-86 academic year, both Fishbein and Haug observed petitioner's performance in the teaching of the vocational related classes.

On April 8, 1986, Haug met with petitioner to discuss a recent observation on April 7 and evaluation (J-3) of petitioner's performance. At the time, petitioner had placed 7 of 53 seniors he was assigned in jobs, a rate of approximately 13 percent. (J-17). Haug concluded that petitioner's performance was unacceptable in classroom instruction, management and work habits. Haug suggested to petitioner that he

1. Set daily and monthly goals for the acquisition of job sites and student placement.

2. Utilize to a greater extent community service groups and organizations.

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

3. Arrange for business and industry representatives to interview students on a monthly basis.

4. Arrange field trips (minimum of four per year) to industries where there is placement potential.

In the annual summary evaluation (J-3) of April 8, 1986, Haug recommended in writing, known to petitioner, that petitioner not receive a salary increment for 1986-87. Haug identified petitioner's deficiencies as follows:

1. An inability to maintain a positive mental attitude regarding the need to place all or at least 60% of his C.I.E. students. He tends to visualize this as a goal which cannot be attained and tends to hold a low expectation level for student placement.

2. He has been unable to "track" his performance regarding placement and therefore, is not able to substantiate his efforts with any raw data in an effort to establish a procurement rate for placement in job site acquisition.

3. He has not demonstrated what I would define as the launching of "aggressive and perservering effort" by which he might drastically improve his procurement level.

The superintendent, who concurred in the principal's recommendation that petitioner not be granted a salary increment, advised petitioner by letter (J-4) dated April 17, 1986 that the Board would discuss withholding an increment for 1986-87 on April 28, 1986 and that absent a contrary request from him the matter would be discussed privately. On April 17, 1986, petitioner wrote (J-5) the principal and stated, among other things, that

> The unemployment rate for the Newark area is about 50%. Jobs are in short supply. The conservative administration in Washington has made many budget cuts. They did not eliminate the summer youth employment program in Newark or Essex county. I think [it] says alot when the present administration in Washington keeps this type of program when they believe, at best, that the Federal Government should be the employer of last resort.

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

> During my seven years as a coordinator at the North Thirteenth St. School I placed more students than any other coordinator in our system at that time. Also, at that time, we were under no pressure to place a certain number of students. The placement at the Sussex Ave. school has always been low. I have been assigned to this building a few years. There were four other coordinators here before me.
>
> I have placed students on 19 jobs. I have sent 20 others on interview and I have 10 students on work study. I feel I deserve my increment.

In the same letter, petitioner complains that he also was expected to teach 12 cooperative office education students in his related class for which he is not certified to teach. After the Board met April 28, 1986, the superintendent advised petitioner in writing (J-6) as stated above that it withheld a salary adjustment and employment increment from him for 1986-87 and the reasons therefor.

Petitioner's affirmative proofs regarding his allegation that the Board's action is arbitrary, capricious, and unreasonable centers upon his view that a 60 percent placement rate is, in the circumstances of the Sussex Avenue school, unreasonable. Petitioner testified that as a general rule the attitude of his pupils is negative regarding employment at minimum wage; many employers in the Sussex Avenue school area have had bad experiences with pupils because of the pupils' negative attitudes; Sussex Avenue pupils "* * * just don't have the training * * *" to secure and hold employment and, as examples, petitioner says Sussex Avenue pupils cannot identify 1/16, 1/32, 1/64 inches; that employment opportunities in Newark are limited to those areas only serviced by bus routes and bus routes are in scarce supply; and, other coordinators who did not achieve 60 percent pupil placement did, in fact, receive their increments.

In regard to two other coordinators who did not achieve 60 percent placement rates, the superintendent explained that they were awarded salary increments even though they did not achieve 60 percent placement because both coordinators had recently been assigned to their respective schools. Petitioner, to the contrary, had been at the Sussex Avenue school since 1983 and in the superintendent's view he should have made more progress towards greater placement than he has.

While I recognize petitioner testified no one observed him during 1985-86 teach in the related class, I am more persuaded by the testimony of Principal Haug that he did observe petitioner teach a related class on April 7, 1986 and prepared his evaluation of

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

that observed performance and annual evaluation based on that observation and upon his meetings with petitioner throughout the year regarding cooperative industrial education goals.

No proofs were offered by petitioner to show how the Board, as he alleges, violated its policy regarding the evaluation of professional staff in terms of the withholding of the salary increment. Accordingly, this allegation is hereby dismissed with prejudice.

DISCUSSION AND CONCLUSIONS

While an essential reason the Board determine to withhold a salary increment from petitioner for 1986-87 is his failure to place 60 percent of his senior cooperative industrial education pupils in jobs, there are other reasons expressed by the superintendent (J-6) of April 30, 1986, regarding that action. The superintendent advised that the salary increment was withheld because of (1) unacceptable classroom management, (2) unacceptable classroom instruction, (3) inability to demonstrate success in petitioner's methodology of job placement for students, and (4) inability to demonstrate success in petitioner's techniques of job placements for students. Obviously, these deficiencies all led to the result of approximately 13 percent of petitioner's pupils being placed in jobs in or about April 1986. While it is true other coordinators who did not reach the 60 percent placement standard were awarded salary increments, that fact standing by itself does not establish any unlawful discrimination by the Board against petitioner in favor of the other two coordinators. The superintendent explained that those two persons had just been assigned to their schools while petitioner has been at the Sussex Avenue facility since 1983. It is reasonable to believe that in a three year period petitioner would have managed to secure sufficient job contacts in order to carry out the goal of the cooperative industrial education program and place a more significant number of pupils in jobs than he has.

Petitioner's explanation that the pupils have a negative attitude, or attendance problems, or lack of transportation, or poor skills, or the employers refuse to employ the pupils because of prior bad experiences is rejected. It is petitioner's function as part of the teacher corps of the Essex County Vocational School system to identify such problems and to take appropriate steps to remedy whatever perceived deficiencies in the pupils he discerns. While petitioner was quick to point out the deficiencies he perceives in the

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

pupils, he was not equally as quick to point out corrective actions he has taken to overcome those perceived deficiencies.

Applying the Kopera standard of review to the facts of this case, I must **CONCLUDE** that the Board of Education had, in fact, a reasonable basis upon which to withhold petitioner's adjustment and salary increment for 1986-87 pursuant to its authority at N.J.S.A. 18A:29-14. It is the Board's judgment whether petitioner earned a salary increment. It determined he did not and on this record the Board did not arrive at that judgment in an arbitrary manner. Accordingly, I **CONCLUDE** petitioner has failed in his burden of proof to establish the Board did not have a reasonable basis in fact upon which to take the controverted action and I also **CONCLUDE** petitioner failed to establish by a preponderance of credible evidence that he was entitled to the adjustment and salary increment otherwise withheld from him by the Board.

Accordingly, the Petition of Appeal is **DISMISSED.**

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

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

January 2, 1987
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 5 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

sc

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

HARRY J. COTYK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner in accordance with N.J.A.C. 1:1-16.4a and b. The Board's reply was untimely, however.

Petitioner avers in his exceptions that the ALJ erred in determining that the Board's action to withhold his increment was not arbitrary or without a rational basis. He asserts that it is patently unfair to hold him accountable for circumstances beyond his control and cites Fanella v. Washington Twp. Bd. of Ed., 1977 S.L.D. 383 in support thereof and avows that his increment should not have been withheld for the high unemployment in the Newark area or the inability of his students to maintain employment once secured. He reiterates his argument that he was singled out for increment withholding (J-8, 9) and that the four reasons for the withholding enumerated by the ALJ in the initial decision, ante, are all dependent upon one underlying reason, namely, his failure to place 60% of his students in jobs.

Upon review of the record and petitioner's exceptions, the Commissioner is unpersuaded that the ALJ erred in his determination that the Board's action was not arbitrary or without rational basis. In the Commissioner's judgment, petitioner has failed in his burden to demonstrate that the Board did not have a basis for its factual conclusion that his performance did not warrant the reward for meritorious service that a salary increment represents. Bernards Twp. Bd. of Ed., supra

As dictated by Kopera, supra, it is not the role of the Commissioner to substitute his judgment for that of the Board, absent a showing of improper motivation or lack of rational basis to its action. It is clear from a review of the record that the ALJ was fully cognizant of the appropriate standard of review and the Commissioner concurs with him that the Board's withholding action was not reached in an arbitrary manner, given the factual circumstances of the matter and notwithstanding petitioner's avowal that circumstances were beyond his control. In the Commissioner's judgment, it was both rational and well within a Board's legislatively granted prerogative to find petitioner's continued unacceptable performance for job placement and related instruction

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

as not meriting a salary increase, even assuming arguendo that the unemployment rate is high in Newark or that public transportation is not particularly suitable or that other staff were not held accountable to a 60% placement rate.

There are undoubtedly numerous difficulties in placing students in jobs in the Newark area as argued by petitioner which could well serve to mitigate against one's meeting a 60% job placement standard. However, a careful review of the record does not demonstrate that petitioner's increment was withheld because he was arbitrarily held accountable to a rigid, inflexible placement standard of 60%. Rather, the record demonstrates that even before the five-year plan setting performance standards for placement was in effect, concern existed over his placement rate. Thus, for three consecutive years, 1983-84, 1984-85, and 1985-86, concern existed over petitioner's success with job placements, both the numbers of students and new job sites. (J-3, 15 and 16)

Petitioner's 1983-84 evaluation (J-15) notes that his placement rate was very high in his previous assignment and it points out that transportation and job opportunities are problematic at the Sussex Avenue facility. Nonetheless, increases in placement of seniors and new placement contacts are identified as areas in need of improvement. While petitioner's 1984-85 evaluation notes improvement in placement over the previous year, areas in need of attention/improvement continue to focus on increasing performance in job placement of students. (J-16) The concerns relative to petitioner's job placement success appear to culminate in April 1986, the second year of the district's five-year plan designed to improve job placement, when his placement rate dropped to approximately 13%. J-3 reads in pertinent part:

> There is an obvious need to successfully place our seniors in jobs by virtue of the fact that firstly, we are an institution in the business of doing just that and secondly, this has been an established and reinforced priority for co-op coordinators within this system for the past two years.
>
> Because of this emphasis which has been the subject of at least two conferences with C.I.E. Coordinators this year, it has become my [the principal's] expectation for Mr. Cotyk to demonstrate an ability to meet the ongoing challenge of job placement.
>
> While Mr. Cotyk's total placements for the year total 19 out of 54, I must indicate that at this time, only 7 students are currently employed. Several students have either quit their jobs or have been fired and one has transferred to another school. Because of the attrition of 11 students from viable job sites, I can only

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

> conclude that the students were not appropriately matched to their work stations or in some instances, they demonstrated poor work habits. In either case it is incumbent upon the C.I.E. Coordinator to focus upon this as a problem and demonstrate the initiative to reinforce the students' improvement of work habits.
>
> ***
>
> B. Mr. Cotyk's areas of weakness are:
>
> 1. An inability to maintain a positive mental attitude regarding the need to place all or at least 60% of his C.I.E. students. He tends to visualize this as a goal which cannot be attained and tends to hold a low expectation level for student placement.
>
> 2. He has been unable to "track" his performance regarding placement and therefore, is not able to substantiate his efforts with any raw data in an effort to establish a procurement rate for placements and job site acquisition.
>
> 3. He has not demonstrated what I would define as the launching of "agressive (sic) and persevering effort" by which he might drastically improve his procurement level.
>
> (J-3)

In light of the above, the Commissioner concurs with the ALJ's conclusion that it is reasonable to believe that in a three-year period petitioner would have managed to secure sufficient job contacts in order to carry out the placement goal of the C.I.E. program and to place a more significant number of pupils than he has achieved. (Initial Decision, ante) Moreover, nowhere in the record does petitioner document what steps within his control he took to offset difficult circumstances in job placement that may be beyond his control which would demonstrate the Board's action to be arbitrary. Nor does he demonstrate that the firings or lack of initial placements were in fact due to factors beyond his control. What is advanced are generalizations about negative attitudes, poor transportation, poor skills, etc. In this respect, the Commissioner concurs with the principal that petitioner fails to substantiate his placement efforts. Moreover, he concurs with the ALJ that:

> Petitioner's explanation that the pupils have a negative attitude, or attendance problems, or lack of transportation, or poor skills, or the employers refuse to employ the pupils because of prior bad experiences is rejected. It is petitioner's function as part of the teacher

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

> corps of the Essex County Vocational School system to identify such problems and to take appropriate steps to remedy whatever perceived deficiencies in the pupils he discerns. While petitioner was quick to point out the deficiencies he perceives in the pupils, he awas not equally as quick to point out corrective actions he has taken to overcome those perceived deficiencies. (emphasis supplied)
>
> (Initial Decision, ante)

Thus, in the Commissioner's judgment, the issue in this matter is not so much a failure to meet a 60% placement standard but rather that a 13% job placement rate is deemed unacceptable after three consecutive years of job placement being identified as a weakness in need of improvement by petitioner. That the Board deemed such a low placement rate as indicative of unacceptable classroom management and instruction and an inability to demonstrate success in methodology and techniques of job placement has not been shown to be unreasonable. Moreover, the Commissioner concurs with the ALJ that the mere fact that other C.I.E. Coordinators were not held to the 60% standard does not by itself establish unlawful discrimination. On the contrary, it serves to illustrate that individual circumstances, such as being newly assigned to a school, were taken into consideration prior to a recommendation being made to withhold an increment.

Consequently, the Commissioner concurs with the ALJ's determination to dismiss the petition and he adopts the initial decision as the final decision in this matter for the reasons expressed therein and elaborated upon above.

COMMISSIONER OF EDUCATION

March 9, 1987

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2971-86
AGENCY DKT. NO. 56-3/86

WILBER EDWARDS,
Petitioner,
v.
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,
Respondent.

Wilber Edwards, petitioner, pro se

Robert H. Greenwood, Esq., for respondent (Greenwood & Sayovitz, attorneys)

Record Closed: December 27, 1986 Decided: January 29, 1987

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves an application by petitioner Wilber Edwards, a resident of the Village of Ridgewood, for an order directing the respondent, Board of Education of the Village of Ridgewood, to certify tenure charges against Samuel B. Stewart, superintendent of schools, and Robert Honsinger, principal of the high school. Such charges, if certified, are forwarded to the Commissioner of Education with a request that he authorize a plenary trial pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The filing and proving of written tenure charges are the legal means that must be used

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

before a tenured employee can be dismissed or have his or her salary reduced on account of inefficiency, incompetency or other cause. The petitioner claims that the respondent Board of Education failed to meet its legal obligation to certify charges against Stewart and Honsinger to the Commissioner of Education after he, Edwards, proffered them to the Board. The Board considered the charges in October and November 1985 and declined to certify them to the Commissioner.

PROCEDURAL HISTORY

Mr. Edwards filed his petition in this action with the Commissioner of Education on April 7, 1986. The Board filed an answer on April 29, 1986. On May 1, 1986, the Commissioner transmitted the matter to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Respondent filed an amended answer and counterclaim for costs, fees and expenses on May 13, 1986. Petitioner filed a reply and answer to the counterclaim on May 20, 1986.

A prehearing conference was held on June 16, 1986, and a Prehearing Order was filed, defining the issues, fixing hearing dates in October and regulating other procedural aspects of the forthcoming hearing. The issues to be decided were listed as follows:

A. Whether or not the Board's decision not to certify tenure charges against Stewart and Honsinger was proper and reasonable under applicable law.

B. Whether or not there is probable cause for the certification of such charges.

C. Whether or not the Board exceeded its discretionary authority in reaching its decision not to certify such charges.

D. Did the Board meet its obligation under law in considering and reaching its decision?

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

E. Is the petition barred by the 90-day filing limitation, N.J.A.C. 6:24-1.2(f)? (This issue was never addressed by either party in any of the proceedings that followed. Therefore, the issue is deemed to have been waived, and it will not be addressed further in this decision.)

F. Is the Board entitled to an award of costs, expenses and/or counsel fees pursuant to its counterclaim, if the Board prevails in this matter?

The Prehearing Order also provided that Samuel B. Stewart, superintendent of schools, and Robert Honsinger, high school principal, were deleted as parties respondent, with the petitioner's consent. Since the scope of this matter is limited to an application to compel the Board to certify tenure charges against Stewart and Honsinger, it was agreed by both parties that the two individuals were not appropriate respondents. Only the Board is empowered to certify tenure charges. If the petitioner succeeds in his application and the Board is compelled to file the tenure charges, then Stewart and Honsinger would become parties respondent, with the Board as petitioner, in a subsequent and separate action. See Prehearing Order, June 25, 1986.

On October 10, 1986, the respondent moved for summary decision and dismissal of the petition. A summary decision is rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. A summary decision can fully dispose of the case without the need for a full trial or testimony of witnesses. N.J.A.C 1:1-13.2 et seq. Since the motion for summary decision was filed only four days before the trial was scheduled to begin, an adjournment of the plenary hearing was granted for approximately one month. The petitioner filed papers in opposition to the motion on November 5, 1986, and oral argument was held at the Office of Administrative Law in Newark, New Jersey, on November 10 and 12, 1986.

On November 14, 1986, an order was entered denying respondent's application for summary decision. All papers filed by the parties and all of their arguments were

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

considered. In addition, all inferences of doubt were drawn against the moving party and in favor of the opponent of the motion. It was concluded that it was necessary to take testimony in order to permit the Board to plainly articulate the reasons for its determination that there was no probable cause to credit evidence submitted by petitioner in support of his charges. It was determined that such testimony was needed to further explain the Board's findings that some of the charges, if true, were not sufficient to warrant dismissal of the high school principal or a reduction in his salary. It was held that only after such a plenary hearing could it be determined if the Board had properly fulfilled its statutory duties and reasonably arrived at its conclusion and decision. See Order Denying Summary Decision, November 14, 1986. (The order referred only to Mr. Honsinger because petitioner's effort to have the charges certified against the superintendent of schools had become moot, due to his departure from his position. See discussion below.)

The plenary hearing was held on November 19, 24 and 25, 1986, in the Municipal Court of the Borough of Glen Rock, New Jersey. Five exhibits were marked in evidence, as listed on the Appendix attached hereto. The petitioner called eight witnesses to testify. Instead of calling witnesses separately, the Board relied upon the complete testimony of those called by petitioner, most of whom would have been utilized as witnesses for the Board in any event. Post-hearing briefs were filed by both parties approximately one month after the hearing ended. The record closed on December 27, 1986.

FACTUAL BACKGROUND

Barry F. Deetz is a tenured biology teacher in the Ridgewood High School. Stephen and John Russo, brothers, were students of Mr. Deetz in 1980-81. They were 16 and 17 years old at the time. In 1981, their father, Nicola Russo, reported to the school authorities that the teacher, Barry Deetz, was involved in an ongoing course of use, possession, cultivation and distribution of marijuana in concert with his two sons. Mr. Russo also reported the matter to the local police.

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

The school authorities, including Robert Honsinger, principal of the high school, Samuel B. Stewart, superintendent of schools, and William J. Cobb, assistant superintendent, interviewed both students at length and then obtained signed, written statements from them. These statements contained specific details of their involvement with the teacher, Mr. Deetz, relating to their common use of marijuana. See Exhibit J-3. Dr. Stewart, Mr. Honsinger and Dr. Cobb then met with Barry Deetz, and his attorney, Theresa Russo. They informed Mr. Deetz and Mr. Russo of the allegations and suspended Mr. Deetz from his position. Dr. Stewart presented tenure charges against Deetz to the Board of Education for consideration. (Theresa Russo also is the mother of Stephen and John Russo and the former wife of Nicola Russo. At the time of the above problems, she was divorced from Nicola Russo, or was in the process thereof, and they were involved in a bitter custody battle over the two sons. She also had become socially involved with, and subsequently married, Barry Deetz.)

The Board of Education reviewed the evidence in support of the charges, particularly the written statements of Stephen and John Russo, whose first-hand accounts indicated that they were participants and eyewitnesses to the marijuana activities with Barry Deetz. The school authorities, Stewart, Honsinger and Cobb, certified to having received the information, orally and in written form, directly from the two boys and their father. The Board, acting with the advice of counsel, considered and certified the charges to the Commissioner of Education, who forwarded the matter to the Office of Administrative Law for hearing.

A protracted trial was held for 15 days in 1982 and 1983. Approximately 30 witnesses testified. The Administrative Law Judge concluded that the testimony of Stephen and John Russo was believable and that the charges were proved by a preponderance of the credible evidence. It was found that the respondent, Barry F. Deetz, was guilty of conduct unbecoming a teacher, and it was ordered that he be dismissed as a tenured teacher (OAL DKT. EDU 4128-81, June 3, 1983).

The decision of the Administrative Law Judge and the entire record was reviewed by the Commissioner of Education. In a four-page decision, dated August 4, 1983, he affirmed the findings and determination of the Judge.

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

Because there is a two-tiered system of administrative agency review in education matters, the Commissioner's decision was appealed further to the State Board of Education. On November 7, 1984, acting in accordance with two reports submitted by its legal committee, the State Board reversed the Commissioner of Education and the Administrative Law Judge. Reviewing the evidence independently, the State Board of Education found contradictions and conflicting testimony in the record that, in the opinion of the State Board, subjected the result to serious doubts and strained credibility. The State Board was particularly concerned that there was no corroboration of the testimony of the two boys. The decision stated that,

> The quantum of proof required to sustain the charges in this case is lacking. The animosity arising from the inter-familial dispute raised question for us about the credibility of the two boys. The lack of corroboration and conflicting testimony further undermined their credibility in our eyes and made their entire testimony and statements suspect. We have therefore concluded that the ALJ's total reliance on the brothers' statements/testimony in arriving at her decision was misplaced and that, in the absence of other evidence substantiating the charges, the determination here is not supported by a preponderance of the credible evidence.
> Decision of State Board of Education, Nov. 7, 1984, at pages 11, 12.

The result of this decision was dismissal of the tenure charges and reinstatement of Mr. Deetz to his teaching position.

The Board of Education appealed the State Board's ruling to the Appellate Division of the Superior Court. The Appellate Division applied the traditional standards of appellate review and affirmed the decision of the State Board, stating that the determination was not arbitrary, capricious or unreasonable and did not lack full support in the evidence. As a reviewing court, the Appellate Division did not weigh the evidence, determine the credibility of witnesses, draw inferences and conclusions from the evidence, or resolve conflicts therein. The court emphasized that it was not its function to substitute its independent judgment for that of an administrative body, such as the State Board, where there may exist a mere difference of opinion concerning the evidential persuasiveness of the relevant proofs.

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

(See Exhibit J-2, containing all decisions and reports rendered In the Matter of the Tenure Hearing of Barry Deetz.)

Barry Deetz was returned to the classroom in 1985, and he was awarded back pay for the full period of time since his suspension in 1981. It had been a costly, time-consuming and debilitating affair.

Petitioner Wilber Edwards is a long-time friend of Barry Deetz. Believing that Mr. Deetz had been severely wronged by the 1980-81 Board of Education and by the school staff, particularly the superintendent, Samuel B. Stewart, and the high school principal, Robert Honsinger, he presented tenure charges against the two men to the 1985-86 Board of Education. The petitioner requested the Board to certify the charges to the Commissioner of Education. If the Board chose to certify the charges, after reviewing the evidence presented, and if the Commissioner of Education concurred, then the matter would be referred for full hearing in the same manner as was done in the case of Barry Deetz four years earlier. Stewart and Honsinger would then be subject to possible dismissal on grounds of incompetency and/or unbecoming conduct.

Copies of the charges were forwarded to Dr. Stewart and Mr. Honsinger, each of whom submitted written responses. The Board met on three occasions, October 21, November 4 and November 18, 1985, to review the charges and responses, with the assistance of counsel. The Board minutes indicate that its members discussed the evidence on a charge-by-charge basis. On November 5, 1985, the Board fowarded a letter to Mr. Edwards informing him that its review of the charges was in process. He was told that references were made in the charges to supporting evidence, but that such evidence was not included. Mr. Edwards was advised that if there was any evidence that he wished the Board to consider, it should be contained with the charges. The letter stated that the Board would wait for approximately one week to give him an opportunity to supplement the charges if he wished to do so, in accordance with N.J.S.A. 18A:6-11. See Exhibit J-1(h) in the Appendix.

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

Mr. Edwards responded within the week, but he did not enclose any specific additional evidence. Instead, he stated that he expected the Board to evaluate a great deal of evidence, such as the transcripts of testimony by Stewart, Honsinger and the Russo family at the original Deetz trial in 1982-83. He also referred to affidavits given by Stewart and Honsinger which were used in that case. None of the above were enclosed, but Mr. Edwards stated that those items must be in the possession of the Board or its attorneys. The petitioner also referred to letters and other matter published in newspapers and magazines. He further stated that he would bring two additional charges for the Board to consider: 1) improper use of Ridgewood schools and 2) nepotism. (It is noted that the record does not contain any such charges, and no evidence was adduced at the hearing in this matter to support same.) See Exhibit J-1(i) in the Appendix.

On November 22, 1985, the Board of Education wrote to Mr. Edwards informing him that it had carefully considered the charges, together with supporting documents and submissions, and had determined not to certify any of the charges to the Commissioner of Education. The reasons for the Board's determination were contained in a detailed 20-page analysis, essentially concluding that there was no probable cause to credit the evidence presented, and in many instances stating that there was no evidence presented, only allegations.

Mr. Edwards then initiated this action, seeking an order to compel the Board to certify the charges against Stewart and Honsinger despite its prior refusal to do so. Originally, the action was filed against the Board together with Dr. Stewart and Mr. Honsinger. However, because the relief sought is an order directed only against the Board of Education, it was agreed at the pretrial conference that Stewart and Honsinger were not proper parties respondent at this point. If the petitioner is successful here and the Board is subsequently ordered to file charges against Stewart and Honsinger with the Commissioner of Education, then a separate action would be commenced by the Board in which the Board of Education would be the petitioner against Stewart and Honsinger as respondents.

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

As indicated above, Mr. Edwards's action to compel the Board to certify charges against Dr. Stewart was dismissed because it was moot. Dr. Stewart previously resigned his position as superintendent and left the Ridgewood school system to pursue another career elsewhere.

THE CHARGES

The specific charges against Samuel B. Stewart and Robert Honsinger, as presented to the Board of Education by petitioner, are not easily summarized. They are set forth at length in Exhibit J-1. The 13 pages containing the charges are annexed to this decision in the Appendix.

Also attached hereto as part of the Appendix is the Board's response to the charges (also contained in Exhibit J-1), consisting of 20 pages.

At the beginning of the hearing, the parties submitted joint stipulations of fact as follows:

1. Robert Honsinger is a tenured high school principal in respondent school district and held that position at the time the charges against him were filed with the Board by petitioner Wilber Edwards.

2. Charges were filed against Robert Honsinger and against then Superintendent Samuel B. Stewart on September 24, 1985.

3. The Ridgewood Board of Education responded to those charges in a detailed statement on November 22, 1985. The Board of Education determined not to certify tenure charges with the Commissioner of Education against either Samuel B. Stewart or Robert Honsinger for the reasons set forth in

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

its response of November 22, 1985.

4. The documents that the parties have agreed should be part of the record and may be entered into evidence in this matter are listed below and attached hereto:

a. A statement to Board of Education of Ridgewood, New Jersey, together with two supporting affidavits of Wilber Edwards;

b. Letter of September 24, 1985, from T.R. Burgin, Ridgewood Board secretary, forwarding the said charges to Dr. Samuel Be. [sic.] Stewart, superintendent of schools, and advising him that he had an entitlement to file a written statement with the Board in response thereto;

c. Letter of September 24, 1985, from T.R. Burgin, Ridgewood Board secretary, forwarding the said charges to Robert Honsinger and advising him that he had an entitlement to file a written statement with the Board in response thereto;

d. Response to charges submitted to Board by Samuel R. [sic.] Stewart;

e. Response to charges submitted to Board by Robert Honsinger;

f. Minutes of the Ridgewood Board of Education Committee of the Whole Executive Session of October 21, 1985, regarding the Wilber Edwards' petition;

g. Minutes of the Ridgewood Board of Education Committee of the Whole Executive Session of November 4, 1985, regarding the Wilber Edwards' petition;

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

h. Letter of November 5, 1985, from Board Secretary Burgin to Wilber Edwards' extending the opportunity to submit further evidence in support of his charges;

i. Letter of Wilber Edwards to Board Secretary Burgin in response to the Board's letter of November 5, 1985;

j. Minutes of the Ridgewood Board of Education Committee of the Whole Executive Session of November 18, 1985, regarding the Wilber Edwards petition;

k. Letter of November 22, 1985, from Board Secretary Burgin to Wilber Edwards advising of the Board's determination not to certify charges to the Commissioner of Education; and

l. Response by Ridgewood Board of Education to charges filed by Wilber Edward [sic.] against Board employees Samuel Stewart and Robert Honsinger mailed to Mr. Edwards on November 22, 1985.

(See Exhibit J-1.)

(The charges referred to in Paragraph 4(a.) above and the Board's response, referred to in Paragraph 4(l.) above are reproduced in the Appendix.)

TESTIMONY AND EVIDENCE

Frank Milliken, chief of police of the Village of Ridgewood, testified about his participation in the accusations against Deetz in 1981. He said that he conducted an investigation after Nicola Russo and his two sons visited the police department to report possible drug violations. Chief Milliken determined that there was insufficient evidence to charge Deetz with any criminal narcotics violation and told Superintendent Stewart that there were no grounds to substantiate a criminal charge. In his opinion, no hard evidence existed, only allegations.

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

When asked to itemize the evidence that had been presented to him, Chief Milliken referred to allegations by Nicola Russo and statements, presumably oral, by the two brothers, John and Stephen Russo. Some of the details of these allegations, as recalled by Chief Milliken, were that the two boys had participated in the use of marijuana in the same room with Mr. Deetz, that Deetz was growing marijuana in his classroom, that one of the boys rolled a marijuana cigarette for Deetz at his request, that Deetz also asked one of the young men to purchase marijuana for his daughter, and that Deetz requested one of them to pot the plants for him. The chief also testified that other Ridgewood students said they had seen marijuana growing in a terrarium in the classroom.

The chief recalled that at the time of the investigation in 1981, John Russo was 16 years old and Stephen Russo was 17. He also recalled that he communicated the results of his investigation to school officials, but there was no written police report.

Douglas Dittrick, a member of the Ridgewood Board of Education in 1981, testified about the process he participated in when reviewing the charges against Deetz in 1981, which resulted in a positive decision to certify the charges to the Commissioner of Education. Mr. Dittrick stated that the Board never had been given a formal police report, but they were advised by Superintendent Stewart and their attorney that the police found there was not sufficient evidence to sustain a criminal charge. However, counsel advised the Board that their function was different, in that the Board was obliged to view the matter on another level, not to evaluate the proofs. He recalled that after considering the evidence presented, the entire Board felt that enough had been presented to satisfy statutory requirements for purposes of certification to the Commissioner.

Mr. Dittrick is still a member of the Ridgewood Board. Turning to the 1985 review by the Board of the current charges submitted by Mr. Edwards, Mr. Dittrick felt that the petitioner was attempting to unearth the Deetz case. In his opinion, it was only a rehashing of earlier events, and no specific evidence was presented to support the charges against Stewart and Honsinger. Mr. Dittrick stated that the Board, aided by counsel, reviewed everything that had been submitted by Mr. Edwards and found that no reasonable or credible evidence had been presented. As stated by Mr. Dittrick, it was the Board's

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

opinion that the allegations lacked reliability and were totally lacking in credibility. He felt that it was Mr. Edwards's responsibility to present sufficient evidence, and he did not do so.

Questioned further about the Board's review and consideration of the charges, Mr. Dittrick recalled that they met and deliberated for approximately two and one-half hours at two separate meetings. At the end of one meeting, counsel advised that since the charges contained only allegations rather than evidence, the Board should give Mr. Edwards an opportunity to submit more. A letter was written to the petitioner for that purpose, and only a letter containing more allegations was received in return rather than evidential material. (See Exhibit J-1(i) in the Appendix.)

Mr. Dittrick stated that the Board chose to certify charges against Deetz in 1981 after counsel advised them of their statutory duties, which did not include evaluating the evidence. There were firsthand written statements from the two young men who claimed to have participated in the illicit activities with Mr. Deetz. The Board would not evaluate that evidence but found that it might be credible on its face. According to Mr. Dittrick, the applicable standard of proof was different than that required by the police to support criminal charges.

Frank T. Hainer, a member of the Ridgewood Board of Education in 1985, testified that he participated in a review of the charges made by Edwards. He considered every charge on a line-by-line basis and found that they were completely lacking in evidential support. Dr. Hainer looked only for evidence, and he found none. He recalls having been instructed by counsel not to deal with credibility, but only with the existence of evidence.

Nicola Russo was also called as a witness. He was questioned about his actions preceding the charges against Deetz in 1981. Mr. Russo testified that he felt he faithfully reported the information he received from his sons. He denied having told Dr. Stewart or Mr. Honsinger or any Board member that the charges were false, and he denied engaging in any conspiracy or fabrication in connection with the charges.

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

Rose Marie C. Schutt was president of the Ridgewood Board of Education in 1980-81 when the charges against Deetz were certified. She testified that the charges were presented to the Board by the superintendent of schools, Dr. Stewart, not by Mr. Honsinger, and she examined them carefully and in detail. In addition to reviewing the charges and the defensive statements made by Mr. Deetz, the Board had also received and considered copies of the accompanying written evidence, primarily in the form of statements from the two young men and certifications from the superintendent, the principal and the assistant superintendent. The Board's attorney was present during the deliberations. He also had sat in with the staff members when they interviewed John and Stephen Russo. Ms. Schutt confirmed that they had no written statement from Nicola Russo. Information from him was presented to the attorney and staff members orally, and then, in turn transmitted to the Board.

Ms. Schutt also said that Dr. Stewart reported the conclusions reached by the police to the Board. However, she was aware that the Board was not dealing with criminal standards of proof. She testified that the Board trusted its attorney's judgment, and neither she nor any other Board member was concerned with the quality of the evidence as long as there was some probable cause to credit it. Furthermore, she firmly stated that no information was transmitted to the Board by Mr. Honsinger. The superintendent, Dr. Stewart, was the person who remained in touch with her, as president of the Board.

Ms. Schutt testified that she had no indication or reason to believe that Mr. Honsinger participated in any falsification of the charges against Deetz. She said that Mr. Honsinger's role was a subsidiary one, and he made no separate statements to the Board, nor did he give them any advice.

The petitioner also called Barry F. Deetz to testify. He stated that he and Mr. Edwards had been friends for 15 or 20 years. The petitioner began to ask Mr. Deetz questions relating to whether he ever grew, used or otherwise dealt with marijuana in his classroom or with his students. This line of questioning was disallowed immediately because it was an obvious attempt to retry the earlier litigation, and it was not relevant

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

to the issues here. Mr. Edwards elected not to examine Mr. Deetz further.

Harold W. Smith, Jr., another member of the Board of Education in 1981, testified that he also voted in favor of certifying the charges against Deetz. Mr. Smith stated that after considering all of the evidence presented, he felt that there was probable cause to credit that evidence. He did not recall all of the documentation he received in the form of evidence, but he remembered that there was a lot of information to consider. It came from the superintendent, Dr. Stewart, who forwarded duplicate copies to all Board members in the usual manner. Mr. Smith testified that he had no indication whatsoever that Mr. Honsinger participated in any falsification of the charges. Referring to the decision by the police that there was not enough evidence to warrant a criminal charge, Mr. Smith said that the police did not say that there was no evidence.

Robert Honsinger, principal of Ridgewood High School, was also called by Mr. Edwards to testify, in an effort to probe Mr. Honsinger's role in the filing of charges against Deetz in 1981. Mr. Honsinger stated that in April 1981 he was called by two administrators who had been approached by Nicola Russo when the matter first surfaced. Mr. Honsinger met with the two administrators and spoke to the two young men himself. That conversation was the source of his certification that accompanied the charges. The certification is a recital of what he was told by the two Russo boys and by Mr. Deetz when he interviewed them in April 1981. See Exhibit J-3.

Mr. Honsinger denied fabricating any of the charges, and he denied giving false information to the Board of Education. He explained that his role was to act as liaison from the high school to the superintendent. He also vehemently denied inducing anyone to testify in the Deetz hearing or to give false testimony.

Mr. Edwards then asked Mr. Honsinger for details about Mr. Deetz's earlier disciplinary record. In answer to that question, Mr. Honsinger reluctantly indicated that Mr. Deetz's record contained several written reprimands. For example: he was reprimanded for kicking a chair out from under a teetering student; a parent complained

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

because his son, one of Deetz' students, had bruises on his body; a complaint was received about insensitive remarks Deetz made to a young woman who had a disfiguring scar as a result of an automobile accident. The purpose of Mr. Edwards's attempt to expose Mr. Deetz's earlier disciplinary record was not clear, nor was it relevant.

At the conclusion of testimony from all of the witnesses called by Mr. Edwards, the Board moved for dismissal of the petition, based upon a claim that the petitioner had not proved a prima facie case that the Board had acted unreasonably or arbitrarily in declining to certify charges against Mr. Honsinger. In response to the motion, Mr. Edwards stated that he had the evidence, but it was all locked up in the Deetz case. Mr. Edwards objected strenuously to this judge's refusal to permit him to redetermine or review facts involved in the Deetz case.

The motion for dismissal was denied, based upon a ruling that it would be more appropriate to give petitioner the benefit of every conceivable doubt, including the testimony of any witnesses that might be presented by the Board. It was recognized that most of the witnesses called by petitioner were not generally supportive of the petitioner's claims.

The respondent rested its case at that point, without calling separate or additional witnesses. Counsel stated that the Board would rely on the testimony of those witnesses who had already testified and upon the contents of the exhibits marked in evidence. Post-hearing briefs were filed by both parties approximately 30 days after the end of the testimony.

SUMMARY OF ARGUMENTS PRESENTED BY THE PARTIES

In an attempt to show that Robert Honsinger engaged in a conspiracy and fabricated false charges against Barry Deetz, Mr. Edwards continues, in his post-hearing argument, to present specific portions of the trial transcripts in the Deetz

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

hearing. He argues that, in considering the 1985 charges against Mr. Honsinger, the Board of Education should have done the same thing. The petitoner persists in attempting to demonstrate that the testimony and evidence in the Deetz case proves there was no basis for the charges against Mr. Deetz. The bulk of Mr. Edwards's post-hearing brief consists of argument based upon testimony in the Deetz trial and its surrounding circumstances. Mr. Edwards also continued making accusations against Mr. Honsinger that are unsupported in the record in this case, and he severely criticized the findings made by the Administrative Law Judge in the Deetz matter.

The Board argued that it reasonably and properly fulfilled its statutory function in considering and rejecting the charges against Mr. Honsinger, citing N.J.S.A. 18A:6-11 and Manalapan-Englishtown Education Ass'n v. Board of Education of Manalapan-Englishtown Regional School District, 187 N.J. Super. 421 (App. Div. 1982). In its brief, the Board further analyzed each of the charges in the light of the evidence adduced at the hearing and the applicable law.

In addition, the Board submitted argument in favor of its application for an award of costs and counsel fees against Mr. Edwards. Recognizing that prevailing case law does not ordinarily grant such an award, respondent argued that reimbursement is particularly appropriate in this case because the charges were preferred and the litigation pursued by petitioner without any facts to back up his severe accusations. The Board accuses petitioner of a bad faith abuse of the judicial process and improperly causing unwarranted public concern and expense.

Mr. Edwards denies that view of his charges and action. He feels that Mr. Deetz was grievously and intentionally wronged by Mr. Honsinger and he wants the Board to compel Mr. Honsinger to pay for it with his job.

FINDINGS OF FACT

The uncontested facts related in the procedural history and in the factual background are incorporated herein, together with the stipulation of facts, Exhibit J-1.

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

The charges against Barry Deetz in 1981 were supported by firsthand written evidentiary statements given by two people, Stephen and John Russo. They both claimed to have participated in and witnessed Mr. Deetz's involvement in the possession, use, cultivation and distribution of marijuana in and about Ridgewood High School. According to their statements, these acts were committed by Mr. Deetz with them and other students.

The contents of the separate statements made by Stephen and John Russo were decidedly against their own interests, inasmuch as they implicated themselves in illegal activities and exposed themselves to the possibility of disciplinary measures with the police and at school.

The certifications relating to the charges given by school officials Samuel Stewart, William Cobb and Robert Honsinger were based upon their interviews and conferences with Stephen and John Russo and Barry Deetz.

Robert Honsinger initially spoke to Nicola Russo in 1981. He also interviewed and attended conferences with Russo's two sons at the request of the superintendent of schools. He requested John and Stephen Russo to submit written statements, which they did. The principal reported to the superintendent of schools, not the Board. His own certification attached to the charges against Barry Deetz repeats the information he was given by Nicola Russo, his two sons and Mr. Deetz.

Robert Honsinger was not in direct contact with the Board of Education in connection with the charges, and he played no part in the process of formulating the charges and communicating them to the Board.

The petitioner provided the 1985 Board of Education with no separate or independent evidence to support the accusations set forth in his charges (except that he expected the Board to sift through and evaluate the evidence and testimony contained in the 1982-83 Deetz hearing). The Board carefully considered the charges, statements of position and all evidence presented to it before voting not to certify the charges.

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

LEGAL DISCUSSION

N.J.S.A. 18A:6-10. **Dismissal and reduction in compensation of persons under tenure in public school system.**

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, . . .

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

N.J.S.A. 18A:6-11. **Written charges; written statement of evidence; filing; statement of position by employee; certification of determination; notice.**

Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction in salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination.

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

Robert Honsinger is a tenured principal in the Ridgewood school system. He is entitled to the protection afforded by the statutory procedures spelled out above before he can be dismissed or have his pay reduced. It is uncontested that all of the procedural steps in the statute were properly followed after Mr. Edwards preferred his charges against Dr. Stewart and Mr. Honsinger. (As mentioned above, no further consideration need be given to the charges against Dr. Stewart because he is no longer a tenured employee.)

Seven charges of unbecoming conduct and five charges of incompetency against Mr. Honsinger were presented to the Board by Mr. Edwards. The Board considered the charges, statements of position and evidence presented to it and found that no credible evidence was presented to support any of them. In several instances, the Board also found that even if true, the charges would not warrant dismissal or reduction in salary. The Board declined to certify any of the charges to the Commissioner of Education. The present proceeding is an appeal by Mr. Edwards of that decision of the Board.

The Board's responsibility in deciding whether to certify tenure charges presented to it is to determine whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction in salary. Manalapan-Englishtown Education Ass'n. v. Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County, 187 N.J. Super. 426 (App. Div. 1981). Whether the Board answered the foregoing questions and, if so, whether it did so properly are the primary issues to be decided here. Manalapan at 429. In answering these questions it is also incumbent on the Board to "articulate plainly the reasons for the determination respecting those questions." Manalapan at 432.

See also, Thomas Cambria et al. v. Board of Education of the Borough of Cliffside Park, Bergen County, et al., 1968 S.L.D. 248; James McCabe v. Board of Education of the Township of Brick, Ocean County, 1974 S.L.D. 299.

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

Evidence is defined as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Black's Law Dictionary, (5th ed. 1979), at 498.

When the Board properly follows the statutory mandate in reviewing and acting upon tenure charges as outlined above, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. It is not the function of the Commissioner of Education to interfere or substitute his judgment for that of the local board in the management of the schools unless they violate the law, act in bad faith or abuse their discretion. James W. Dennis v. Board of Education of the City of Long Branch, Monmouth County, 1976 S.L.D. 14; Ridgefield Park Education Ass'n. v. Board of Education, Ridgefield Park, OAL DKT. NO. EDU 9169-83 (May 14, 1984), Comm'r of Education (June 25, 1984), State Board (Feb. 6, 1985), aff'd (N.J. App. Div., December 24, 1985, A-2859-84T7)(unreported).

The petitioner has placed much reliance on the fact that the Ridgewood police found that there was insufficient evidence to support criminal charges against Deetz in 1981. In disciplinary proceedings against a teacher, a prior criminal court result does not proscribe the authority of a board of education to reach an administrative determination. It has been held that acquittal in a criminal case does not prevent a departmental trial, even when the disciplinary proceeding arises from the same factual matter as the indictment. The proceedings are entirely independent of each other. Borough of Park Ridge v. Salimone, 36 N.J. Super. 485 (App. Div. 1955), affd. 21 N.J. 28 (1956). Such proceedings (administrative/disciplinary) are civil in nature and not criminal. Kravis v. Hock, 137 N.J.L. 252, 254 (Sup. Ct. 1948). See also, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 12 (App. Div. 1974); In re Darcy, 114 N.J. Super. 454 (App. Div. 1971; In re Pennica, 36 N.J. 401 (1962); City of Asbury Park v. Dept. of Civil Service, 17 N.J. 419, 429 (1955).

It is also well known that, unlike a criminal prosecution, the burden of proof in

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

an administrative/civil proceeding need be sustained only by a fair preponderance of the credible evidence, not beyond a reasonable doubt. Akinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Darcy, at 458.

By way of counterclaim, the Board has demanded an assessment and recovery against Mr. Edwards of its counsel fees and costs.

Historically, the Commissioner has declined to award counsel fees to prevailing parties, absent statutory authorization. See, E.B. et al. v. Board of Education of the North Hunterdon Regional School District, et al., OAL DKT. NO. EDU 5187-85 (March 14, 1986), at 7-19; reversed by Commissioner of Education, May 1, 1986.

It is nevertheless true that the Commissioner has awarded counsel fees in several instances. Brown v. Bd. of Ed., City of Newark, OAL DKT. NO. EDU 2697-84 (Nov. 2, 1984) rev'd by Comm'r. of Education (Dec. 19, 1984); Fox v. Board of Ed. of the Tp. of Cinnaminson, 1982 S.L.D. 242, (aff'd by Commr. 1982 S.L.D. 246); Ross v. Bd. of Ed. of the City of Jersey City, 1981 S.L.D. 307, aff'd. Commissioner of Education, 1981 S.L.D. 319.

However, in E.B., the Commissioner considered, and apparently rejected, the applicant's claim that the foregoing decisions might have established any precedent towards counsel fee awards. The Commissioner referred to Ross as "an exception to the consistent practice of the Commissioner to deny attorney's fees to successful litigants in education cases." E.B. at 30. It is obvious upon reading the Commissioner's decision in Ross that the few isolated instances where he has approved the award of counsel fees are regarded by him as errant cases that should be confined strictly to their facts.

In another recent decision, Gibson v. Board of Education of the City of Newark, OAL DKT. NO. EDU 6160-83 (Feb. 2, 1984), Comm'r. of Education (March 30, 1984), dismissed State Board (June 6, 1984) rev'd and remanded appellate division 205 N.J. Super.

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

48 (App. Div. 1985) State Board (May 6, 1986), the State Board specifically limited Ross to its facts, reversing the Commissioner's award of counsel fees to the successful litigant. The State Board held that,

> Ross also represents a serious deviation from the general policy that litigants bear their own counsel fees, embodied in both case law, Gerhardt v. Continental Ins. Co., 48 N.J. 291, 302 (1966), and in the rules governing allowance of attorney fees in court cases: R. 4:42-9 limits such awards to specific circumstances, none of which apply here. . . .
>
> We believe that the possibility of attorney fees in similar cases might encourage litigation in the future between boards and their members over issues of far less merit than those presented here. Gibson, State Board of Education, (May 6, 1986), at 29, 30.

In reiterating his position, the Commissioner has clearly stated that, "until such time as he is granted statutory authority or the imprimatur of the Courts of New Jersey to do so, the Commissioner declines to grant counsel fees." E.B., at 31. This clear statement must be applied to respondent's request.

Additionally, there is no indication that a request for an award of costs should be treated any differently than counsel fees.

CONCLUSIONS

Uncontroverted testimony was adduced from Board members that, with the assistance of counsel, the Board considered each of the charges individually during two meetings in October and November 1985. There was also no disagreement that, in its deliberations, the Board utilized Mr. Honsinger's statement of position and the petitioner's statements of evidence presented to it, in accordance with the statutory requirements. Each charge and the Board's individual decisions are outlined below:

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

Conduct Unbecoming a School Principal

Charge One:

That Robert Honsinger collaborated with Dr. Stewart, Nicola Russo, John Russo and Stephen Russo to fabricate false charges of misconduct to be used as the basis for disciplinary action against Barry Deetz.

The Board found no probable cause to credit the evidence in support of this charge. The Board stated that a review of the materials presented revealed no basis for the charge.

It is **CONCLUDED** that the Board properly reviewed this charge and all materials presented to it in connection therewith. Petitioner has not shown that the Board's decision was unreasonable, arbitrary, capricious or in bad faith. Furthermore, no evidence was adduced at the hearing here to support petitioner's assertion that Robert Honsinger engaged in a conspiracy to fabricate charges against Barry Deetz in 1981.

Charge Two:

That Honsinger and his "accomplices" charged that Barry Deetz was engaged in activities in the high school relating to the cultivation, possession, use and distribution of marijuana; that none of these charges against Deetz were ever proven to be true; and that the Ridgewood Police Department, after an investigation, found no evidence of any kind to support them.

The Board found that this charge was a statement of asserted fact that does not contain any specific charge against Mr. Honsinger. In any event, the Board rejected the charge, stating that there was no probable cause to credit evidence in support of it and that there was no basis for the charge.

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

It is **CONCLUDED** that the Board's decision was not unreasonable, arbitrary, capricious or in bad faith and that the Board was correct in asserting that Charge Two does not state a charge. Furthermore, evidence adduced at the hearing leads to a further **conclusion** that, although none of the charges against Deetz were ever proven to be true, neither were they proven to be untrue. The decisions of the ALJ and the Commissioner of Education were reversed for the reasons stated above, not because the charges against Barry Deetz were proven to be untrue. The conclusion reached by the police investigation was that there was no evidence that could be used to support a criminal charge. The police did not say that there was no evidence of any kind.

Charge Three:

That when Honsinger received information from the police that there was insufficient evidence upon which to base a criminal charge, he should have made a thorough in-school investigation of the matter, and that instead he joined with Dr. Stewart to press charges against Deetz.

The Board found that no creditable evidence had been presented to support this charge against Honsinger. The Board found that Mr. Edwards's reference to a police report given to Mr. Honsinger was unsupported by the evidence and that the charge asserts a bias towards Deetz on the part of Honsinger, which bias was unproven. The Board also took note of the differences between the evidence needed for a criminal prosecution and that needed for the taking of administrative action. The Board commented that the school administration was not bound to preclude administrative action because the police chose not to pursue criminal charges. The Board further noted that the evidence disclosed that Mr. Honsinger properly performed his duty in 1981 in a timely and responsible manner and that the Board, rather than the administrators, was responsible for certification of the charges against Deetz.

It is **CONCLUDED** that the Board properly reviewed all of the evidence presented to it relating to this charge and that their decision was not unreasonable, arbitrary, capricious or in bad faith. It is further **CONCLUDED** that no credible evidence

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

was presented at the hearing to indicate that the Board failed to completely fullfill its statutory duties in reviewing this charge.

Charge Four:

That Mr. Honsinger caused a number of high school teachers and administrators to testify at the Deetz hearing despite his knowledge that they had nothing positive to say in favor of the charges and that it was a costly waste of time and a deprivation of the educational services to which the students were entitled. Furthermore, that Mr. Honsinger did not use his influence to persuade Dr. Stewart to stop the hearings.

The Board found no probable cause to credit evidence to support this charge and further that no such evidence was presented.

It is **CONCLUDED** that the Board's assessment was correct, and its decision was not unreasonable, arbitrary, capricious or in bad faith. It is further **CONCLUDED** that no evidence was presented by petitioner at the hearing that demonstrated otherwise.

Charge Five:

That, after being aware that the Russo boys testified to their involvement with marijuana at home, he did nothing to help them, such as counselling and corrective programs or other diversion.

The Board rejected this charge stating that it was a mere conclusional assertion without sufficient supporting evidence. The Board further found that even if true, this charge not would warrant dismissal or a reduction in salary.

It is **CONCLUDED** that the Board's decision was not unreasonable, arbitrary, capricious or in bad faith. It is further **CONCLUDED** that no evidence was presented at the hearing in support of the charge or to demonstrate that the Board's decision was unjustified or improper.

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

Charge Six:

That Mr. Honsinger disregarded decisions of the State Board of Education and the Appellate Division of the Superior Court by stating his opinion that the return of Barry Deetz to the classroom while his legal status was still in doubt would most probably prevent meaningful education in the classroom.

The Board found no credible evidence to support the conclusion asserted in this charge and that, even if true, such a statement by Honsinger would not constitute conduct that would be punishable by dismissal or a reduction in salary.

It is **CONCLUDED** that the decision of the Board was justified and was not unreasonable, arbitrary, capricious or in bad faith. The charge itself is an opinion and an argument rather than an evidential assertion.

Charge Seven:

That Mr. Honsinger showed a callous disregard for the rights of Barry Deetz in his capacity as a parent of a student, Sally Deetz. Mr. Deetz had been barred from the school grounds pending determination of the tenure charges against him. He was asked by Mr. Honsinger to leave the school when his daughter was receiving an award.

After reviewing the evidence and the record, the Board found that, even if true, the charge would in no event warrant dismissal or a reduction in salary. The Board noted that Mr. Honsinger was enforcing a directive of the superintendent.

It is **CONCLUDED** that the Board's decision was not unreasonable, arbitrary, capricious or in bad faith. It is further **CONCLUDED** that no evidence was presented by petitioner at the hearing that dealt with this charge in any way.

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

Incompetency

Charge One:

That within the period of a few years Mr. Honsinger caused charges to be brought against three well-qualified teachers, causing divisive wounds that have yet to heal in one case and causing lengthy and costly tenure disputes in the others.

The Board found that no credible evidence had been presented to warrant such conclusions about Mr. Honsinger's incompetence and that mere reference to three unrelated cases was not sufficient to provide support for the filing of tenure charges against Mr. Honsinger. The Board also noted that responsibility for the certification of tenure charges rests with the Board of Education, not the principal of the high school. The Board further found that, even if true, such a charge would not warrant dismissal or a reduction of pay.

It is **CONCLUDED** that the decision of the Board was justified. No evidence about this charge was presented at the hearing or in any materials presented to the Board by Mr. Edwards.

Charge Two:

That Mr. Honsinger caused a wasteful use of funds meant to be used for educational purposes by being involved in prior tenure charges against a teacher named Verost, and that Honsinger's involvement in the Deetz case caused a similar waste of time and money.

The Board rejected this charge stating that no credible evidence had been presented to warrant such a conclusion. The Board further noted that a high school principal should not bear responsibility for the function of the Board in pursuing tenure charges. Furthermore, the charge itself indicates that the Board prevailed in its charges against Verost. The Board also noted that there was no showing or indication that Mr.

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

Honsinger did not perform his role properly in the matter of Barry Deetz. The Board stated that even if proven, this charge would not warrant dismissal or a reduction in pay.

It is **CONCLUDED** that the Board's decision was justified and was not unreasonbale, arbitrary, capricious or in bad faith. Furthermore, no evidence was presented at the hearing by petitioner relating to this charge.

Charge Three:

That Mr. Honsinger's administrative responsibilities were reduced during the 1985-86 school year, a "wasteful absurdity" and further evidence that Honsinger is unable to cope with typical administrative responsibilities.

The Board found that this charge was unsupported by credible evidence and was not an assertion against Honsinger in any event, but an attempt to fault the Board. The Board noted that the comments could not be the basis for a charge of incompetency against Mr. Honsinger and that, even if true, the accusation could not warrant the imposition of any penalty against Honsinger.

It is **CONCLUDED** that the Board's determination was justified and not unreasonable. Furthermore, no evidence was adduced at the hearing to deal with this charge.

Charge Four:

That Mr. Honsinger is generally unable to deal with personnel problems, that veteran productive staffers were getting out (of the school system) at the earliest possible opportunity, and that those who remained were governed by intimidation rather than leadership.

The Board found that no credible evidence had been presented to warrant this charge. The Board also noted that, if personnel problems exist in the school system, there

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

is a substantial gap between such problems and a specific charge that might lead to the disciplinary dismissal of a high school principal. The Board further found that, even if proven, such a charge would not warrant Mr. Honsinger's dismissal or a reduction in his pay.

It is **CONCLUDED** that the Board's judgment in this regard was justified. Its conclusions, reached after reviewing all of the materials presented, were not unreasonable, arbitrary, or in bad faith. Furthermore, no evidence was presented by the petitioner at the hearing to address this charge.

Charge Five:

This charge continues to address Mr. Edwards's opinion that Mr. Honsinger's conduct during the Deetz hearing was reprehensible, referring to the principal's testimony at that trial. The charge alleges that Mr. Honsinger committed a breach of personal integrity.

The Board found that no credible evidence was offered to support this charge. It did not view Mr. Honsinger's testimony at the Deetz hearing as a lack of integrity, particularly when Mr. Honsinger corrected previous testimony that he thought might have been inaccurate.

It is **CONCLUDED** that the Board's decision with respect to this charge was not unreasonable, arbitrary, capricious or in bad faith. The assertion of this charge by Mr. Edwards and the accusation contained therein is a continuation of the petitioner's desire to re-evaluate evidence in the Deetz case. Furthermore, no evidence was presented at the instant hearing dealing with the subject matter of this charge.

A very substantial portion of the petitioner's case involved an attempt by him to show that Barry Deetz was completely innocent of the charges in the 1981-84 tenure proceedings against him, and that the superintendent, the high school principal, Nicola

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

Russo and his two sons were engaged in an intentional conspiracy against Deetz. Mr. Edwards continuously tried to delve into the testimony and merits of the Deetz hearing to achieve his goal. He continued to insist that the 1985 Board of Education should have read the Deetz transcripts so that it could reach its own conclusions based on that testimony and then use those conclusions as a basis for certifying charges against Mr. Honsinger. Mr. Edwards essentially claims that the decisions of the State Board of Education and the Appellate Division in the Deetz case reinforce his opinion that the man was innocent and that the Administrative Law Judge and the Commissioner of Education were wrong almost to the point of being incompetent themselves. On many occasions, this Judge was compelled to halt Mr. Edwards' attempts to retry the merits of the Deetz case. The petitioner often needed to be reminded that the issue to be addressed was not the guilt or innocence of Mr. Deetz but whether or not the 1985 Board of Education properly fulfilled its statutory duty in refusing to certify the charges against Mr. Honsinger.

In retrospect, it now seems that the 1981 Board might better have viewed the Deetz situation in a different light. The most negative comment that can be appropriate is that they used poor judgment in filing the charges, under all of the circumstances. However, when considering the legal obligations and limitations they were compelled to apply, pursuant to N.J.S.A. 18A:6-11, might they not have been faced with a suit identical to this one if they declined to certify the Deetz charges? Might an unhappy taxpayer or other interested party have alleged that the Board's duty in 1981 was not to evaluate the evidence but only to consider if any evidence existed which might be given credence?

It is relatively simple for dissident voices, appellate courts or state boards of education to look back and evaluate a judgment made earlier by a governing body or a board of education faced with the need to decide and act on a problem as soon as it is presented. Those who have the unhurried luxury of a "Monday morning quarterback" are not subject to the same pressures or perspectives as those who are compelled to make the initial decisions.

We should expect our public officials to be intelligent, rational, hardworking people of good faith. However, they are human and they are not infallible or perfect. On

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

occasion, they will err in their judgments. If they apply their best efforts and act in good faith, we are fortunate when their efforts turn out to be correct most of the time. If their rate of error is too high, our system gives us the ability to say "thank you", and then to elect others with the hope that they will do better. There is no need to punish a public official, governing body, board of education, superintendent of schools or high school principal because it turns out that he, she or they made a decision that ultimately was considered to have been judgmentally poor, as long as they acted in accordance with the above standards.

That was the case when the 1981 Ridgewood Board of Education certified the tenure charges against Barry Deetz. The Board and its staff (including a superintendent and high school principal) acted in good faith based on the evidence they had and with the advice of counsel. The fact that an appellate body looked leisurely at the situation three years later and decided that the Board's action was unwise is no reason to punish the officials in the manner sought by petitioner.

Returning to the issue that must be decided here—the propriety and legality of the 1985 Board action in refusing to certify the petitioner's charges—it is **CONCLUDED** that the Board fully and duly considered the charges together with statements of evidence presented to it by the petitioner in support of each charge, pursuant to statute, N.J.S.A. 18A:6-11. In actuality, very little, if any, evidence was presented. The submission by the petitioner in the charges and in his supporting materials consisted primarily of allegations, accusations and unsupported inferences. No separate evidence or proof through the medium of records, documents, statements, exhibits, concrete objects or other firsthand items was offered to prove the truth of the charges.

It is further **CONCLUDED** that the Board's decisions as to each charge were not unreasonable, arbitrary or capricious. Its conclusions were reached in good faith and in full compliance with its statutory obligations. The Board fully and properly considered and answered the questions before it: was there probable cause to credit the evidence in support of the charges, and were such charges, if credited, sufficient to warrant the

You are viewing an archived copy from the New Jersey State Library.

dismissal of the tenured employee or a reduction in his salary? In addition, the Board's conclusions were fully supported by adequate findings, which were plainly articulated.

It is further **CONCLUDED** that the Board's application for an award of counsel fees and costs must be denied, based on the conclusions of law stated above. The Board of Education of the Village of Ridgewood must bear responsibility for its own litigation expenses in this matter, without reimbursement by means of an assessment against the petitioner.

ORDER

It is therefore **ORDERED** that the petition be **DISMISSED**, and the respondent's application for counsel fees and costs be **DENIED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

You are viewing an archived copy from the New Jersey State Library.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

January 29, 1987
DATE

ARNOLD SAMUELS, ALJ

FEB [illegible]
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 3 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

You are viewing an archived copy from the New Jersey State Library.

WILBER EDWARDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that the only exceptions to the initial decision were those filed by the Board pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board's exceptions are limited to the ALJ's finding that denies it an award of counsel fees resulting from the cost of defending itself in these proceedings against petitioner's unsuccessful attempt to compel the filing of tenure charges against the former superintendent and the principal of the Ridgewood High School.

While the Board does not challenge the ALJ's basic analysis of existing case law with regard to the nonpayment of legal fees, it argues that petitioner's appeal of its action in this matter is so egregious and represents a misuse of the administrative process by one who is so familiar with the process that an award of legal fees under these exceptional circumstances is in order. The Board relies on the argument presented in its post-hearing brief filed with the ALJ and made part of the record herein to substantiate its claim for legal fees. In its brief the Board acknowledges that current case law does not lend support for the recovery of costs and legal fees. Gibson, supra. However, the Board urges the Commissioner to invoke the same power incidental to his general authority to hear and determine school controversies under N.J.S.A. 18A:6-9 to award legal fees herein, as was conferred upon him by the Appellate Court in authorizing him to award the payment of interest in re Board of Education of the City of Newark v. Levitt and Sasloe, 197 N.J. Super. 239 (App. Div. 1984). The Board maintains that since the source of the Commissioner's authority under N.J.S.A. 18A:6-9 is statutory, such authority to award costs and legal fees, if invoked by the Commissioner herein, would take precedence over prior case law to the contrary.

In support of its contention that the award of legal fees is appropriate under the circumstances giving rise to the matter controverted herein, the Board argues in pertinent part as follows:

You are viewing an archived copy from the New Jersey State Library.

> This is a case where Petitioner was a prior member of the same board of education he challenges here. As such, he was familiar with the school tenure laws and with requirements for proper tenure procedures. He nevertheless proceeded to invoke the jurisdiction of the Commissioner without any supporting facts to back up his severe accusations. It should be remembered that, no matter what the state of his prior knowledge, he was specifically pointed to the applicable statute by the Board prior to its determination and prior to the end of his opportunity to present his supporting evidence to the Board. (In addition, he was told by letter of November 5, 1985, that "if there is any evidence that you wish the Board to consider, it should be contained in the filed charges.") He had to have known the impact that even the making of serious charges would have upon the board, the community and the individuals involved.
>
> Edwards proceeded nevertheless to the Commissioner insisting upon his utilizing the discovery and hearing processes to continue to look for the prerequisite evidence that he lacked. He continued with the matter even after he received briefs and helpful observations from the Judge directing his attention to the applicable case law and the absolute requirement that he have supporting creditable evidence. He persisted through full trial notwithstanding his total lack of the prerequisite supporting facts. The Court could not know if he had the facts or not until Petitioner had the opportunity to produce them. But Edwards himself knew. Undeterred by the absence of proper proofs, he relentlessly pursued his fishing expedition for facts of a matter that happened over five years ago and to which he was not a party. He thus abused the judicial process and improperly caused unwarranted public concern and expense.
>
> (Board's Post-Hearing Brief, at pp. 46-47)

Upon review of those arguments advanced by the Board for the award of legal fees, the Commissioner finds and determines that the Board's reliance on Newark v. Levitt in its analogy of the incidental powers vested in the Commissioner to award legal fees under the general authority of the Commissioner pursuant to the provisions of N.J.S.A. 18A:6-9 is misplaced. In rejecting the Board's request for legal fees, the Commissioner views as instructive the State Board's decision on remand in Gibson, supra.

Similarly, upon a thorough review of the record, the Commissioner finds and determines that petitioner's allegations

You are viewing an archived copy from the New Jersey State Library.

against the Board which claim that it improperly and illegally exceeded its discretionary authority in refusing to certify tenure charges against its former superintendent and its high school principal are totally without merit specifically for the reasons arrived at by the ALJ in his conclusions in the initial decision, ante, and recited below.

> [I]t is CONCLUDED that the Board fully and duly considered the charges together with statements of evidence presented to it by the petitioner in support of each charge, pursuant to statute, N.J.S.A. 18A:6-11. In actuality, very little, if any, evidence was presented. The submission by the petitioner in the charges and in his supporting materials consisted primarily of allegations, accusations and unsupported inferences. No separate evidence or proof through the medium of records, documents, statements, exhibits, concrete objects or other firsthand items was offered to prove the truth of the charges.
>
> It is further CONCLUDED that the Board's decisions as to each charge were not unreasonable, arbitrary or capricious. Its conclusions were reached in good faith and in full compliance with its statutory obligations. The Board fully and properly considered and answered the questions before it: was there probable cause to credit the evidence in support of the charges, and were such charges, if credited, sufficient to warrant the dismissal of the tenured employee or a reduction in his salary? In addition, the Board's conclusions were fully supported by adequate findings, which were plainly articulated.

Accordingly, for all of the foregoing reasons enunciated in the initial decision and supplemented above, the instant Petition of Appeal is hereby dismissed and the Board's application for legal fees and costs is denied.

COMMISSIONER OF EDUCATION

March 10, 1987

You are viewing an archived copy from the New Jersey State Library.

WILBER EDWARDS,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 10, 1987

For the Petitioner-Appellant, Wilbur Edwards, pro se

For the Respondent/Cross-Appellant, Greenwood and Sayovitz (Robert H. Greenwood, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

August 5, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
WITHDRAWAL
OAL DKT. NO. EDU 7147-86
AGENCY DKT. NO. #350-10/86

IN THE MATTER OF THE SPECIAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF ASBURY PARK.

Alfred L. Ferguson, Esq., for petitioner (McCarter & English, attorneys)

Craig E. Darvin, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: January 12, 1987 Decided: February 2, 1987

BEFORE **RICHARD J. MURPHY**, ALJ:

This matter involves a challenge to the results of a special school election held on October 7, 1986, in the school district in the city of Asbury Park. The petitioners, who are registered voters of Asbury Park, intend that the results of two propositions on the ballot for construction of new schools should be invalidated because of illegal votes.

On December 18, 1986, a Letter Order, which is attached and hereby incorporated by reference, was issued granting a motion to dismiss made by the Asbury Park Board of Education with respect to the election results of the first proposition in that the number of votes being challenged were insufficient to change the result of the election. That Letter Order also denied the motion to dismiss, as well as a cross-motion for summary decision, as to the second proposition in issue pending further proceedings to determine disputed facts that could have changed the result of the election. Those facts concerned 56 votes cast by persons not providing the required addresses at the polling place. On January 12, 1987, counsel for the petitioners advised that they were abandoning the remaining factual issue as to the 56 votes and thus did not wish to proceed with the

You are viewing an archived copy from the New Jersey State Library.

hearing. In doing so, the petitioners reserved their right to pursue the legal issues resolved by the Letter Order. I so **CONCLUDE.**

In that there is therefore no need for further fact finding proceedings before the Office of Administrative Law, the Letter Order of December 18, 1986, effectively resolves all outstanding issues and is ready for final review by the Commissioner of Education. It is so **ORDERED.**

It is further **ORDERED,** given the petitioners' decision to abandon the factual issue of the 56 votes on the second proposition, that the petition be withdrawn pursuant to N.J.A.C. 1:1-17.2 insofar as it pertains to the factual question concerning those votes for reason of failure to prosecute.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

FEB 2 1987
DATE

Received
RICHARD J. MURPHY, ALJ

FEB - 4 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 5 1987
DATE

Ronald J. Parker
OFFICE OF ADMINISTRATIVE LAW

ds

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW
CN 049
QUAKERBRIDGE PLAZA
BUILDING NO. 9
QUAKERBRIDGE ROAD
TRENTON, NJ 08625
(609) 588 6587

RICHARD J. MURPHY
ADMINISTRATIVE LAW JUDGE

December 18, 1986

Alfred L. Ferguson, Esq.
McCarter & English
550 Broad Street
Newark, NJ 07102-4578

Craig E. Darvin, Esq.
McOmber & McOmber
54 Shrewsbury Avenue
Red Bank, NJ 07701

RE: IN THE MATTER OF THE SPECIAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF ASBURY PARK OAL DKT. NO. EDU 7147-86

LETTER ORDER

Dear Counsel:

This order addresses a motion to dismiss for failure to state a claim made by the Asbury Park Board of Education, as well as cross-motion for summary decision submitted by the petitioners. For the reasons set forth below, the motion to dismiss is granted with respect to the results of Proposition No. 1, which would not be changed by the irregularities alleged. As to Proposition No. 2, both the motion to dismiss and motion for summary decision are denied pending further proceedings to determine disputed facts which could change the result of the election.

There is no dispute that a special election was held in Asbury Park on October 7, 1986, to consider propositions for the building of two new schools. Proposition No. 1 concerned the Bradley Street School and was approved by a margin of 125 votes with 688 for and 563 against. The second proposition, for the Bond Street School, passed by a narrower margin of 41 votes (623 to 582). Petitioners claim that illegal votes were received because of fraud or error and cite the results at the Middle School which were as

You are viewing an archived copy from the New Jersey State Library.

follows: Proposition One 328 for and 39 against; Proposition No. 2, 291 yes to 39 no. They claim that the result at the Middle School was at odds with previous votes at that location on roughly the same issue. They further allege that a total of 56 votes at all locations were cast without voters providing addresses with their signatures. Petitioners also argue the votes should be set aside because both the Commissioner of Education and Local Finance Board failed to approve the issuance of bonds pursuant to N.J.S.A. 18A:24-26, 27 within 60 days as required.

The Board of Education argues that a recount conducted on Tuesday, October 28, 1986, establishes that no error in counting of votes was made. As to allegations concerning the fraud and corruption, the Board contends that it is not enough for the petitioners to claim that the results between the Middle School polling place and other polling places were disparate, without showing that illegal votes were received or that there was other fraud in the election. They also argue that the challengers have failed to show that the number of illegal votes received would have changed the result of the election. The petitioners respond by claiming that 56 votes were counted from all polling places by voters who failed to provide addresses as required by N.J.S.A. 18A:14-50. Since the margin on Proposition No. 2 was only 41 votes, petitioners claim that this defect was sufficient to change the result of the election and requires that it be set aside with respect to the second proposition. As to the first proposition which won by a margin of 125, petitioners concede that 56 votes would not change the result but contend that the failure of the Commissioner of Education or local Board of Finance to approve the bond issue within 60 days renders the votes invalid.

With respect to Proposition No. 1, which won by 125 votes, it is evident that the petitioners have failed to state a claim upon which relief can be granted in that their claim of 56 invalid votes would not change the result of the election pursuant to N.J.S.A. 19:29-1. Thus, even if the votes without addresses were deemed illegal and were shown to have been cast in support of the proposition, the result of the election would remain the same and could not be set aside. See, In re Application of Moffat, 142 N.J. Super. 217 (App. Div. 1976).

As to the second proposition, which passed by only 41 votes, it is apparent that the 56 votes claimed to have been illegally cast could change the election if they were shown to have been cast by persons who were not residents and, further, cast in favor of

You are viewing an archived copy from the New Jersey State Library.

the proposition. The burden of proof is on the contestants to show both that illegal votes were cast and that they were cast in such number as to change the result. See, Application of James T. Murphy, 101 N.J. 163, 167 (App. Div. 1968), certif. den. 52 N.J. 172 (1968) (no relation). In this instance the only defect alleged is that the signatures of voters were not accompanied by their legal addresses. Petitioners do not claim that signatures were invalid, or given by persons who were not residents or otherwise qualified to vote. In the absence of any showing that votes were cast by persons not qualified to do so or under fraudulent circumstances, the absence of addresses alone is not sufficient to validate the votes in question if they were, in fact, cast by persons qualified their residence and other factors to vote. Because it may be that some if not all of the 56 voters may not have been residents qualified to vote, the motion to dismiss should not be granted as to the second proposition until the petitioners have had an opportunity to prove that votes were cast by persons not qualified to vote in sufficient numbers to change the result. Although petitioners have not claimed that any votes were cast by nonresidents or persons otherwise unqualified to vote, there is a genuine issue of material fact as to whether all or some of the 56 votes cast on the second proposition were invalid for reasons of nonresidency.

On that basis, it is necessary to deny the motion for summary decision pending resolution of the factual question of whether illegal votes were cast by nonresidents and, if so, whether in sufficient numbers to change the results of the election. See, In re Bonsanto's Application, 171 N.J. Super. 356, 362 (App. Div. 1979). It is not enough as a matter of fact or law that the petitioners claim that 56 voters failed to list their addresses when they gave their signatures at the polling place. That defect, while not inconsequential, does not in and of itself render the votes invalid so long as they were cast by registered and qualified voters. Title 18A exhibits concern with identification of voters through comparison of signatures as a condition precedent to receiving a ballot. See, N.J.S.A. 18A:14-50 to 51.1. The statute makes clear that the election officers at the poll shall list opposite a voter's name the number of the ballot furnished and thereby have an opportunity to check to ensure that an address is provided, as well as to compare signatures. Although there may have been error in failure to note that addresses were missing, this alone should not render those votes illegal if the rolls of eligible voters can be checked and residence easily verified. There is therefore at this time a genuine issue as to whether the 56 votes in question were cast by qualified residents and this question

You are viewing an archived copy from the New Jersey State Library.

needs to be resolved by further fact finding in the form of a hearing, unless the parties can stipulate.

With respect to petitioners' claim as to the failure of the Commissioner of Education and Local Board of Finance to act within 60 days to approve the issuance of bonds in connection with the construction of these schools, under 18A:24-25, 27, there is no requirement that the underlying vote be set aside because of the inaction of the Commissioner or Local Finance Board. Such inaction, if it indeed occurred, would subject the Commissioner or the Local Board of Finance to legal action to compel a performance of their statutorily mandated responsibilities, but the result of the underlying vote on the bond would not automatically become null and void upon the expiration of a 60-day period. Petitioners motion for summary decision on that basis is therefore denied.

Having reviewed the briefs and certifications submitted in support of the Board of Education's motion to dismiss as well as the petitioners' cross-motion for summary decision, I hereby **ORDER** that the motion to dismiss is granted as to Proposition No. 1 and that both the motion to dismiss and motion for summary decision are **DENIED** as to Proposition No. 2 pending further proceedings on the factual questions surrounding the 56 votes described above.

This Order may be reviewed by **SAUL COOPERMAN, COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case, pursuant to N.J.A.C. 1:1-16.5.

Very truly yours,

Richard J. Murphy
Administrative Law Judge

RJM/ds

c: Elizabeth J. Lazzara, Assistant Director, Judicial Management, Decisions

You are viewing an archived copy from the New Jersey State Library.

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
ASBURY PARK, MONMOUTH COUNTY. :
:

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that petitioners' exceptions to the initial decision as well as the Board's reply to those exceptions were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

It is noted that petitioners have abandoned their challenge to the ALJ's determination regarding the dismissal of Proposition No. 2, which pertained to the issue concerning whether a sufficient number of signatures on the poll lists (unaccompanied by the addresses of the voters) were, in fact, signatures of individuals who were residents of the City of Asbury Park.

However, petitioners do except to that conclusion reached by the ALJ referenced in the initial decision and cited in the attached letter order issued by the ALJ on December 18, 1986 wherein he ruled as follows:

> With respect to petitioners' claim as to the failure of the Commissioner of Education and Local Board of Finance [Department of Community Affairs, Division of Local Government Services] to act within 60 days to approve the issuance of bonds in connection with the construction of these schools, under 18A:24-25, 27, there is no requirement that the underlying vote be set aside because of the inaction of the Commissioner or Local Finance Board. Such inaction, if it indeed occurred, would subject the Commissioner or the Local Board of Finance to legal action to compel a performance of their statutorily mandated responsibilities, but the result of the underlying vote on the bond would not automatically become null and void upon the expiration of a 60-day period. Petitioners motion for summary decision on that basis is therefore denied.
> (Attached Letter Order, at p. 4)

You are viewing an archived copy from the New Jersey State Library.

Petitioners except to the above-cited ruling made by the ALJ for the reasons set forth in pertinent part below:

> The legislature has seen fit to require that local school boards undergo a rather detailed procedure when bond proposals will exceed the statutory (sic) prescribed debt limit of a municipality. Such expenditures on the part of school boards may have a drastic and harmful effect on a municipality's credit. The real fear behind the legislation is that municipalities will go bankrupt in funding educational facilities proposed by local school boards. To avoid potential harm to the credit of a municipality, the legislature has designed a check on the power of local school boards. One aspect of that check system is the requirement that proposals for new educational facilities come under scrutiny by state agencies when they can seriously and deleteriously affect the municipality's credit. Commissioner and Finance Board approval of such excess expenditures, therefore, is required by statute as a protection to municipalities.
>
> ***
>
> In this case, for example, the Asbury Park School Board submitted its application for review to the Commissioner and Finance Board on June 26, 1986. The Commissioner and Finance Board, therefore, had until August 25, 1986 to respond as required by N.J.S.A. 18A:24-26 and 18A:24-27. Endorsements were not made, however, until September 16, 1986: a 22-day delay. This is not a de minimus infraction.
>
> To continue to ignore the requirements of the statutes, by failing to enforce the statutes' requirements, is to provide an example to local school boards concerning the way in which they may conduct school board elections in the future. School boards may, it seems, wholly ignore the statutory requirements that are designed to check their authority in cases where they risk putting the credit of a municipality in jeopardy. An explicit statutory requirement designed to protect the credit and future financial existence of a municipality is too important to waive so casually.
>
> (Petitioners' Exceptions, at pp. 4-5)

You are viewing an archived copy from the New Jersey State Library.

The Board rejects the argument advanced by petitioners in seeking to overturn the result of the special school election. The Board contends that petitioners' reliance upon technical violations of statutory prescription which were not committed by the Board may not be used to invalidate the outcome of the special school election held on October 7, 1986, at which time the voters approved the construction of two new schools in the City of Asbury Park.

In support of its legal argument, the Board relies on Wene v. Meyner, 13 N.J. 185 (1953) and In the Matter of the Annual School Election Held in the Borough of Totowa, Passaic County, 1965 S.L.D. 62. The Board maintains that the above-referenced decisions stand for the proposition that technical violations of statutory prescription are insufficient to vitiate the outcome of an election.

The Commissioner has reviewed the respective positions of the parties in connection with those findings and conclusions set forth in the initial decision and the prior Letter Order issued by the ALJ on December 18, 1986 attached to the initial decision and incorporated by reference therein.

In the Commissioner's judgment, the technical violations of law relied upon by petitioners in order to set aside the special school election held in the City of Asbury Park on October 7, 1986 are without merit and attempt to exalt form over substance. The record of this matter reveals that the Board complied with the appropriate requirements of N.J.S.A. 18A:24-25 in seeking to obtain consent from the Commissioner of Education and the Local Finance Board, Department of Community Affairs to exceed the debt limitations imposed by law for the issuance of school construction bonds subject to voter approval.

While it is undisputed that the Board's application to the Commissioner and the Local Finance Board was not approved by either of the respective agencies within the 60-day time period contemplated in law, there is no finding that such delay in granting approval of the Board's application prejudiced petitioners or thwarted the will of the electorate who voted at the special school election on October 7, 1986.

Accordingly, for the reasons expressed by the ALJ in his initial decision and his Letter Order of December 18, 1986 the Commissioner finds and determines that the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

March 2, 1987

You are viewing an archived copy from the New Jersey State Library.

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE CITY OF :
ASBURY PARK, MONMOUTH COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 2, 1987

For the Petitioner-Appellant, McCarter and English (Alfred L. Ferguson, Esq., of Counsel)

For the Respondent-Respondent, McOmber and McOmber (Craig E. Darvin, Esq., of Counsel)

This is an appeal from a Commissioner's decision which, adopting the Administrative Law Judge's determination, dismissed a petition challenging the validity of a special school election in which voters granted approval for the construction of two new schools. Petitioners claimed that 56 invalid votes were cast so as to warrant setting aside the results of the election. The Administrative Law Judge granted the district Board's motion to dismiss Petitioners' claim concerning the first ballot proposition, but denied dismissal of their claim concerning the second proposition. Petitioners subsequently advised the Administrative Law Judge that they were abandoning the factual issues concerning the 56 votes originally the subject of the challenge, but reserved their right to pursue the legal issues. Thus, the only issue before the Commissioner when he decided the case was the effect on the validity of the election of the failure of the Commissioner of Education and the Local Board of Finance to act within 60 days to approve the issuance of bonds in connection with the construction of the proposed schools. As stated, the Commissioner adopted the Administrative Law Judge's determination, which found on this issue that the failure of these agencies to act within 60 days did not require that the underlying vote be set aside. Petitioners appealed this determination as it related to the second ballot proposition, which concerned the construction of one of the two proposed schools.

After reviewing the record in this matter, we concur with the Commissioner that the failure of the Commissioner and the Local Board of Finance to act within the 60 days specified by N.J.S.A. 18A:24-26 and N.J.S.A. 18A:24-27 does not warrant setting aside the results of the election in this case. As emphasized by the Commissioner, the district Board did comply with the requirements imposed on it by N.J.S.A. 18A:24-25 by seeking approval from the Commissioner and the Local Finance Board to exceed the debt limitation in

You are viewing an archived copy from the New Jersey State Library.

issuing the school construction bonds that were included for approval in the challenged ballot proposition. Although we emphasize the importance of conformity with the 60 days requirement imposed on the Commissioner and the Local Finance Board by N.J.S.A. 18A:24-26 and N.J.S.A. 18A:24-27 respectively so as to avoid delay in ultimate approval for the issuance of bonds, we affirm that the delay in approval by the Commissioner and Local Finance Board in this case did not prejudice the voters or thwart the will of the electorate. We therefore affirm the Commissioner's decision in this matter substantially for the reasons expressed therein.

JULY 1, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3757-86
AGENCY DKT. NO. 181-5/86

FLORENCE AMOS,
Petitioner,
v.
RED BANK BOROUGH BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: December 2, 1986 Decided: January 14, 1987

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Florence Amos (petitioner) alleges and the Red Bank Borough Board of Education (Board) denies that the Board improperly charged the petitioner with sick leave when she was absent from duty because of a service-connected disability. The matter was joined before the Commissioner of Education by the filing of a verified petition of appeal on May 27, 1986 by the petitioner and an answer thereto on June 6, 1986 by the Board. The matter was transmitted on June 9, 1986, to the Office of Administrative Law for disposition as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Prehearing conferences were held by telephone in July, August and September 1986. The parties at first believed the matter to be amenable to amicable resolution. On September 15, it appeared that settlement was not likely. I set the matter down for

You are viewing an archived copy from the New Jersey State Library.

hearing on Monday, October 20, and directed all discovery to be completed by October 10. Following another telephone conference on October 17, the parties agreed that the matter would proceed to summary judgment on the papers. A schedule of submissions was established and the hearing date adjourned. The submission schedule was extended for good cause shown and the record closed on December 2, 1986.

I

The petitioner states, by affidavit, that she has been employed as a teaching staff member in the Red Bank Borough School District for 17 years. She has taught nearly all subjects offered at the grade 6 and grade 8 levels. In 1984-85, she taught reading and language arts.

Prior to May 1, 1985, she had accumulated approximately 59 and one-half sick days pursuant to N.J.S.A. 18A:30-3. During the period May 2 - May 31, 1985, the petitioner states at least 18 of her pupils contracted chicken pox and were absent from class for that reason. The petitioner had class contact with these pupils from 140-535 minutes per week. On or about May 15, the petitioner contracted chicken pox. She was absent from her teaching duties May 16 - May 24, 1985.

The petitioner also states she has personal knowledge of prior instances within the district in which teaching staff members who had contracted diseases commonly referred to as childhood illnesses had not had their accumulated sick leave decreased because it was determined that these teaching staff members had incurred a service-connected illness. The petitioner identifies two teachers who were so treated.

The petitioner believed throughout the 1984-85 school year that her absence would be treated similarly. At or about the beginning of the 1985-86 school year, she was informed by a Board agent that her accumulated sick leave had been decreased by seven days because of her absence in May. Upon being so informed, she filed an Employer's First Report of Accidental Injury for Occupational Illness (petitioner's exhibit D) on September 23, 1985.

On or about September 26, she received a copy of a memorandum from a Board agent stating, in pertinent part, that her workers' compensation form would not be

You are viewing an archived copy from the New Jersey State Library.

processed because the school administration viewed the form as "untimely" (petitioner's exhibit E).

The petitioner further states that during the period at issue, she was treated by Dr. Philip B. Eatough. The physician is licensed to practice in New Jersey, is a diplomate of the American Board of Internal Medicine and is Board certified by the American Board of Cardiology. The petitioner saw Dr. Eatough on May 16 and May 23, 1985. The physician specifically diagnosed her illness as chicken pox. He prescribed medication and closely monitored her condition, which he viewed as serious, given the problems that often attend chicken pox in an adult. The petitioner states that, to the best of her knowledge, she at no time during the period of incubation for chicken pox came into contact with any individual who contracted chicken pox contemporaneously with her illness who is not also a pupil in the Red Bank Middle School.

An affidavit of Dr. Eatough is consistent with that of the petitioner. In addition, the physician states that the incubation period from the time of exposure to the appearance of a rash in chicken pox is 10-20 days, most often 14-17 days. The disease is highly contagious with attack rates of 80 percent or more. In paragraph seven of his affidavit, the physician states, "2 to 20 percent of the cases occur in persons over the age of 15 years. Within a reasonable degree of medical certainty Mrs. Amos contracted chicken pox because of her exposure to her students." The physician points out that chicken pox is normally not contracted unless there is something more than "ephemeral contact with a carrier." He believes the petitioner's direct involvement with at least 18 pupils during the relevant incubation period who contracted chicken pox leads to the conclusion that the petitioner's chicken pox was contracted due to her "massive exposure to these students." Ibid.

II

The petitioner argues that her work-related illness entitles her to benefits pursuant to N.J.S.A. 18A:30-2.1. Her affidavit and that of her physician establish that she contracted chicken pox because of her exposure to pupils who contracted that illness in May 1985.

You are viewing an archived copy from the New Jersey State Library.

The Board has not specifically challenged the petitioner's averments that her illness was the result of her exposure to children in her classes who contracted chicken pox within the relevant incubation period. The Board, however, expresses concern that N.J.S.A. 18A:30-2.1 was not intended to cover situations in which teachers contract "juvenile diseases" and teachers would next allege that common colds were related to their exposure to pupils with colds.

There would be substantial proof problems in situations concerning common colds. In this case, however, the disease in question is chicken pox. Chicken pox is not normally contracted by adults unless there is something more than casual contact with a carrier. Therefore, there are substantial differences between the contraction of juvenile illnesses by an adult and the contraction of a common cold. It is clear that Mrs. Amos contracted chicken pox as a direct result of her contact with pupils in her classes who contracted chicken pox during the relevant period.

The Commissioner of Education has interpreted N.J.S.A. 18A:13-2.1, as amended, to have precisely the same meaning as it does in the Workers' Compensation Act where it has been held to include all work-related episodes, both injuries and illnesses. Bergmann v. Vineland Bd. of Ed., OAL DKT. EDU 8457-82 (Aug. 1, 1983) adopted, Comm'r. of Ed. (Sept. 15, 1983), citing Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982).

A compensable occupational disease as defined in N.J.S.A. 34:15-31 is one due to causes or conditions characteristic of a particular trade, occupation, process or employment, or is due to the exposure of any employee to the cause thereof arising out of and in the course of employment. The petitioner cites several cases in support.

The Commissioner of Education has appropriate jurisdiction in this case to decide the matter based upon the prescriptions of N.J.S.A. 18A:30-2.1 whether or not a claim petition was filed under the Workers' Compensation Act. Even though the Board contends that dicta in Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985) somehow requires the conclusion that the present petition should be dismissed because of an alleged failure on the part of the petitioner to file for workers' compensation benefits, Forgash at no time requires, as a condition precedent for the processing of a petition by the Commissioner, that a compensation petition form must be

You are viewing an archived copy from the New Jersey State Library.

filed. In Forgash, a reference was made that N.J.S.A. 18A:30-2.1 "contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner." at 467. The Board is hard-pressed to equate the reference to "contemplate" as being synonymous with a directive that in all situations an employee must file for compensation benefits in order to be eligible to file a petition with the Commissioner of Education.

The petitioner also argues there is substantial administrative and judicial precedent that establishes her entitlement to have the present matter considered, pursuant to N.J.S.A. 18A:30-2.1, regardless of whether a compensation petition was filed.

In Masino v. West Deptford Bd. of Ed., OAL DKT. EDU 4347-79 (Oct. 3, 1980) adopted, Comm'r of Ed. (Nov. 20, 1980), rev'd and remanded, St. Bd. (July 1, 1981), interlocutory appeal dism. (N.J. App. Div., June 15, 1983, A-5469-80T1) (unreported), the State Board concluded that, although compensation under N.J.S.A. 18A:30-2.1 and under the Workers' Compensation Law both depend on a factual finding that the injury arises out of and in the course of one's employment, the Commissioner had jurisdiction to determine that issue insofar as provisions of Title 18A are involved.

In Theodore v. Dover Bd. of Ed., the court concluded the appropriate administrative remedy for school district employee claims regarding N.J.S.A. 18A:30-2.1 was a proceeding before the Commissioner. Once the Appellate Division concluded that the trial court in Theodore had misinterpreted the phrase "accident arising out of or in the course of his employment," as contained in N.J.S.A. 18A:30-2.1; it ordered the Dover Township Board to pay Theodore benefits pursuant to N.J.S.A. 18A:30-2.1, without any substantive consideration as to whether the injury at issue was a service-connected disabling injury within the meaning of that term in N.J.S.A. 18A:30-2.1.

The petitioner asserts this is significant in a present case, in light of the conclusion in Sirianni v. Howell Township Bd. of Ed., OAL DKT. EDU 2774-85 (Dec. 26, 1985) adopted, Comm'r of Ed. (Feb. 5, 1986), which establishes that a failure on the part of a local board to comply strictly with the prescriptions of N.J.S.A. 18A:30-2.1, with regard to an independent investigation concerning any service-connected disability, would likewise render a board of education strictly liable for the payment of the salaries and benefits at issue, without consideration of the substantive medical proofs.

You are viewing an archived copy from the New Jersey State Library.

The petitioner urges that Williams v. Bd. of Ed. of the Tp. of Deptford, 192 N.J. Super. 31 (App. Div. 1983) aff'd 98 N.J. 319 (1985), is significant to the present case. The Appellate Division, interpreting what was meant by the reference within N.J.S.A. 18A:30-2.1 to a "period of absence for up to one calendar year," concluded that, "[n]othing in Theodore suggests that any other portion of N.J.S.A. 18A:30-2.1 is to be construed in conjunction with or in light of the Workers' Compensation Act." 192 N.J. Super. at 36.

The Appellate Division also dichotomized the Workers' Compensation Act and the education statutes:

> Appellant also argues that the maxim that the Workers' Compensation Act is to be liberally construed to bring as many cases as possible within its coverage should be applied here to result in reading the two statutes in pari materia. However, the statute before us in this case is not part of the Workers' Compensation Act, but is rather part of the statutory scheme governing and regulating the educational system in New Jersey. Broadly viewed, the Workers' Compensation Act and N.J.S.A. 18A:30-2.1 both share a concern, in a way, with methods of compensation of employees for personal injuries sustained in accidents arising out of and in the course of their employment. But this is only a broad or general similarity. The rule of in pari materia is only invoked to aid in the construction of statutes that pertain to the same subject matter. State v. DeCarlo, 67 N.J. 321, 325 (1975). [at 36]
>
> . . .
>
> Unlike the workers' compensation requirement, payments under the education law are made without any waiting period and during the period the employee received or was eligible to receive temporary disability under the workers' compensation laws, and they are coupled with a preservation of sick leave time. N.J.S.A. 18A:30-2.1 also provides for the reduction of salary payments by the amount of any workers' compensation award made for temporary disability. (Footnote omitted.) [at 38-39]

The petitioner also argues that temporary disability benefits under the Workers' Compensation Act and under N.J.S.A. 18A:30-2.1 are not necessarily the same thing. A compensation insurance carrier may well determine that temporary disability benefits should be terminated based on the definition of temporary disability under the Workers' Compensation Act, while the individual still may be disabled under N.J.S.A. 18A:30-2.1 in terms of not being able to resume instructional responsibilities. Therefore, this matter is

You are viewing an archived copy from the New Jersey State Library.

appropriately before the Commissioner of Education. A teacher does not have to seek temporary disability benefits under the workers' compensation laws as a condition precedent to receiving the benefits of N.J.S.A. 18A:30-2.1.

The petitioner did attempt to seek workers' compensation benefits but was advised by an agent of the Board that it would not process her application because it was not timely. The Board may not, then, raise the issue of exhaustion of remedies under the workers' compensation laws because the exhibits attached to the petitioner's affidavit clearly show she made every effort to file the appropriate papers, only to be advised by the Board of Education that it would not process them.

III

The Board argues that, despite the cases cited by the petitioner, she cannot get around the specific language contained in Forgash, 208 which states:

> Moreover, as the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court. By its terms, this statute contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner of the eligibility of the injured employee for the additional benefits provided by the statute. [at 466-467]

Forgash was decided on December 31, 1985, and is the latest decision in this area of the law. The Appellate Division made it clear that certain procedures must be followed before N.J.S.A. 18A:30-2.1 may be invoked:

1. A proceeding pursuant to N.J.S.A. 18A:30-2.1 cannot be used to circumvent the compensation statutes.

2. N.J.S.A. 18A:30-2.1 requires "a prior determination of a compensable injury by the compensation court" before it can be invoked.

3. The only function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits and cannot be considered independently.

You are viewing an archived copy from the New Jersey State Library.

Thus, the Appellate Division has stated that N.J.S.A. 18A:30-2.1 may be invoked if, and only if, there has been an initial determination of a compensable injury by the Division of Workers' Compensation. The prior cases cited by the petitioner, may not be considered in light of Forgash and cannot be binding on this tribunal. The decision of the State Board of Education in Masino, decided in 1981, cannot supersede the decision of the Appellate Division in Forgash. If Masino rules otherwise, it has been reversed by Forgash and is no longer good law.

It is apparent on its face that N.J.S.A. 18A:30-2.1 is merely a tie-in to the Workers' Compensation legislation. Its only purpose is to extend the sick leave of those employees who have valid compensation claims, of those employees who are absent "as a result of a personal injury caused by an accident arising out of and in the course of [their] employment." Logically, this must first be determined in a proceeding before the Division of Workers' Compensation. If a decision is rendered in favor of the employee, then, and only then, do the provisions of the education statute apply. The statute is meaningless otherwise and the Appellate Division has so decided in Forgash.

Second, it is absurd for the petitioner to argue that she did apply for workers' compensation benefits, but was denied by a Board agent (petitioner's exhibit E). The petitioner knows, or should know, that the appropriate procedure is to file a formal Workers' Compensation Petition, which she failed to do.

Last, because the petitioner failed to meet procedural requirements and a decision on the merits is inappropriate at this time, it is unnecessary for the Board to present extensive medical testimony in opposition to her allegations. However, the Board points out that even Dr. Eatough, the petitioner's expert witness, is not sure of the cause of the petitioner's illness. He states that his opinion is based upon "a reasonable degree of medical certainty." Such a statement, from the petitioner's own expert, creates considerable doubt as to how Mrs. Amos contracted chicken pox and makes it apparent that she could not establish a valid workers' compensation claim even if she had filed properly.

The petitioner cannot now attempt to use N.J.S.A. 18A:30-2.1 to circumvent the workers' compensation procedure, which is what she seems to be attempting to do.

You are viewing an archived copy from the New Jersey State Library.

IV

The question of primary jurisdiction in this area admittedly has followed a circular course. In Wellington v. Caldwell - W. Caldwell Bd. of Ed., agency DKT. NO. 209-5/78 (Dec. 15, 1980) adopted, Comm'r of Ed. (Jan. 29, 1981), this judge and the Commissioner determined that Wellington's claim had first to be examined by the Division of Workers' Compensation. Masino, Theodore and Williams followed. Masino seems to say what the petitioner contends it does. The Appellate Division having declined review, the last standing decision in Masino is the State Board of Education decision of July 8, 1981. Among other things, the State Board stated:

> . . . Even though compensation under N.J.S.A. 18A:30-2.1 and under the Workers' Compensation Law both depend on a factual finding that the injury arises out of and in the course of one's employment, the Commissioner clearly has jurisdiction to determine that issue insofar as the provisions of the title 18A are involved. Whether or not an award will be made under the Workers' Compensation Law will be decided by the Division of Workers' Compensation. That does not mean, however, that the Commissioner cannot determine the same factual issues for the purpose of applying N.J.S.A. 18A:30-2.1. [at 2]

In 1982, the Appellate Division delivered Theodore. That case is distinguishable from the present case both procedurally and substantively. While it is true that the case settles the meaning of the phrase "accident arising out of or in the course of his employment," little else is similar to the present matter. After observing that the trial court judge should have transferred the plaintiff's claim to the Commissioner of Education, the appellate panel chose to determine the matter in order to avoid waste of both judicial and administrative resources as well as a burden on the plaintiff.

The court determined that it was not bound by an agency's statutory interpretation. It then held that the subject phrase was intended to have the same meaning in the education statute as in the workers' compensation statute. The court went on to discuss impact or stress, considerations not pertinent here.

Still later, the Appellate Division decided Williams. The emphasis of that case was interpretation of the phrase "for up to one calendar year" in N.J.S.A. 18A:30-2.1. It is important to bear in mind that the facts in Williams were not disputed. The court held

You are viewing an archived copy from the New Jersey State Library.

that the one-year period for continuation of salary under the statute did not refer to aggregate absences due to injury and, thus, Williams was entitled to full salary without charging any part of her absence to her annual or accumulated sick days, only during the 12-month period running from the date of injury or first absence. While that is an important holding, it is not essential to a determination of this case.

Then came Sirianni. That matter, too, is distinguishable from the present case. In that matter, the Board agreed that Sirianni had contracted Shigellosis from a pupil. Perhaps the most important distinction is that the Board had deferred to its compensation insurance carrier's medical determinations. The Commissioner expressly agreed with the determination of the administrative law judge that "the Board should not have deferred to an insurance carrier and should have independently investigated the nature of the petitioner's disability to determine whether she was covered under N.J.S.A. 18A:30-2.1." at 9.

Then came Forgash. That decision says N.J.S.A. 18A:30-2.1 "contemplates" prior determination by a compensation court. Id. at 467. I have less difficulty than does the petitioner reading the word "contemplate" as imperative. The pertinent paragraph states:

> Moreover, as the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court. By its terms, this statute contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner of the eligibility of the injured employee for the additional benefits provided by the statute. [at 466-467]

There is no ambiguity in this paragraph. The court recognizes that the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited period. A proceeding under the education statute may not be used to supplant the function of the compensation court. The statute contemplates a prior determination of a compensable injury by the compensation court before the Commissioner may consider the eligibility of the injured employee for the additional benefits provided by the statute. Although it may be an unfortunate fact that the typical compensation case moves more slowly than the typical education case, I FIND that

You are viewing an archived copy from the New Jersey State Library.

N.J.S.A. 18A:30-2.1 requires a prior determination of a compensable injury by the compensation court before it may be invoked.

Although I believe this finding to be legally correct, I also believe it to be equitably deficient. N.J.S.A. 34:15-38 imposes a waiting period in any case in which the total period of disability is seven calendar days or less. The petitioner here is saved harmless from this requirement because her period of disability covered nine calendar days.[1] Nevertheless, it is not difficult to conceive of cases in which the period of disability would be seven days or less.

This suggests situations in which an employee, entitled to sick leave, could effectively be denied the benefit of N.J.S.A. 18A:30-2.1 if the fact of service-connectedness were disputed and if the matter proceeded first in the compensation court. I have read the court's exploration of legislative intent in Theodore and find no great help there. It seems that if short-term service-connected disabilities are to enjoy the protection of N.J.S.A. 18A:30-2.1, a court of competent jurisdiction or, better still, the Legislature must say so.

I would have no difficulty finding for the petitioner on the merits. While it might be virtually impossible to prove how a common cold was contracted, there would be little problem here establishing it was more likely than not that the petitioner contracted chicken pox from pupils with whom she had contact and who were incubating the disease at the time. Thus, the Board's fears of opening some supposed floodgates to litigation of this type are unfounded.

---

[1]The petitioner is also saved harmless from the Board's decision that she untimely filed a First Report form by N.J.S.A. 34:15-51 which provides a period of two years in which to file.

You are viewing an archived copy from the New Jersey State Library.

If this case were to turn only on its procedural aspects, I would have to determine that the Appellate Division decision in Forgash controls. There is, however, more that must be considered. First, I **FIND** the petitioner's averment that two named teaching staff members contracted childhood diseases but did not suffer a reduction in accumulated sick leave because it was determined that their illnesses were service-connected has not been rebutted by the Board. Second, I **FIND** that the petitioner's physician's determination, "within a reasonable degree of medical certainty," that Mrs. Amos contracted chicken pox from her pupils is similarly unrebutted.

Accordingly, I **CONCLUDE** that the petitioner's case of chicken pox in May 1985 was a sevice-connected illness and that the Board arbitrarily and capriciously refrained from treating her absence therefor as it had treated the absences of two other teaching staff members who contracted childhood diseases.

Therefore, it is **ORDERED** that seven days be recredited to the accumulated sick leave of Florence Amos by the Red Bank Borough Board of Education.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

You are viewing an archived copy from the New Jersey State Library.

OAL DKT. NO. EDU 3757-86

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

14 JANUARY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

JAN 15 1987

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 20 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

You are viewing an archived copy from the New Jersey State Library.

FLORENCE AMOS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board's exceptions reiterate the assertion that the Court's decision in Forgash, supra, compels a decision in its favor and places reliance on the arguments previously advanced to and considered by the ALJ.

Petitioner contends that affirmance of the initial decision is required because the Board does not except to the ALJ's finding that two other teachers did not suffer a reduction in accumulative sick leave when contracting childhood diseases nor does it except to his conclusion that the Board failed to rebut the determination of petitioner's physician that, with "a reasonable degree of medical certainty," she contracted chicken pox from her students. (Petitioner's Exceptions, at p. 1, quoting Initial Decision, ante)

Petitioner does aver, however, that the ALJ erred in concluding that dicta in Forgash, supra, requires that a prior determination from the Division of Workers' Compensation be made before the Commissioner may consider the matter under N.J.S.A. 18A:30-2.1. Moreover, she argues that, assuming arguendo one could read that decision as such, there are Appellate Court decisions, including Masino, supra, and Theodore, supra, cited by petitioner which have concluded that a petition of appeal may be filed before the Commissioner concerning N.J.S.A. 18A:30-2.1 independent of any action before the Division of Workers' Compensation. Petitioner further contends that the fact one Appellate Court panel disagrees with several other panels regarding a particular issue does not mean the later court opinion is of greater precedential impact than the other contrary decisions.

Upon a thorough examination of the record of this matter including the pertinent case law cited by the parties in their briefs, the Commissioner concurs with the ALJ's finding that a prior determination of a compensable injury by the compensation court is necessary before the Commissioner renders a determination under N.J.S.A. 18A:30-2.1.

You are viewing an archived copy from the New Jersey State Library.

Notwithstanding the decisions rendered in such cases as Williams, supra, Theodore, supra, and Masino, supra, it was not until the recent decision in Forgash, supra, that the Appellate Court explicitly and expressly spoke on the exact question of whether or not a prior determination by the compensation court is a precedent condition to the Commissioner's consideration of a dispute pursuant to N.J.S.A. 18A:30-2.1. The Forgash court's answer was quite clearly and unambiguously in the affirmative. It reads in pertinent part:

> Moreover, as the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court. By its terms, this statute contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner of the eligibility of the injured employee for the additional benefits provided by the statute.
> (208 N.J. Super. at 466-467)

As correctly pointed out by the ALJ, the Forgash court recognizes that:

1. The express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited period.

2. A proceeding under education statute may not be used to supplant the function of the compensation court.

3. The statute contemplates a prior determination of a compensable injury by the compensation court before the Commissioner may consider the eligibility of an injured/ill employee for the additional benefits provided by N.J.S.A. 18A:30-2.1.

Given the above, the Commissioner must abide by that decision unless and until the court issues further guidance or opinion on the matter.

Consequently, the determination of the ALJ with respect to this issue is affirmed for the reasons expressed in the initial decision and herein.

The Commissioner does not, however, concur with the ALJ's determination to restore the accumulative sick days deducted from petitioner due to "equity deficiency" (Initial Decision, ante) or because "there is more that must be considered" in this matter than the "procedural aspects." (Initial Decision, ante) Until such time as a prior determination is made by Workers' Compensation with

You are viewing an archived copy from the New Jersey State Library.

respect to petitioner's claim to an occupational illness, the Commissioner cannot and will not render a determination on N.J.S.A. 18A:30-2.1 as dictated by Forgash, supra, irrespective of and notwithstanding what the Board may have done in the past with two other teachers who contracted childhood illnesses.

In other words, petitioner must first, in accordance with Forgash, pursue her occupational illness claim under the provisions of N.J.S.A. 34:15-1 et seq. before the Commissioner may determine her N.J.S.A. 18A:30-2.1 claim. Once her eligibility has been determined through the workers' compensation statutes, he could then render a determination on any controversy that may exist over the education statute which is intended to complement those for workers' compensation. The Commissioner does not, therefore, concur that a Board's prior handling of two other teachers would supersede or relieve petitioner from meeting this procedural requirement which has been specifically expressed by the court in Forgash. Moreover, any allegation of failure by the Board to process her workers' compensation claim must be adjudicated under the statutory provisions for workers' compensation, not those for education.

Accordingly, the initial decision is affirmed in part and reversed in part as explained herein. The matter is, therefore, dismissed without prejudice.

COMMISSIONER OF EDUCATION

March 17, 1987

Pending State Board

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4929-86
AGENCY DKT. NO. 236-7/86

BONNIE SONTUPE and UPPER FREEHOLD REGIONAL EDUCATION ASSOCIATION,
Petitioners,
v.
SAUL COOPERMAN, COMMISSIONER OF EDUCATION and BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT,
Respondents.

Mary Jane Cullen, Esq., for petitioners (Ruhlman, Butrym & Friedman, attorneys)

Regina A. Murray, Deputy Attorney General, for respondent Saul Cooperman, Commissioner of Education (W. Cary Edwards, Attorney General of New Jersey, attorney)

Dennis Lavender, Esq., for respondent Upper Freehold Regional School District (Kalac & Newman, attorneys)

Record Closed: January 21, 1987 Decided: February 5, 1987

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Bonnie Sontupe, a nontenure teacher whose employment for 1986-87 was not renewed by the employing Upper Freehold Regional Board of Education (Board), is joined by the Upper Freehold Regional Education Association (Association), the majority representative of all teachers in the Board's employ, in this Petition of Appeal through

You are viewing an archived copy from the New Jersey State Library.

which they jointly allege that the Board erred as a matter of law when it elected not to offer Sontupe reemployment predicated upon an asserted administrative rule promulgated by the Commissioner of Education in violation of the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. While Sontupe does not seek an Order of reinstatement against the Board with the concomitant status of tenure in its employ, although she would accept such offer if tendered, she and the Association (petitioners) do seek an Order by which the Commissioner's asserted rule is declared invalid and of no legal force or effect and by which the Board would be restrained from implementing the controverted substance of the memorandum until and if its adoption complies with the Administrative Procedures Act. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted at which six justiciable issues were agreed upon. A hearing was scheduled to commence January 14, 1987 which hearing was adjourned upon receipt of a motion for summary decision under N.J.A.C. 1:1-13.1 et seq. on behalf of the Commissioner. The Commissioner seeks to be dismissed as a party respondent, which motion is joined by the Board in its own behalf, for failure of petitioner Sontupe and the Association to state a claim upon which relief could or should be granted. The record closed on the motion January 21, 1987 upon receipt of petitioners' memorandum in opposition thereto.

BACKGROUND FACTS

For purposes of the motion for summary decision, the background facts of the matter as established by the pleadings and exhibits are these. Petitioner, who possesses an elementary school teacher endorsement on an instructional certificate, began her employment with the Board September 1, 1983. From that time to the present, petitioner has been assigned to teach basic skills mathematics at the Board's Allentown High School. Pupils receive credit towards graduation for successfully passing this course. At the time of her initial employment, the Board required petitioner to hold the elementary school endorsement as a condition for employment.

Petitioner alleges that through December 1985, the Board and all boards of education in New Jersey as well as the State Board of Education rule at N.J.A.C. 6:11-6.1, perceived and provided that the elementary school teacher endorsement to be the proper certification to teach secondary basic skills mathematics courses which are creditable by the pupils towards graduation. N.J.A.C. 6:11-6.1 provides in part that "Teachers with

You are viewing an archived copy from the New Jersey State Library.

elementary endorsements are authorized to teach the common branch subjects, such as reading, writing, arithmetic, and spelling in the secondary school, grades seven through 12."

On or about December 31, 1985, respondent Saul Cooperman, Commissioner of Education, advised all Chief School Administrators in part as follows:

> At the December 4, 1985 meeting of the State Board of Education, I recommended to the board the passing scores for the grade nine High School Proficiency Test * * *
>
> According to New Jersey law and the Administrative Code, the state board must approve the HSPT passing scores. I will recommend that they do so at the January 8, 1986 meeting * * *
>
> The attached information addresses questions about the impact of the HSPT on instructional orograms. The information is organized in a question and answer format.
>
> I am providing you with this material at this time so that you can estimate the number of pupils likely to be eligible for compensatory services in 1986-87 * * * In addition, critical questions dealing with * * * certification * * * are addressed in the attached paper. I trust that these clarifications will prove useful as you develop you 1986-87 instructional program * * *
>
> (See letter dated December 31, 1985)

Question 12 in the attached "question and answer format" asks "What certification is required to teach in various types of elementary or secondary remedial programs?" The answer proffers, among other things, the following:

> * * *
>
> Communications and Computation courses, which are utilized to fulfill the state's graduation requirements (e.g. one year of communication for each year of enrollment up to four credit years and two credit years of computation) may not be taught by a teacher with an elementary certificate [elementary endorsement on an instructional certificate]. These courses must be taught either by a subject matter certified teacher (English or mathematics) or by a teacher with dual certification (e.g. English/Elementary, English/Reading, Mathematics/Elementary).
> * * *

You are viewing an archived copy from the New Jersey State Library.

Petitioners contend that this memorandum sets forth an administrative rule which to be valid requires prior notice and hearing under the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. The Commissioner contends the memorandum merely clarifies the existing rule at N.J.A.C. 6:11-6.1 and that such clarification is exempt from any requirements of the Act.

According to Exhibits B and C attached to petitioners' letter memorandum in opposition to the motion for summary decision, petitioner Sontupe is described as " * * * a conscientious and satisfactory teacher * * *" who has "* * * met or exceeded district standards in all areas * * *" and that Sontupe "* * * would have been recommended for tenure, and rehired for the 1986-87 school year" but for the recent change in certification requirements for one who teaches basic skills mathematics at the secondary school level. The vice president of the Association, according to Exhibit D attached to petitioners' opposition to the present motion, received from an assistant commissioner of education a letter dated April 3, 1986 which states in part:

> I [the assistant commissioner] appreciate your concern regarding the impact of the Commissioner's decision on these teachers [teachers with elementary endorsements who currently provide basic skills remedial math instruction at Allentown High School] and on school districts throughout the state. Granted, districts may not continue to employ elementary teachers to teach secondary level remedial math courses which count toward fulfilling the communication or computation graduation requirement * * *

Petitioner Sontupe was advised by letter dated April 28, 1986 that the Board determined not to offer her employment for 1986-87 because of the "* * * change in certification requirements for High School Basic Skills Teachers * * *".

This concludes a recitation of the facts upon which the Commissioner moves to dismiss the Petition of Appeal which is joined by the Board on its own behalf. The Commissioner seeks to be dismissed as a party respondent while the Board seeks dismissal of the Petition of Appeal. The joint attack made is that as a nontenure teacher petitioner Sontupe is not entitled as a matter of law to a plenary hearing and that the Petition of Appeal fails to state a claim upon which relief could be granted her. Petitioners Sontupe and the Association oppose the motion for summary decision on the grounds that a genuine issue of material fact remains to be decided which precludes a motion for summary decision.

You are viewing an archived copy from the New Jersey State Library.

LEGAL ARGUMENTS IN SUPPORT OF MOTION FOR SUMMARY DECISION

The Commissioner and the Board point out that prior to 1974, a local board of education could determine not to reemploy a nontenure teacher in New Jersey for any reason or no reason at all so long as the reasons were not constitutionally or statutorily proscribed. In 1974, the New Jersey Supreme Court decided Donaldson v. Bd. of Ed. of North Wildwood, 65 N.J. 236 (1974) wherein it held that a nontenure teacher was entitled to a statement of reasons for not being reemployed. While the Donaldson court held that a nontenure teacher was to be afforded a statement of reasons, it did not go so far as to say the nontenure teacher whose employment was not continued was entitled to litigate the accuracy of the reasons. The court pointed out that:

> * * * The requirement that reasons be stated would in no wise curb the breadth of the board's discretionary authority to decide whether any particular teacher should or should not be reengaged. Id. at 246.

Thereafter, the Legislature enacted N.J.S.A. 18A:27-3.1 et seq. which establishes procedures for observing, evaluating and terminating nontenure teachers. The State Board thereafter promulgated rules and regulations under N.J.S.A. 18A:27-3.3 which establishes procedures a nontenure teacher may follow upon receipt of a statement of reasons for nonrenewal, the opportunity to informally persuade the employing board to convince it it erred, to be represented by counsel, and to present witnesses. N.J.A.C. 6:3-1.20.

The Commissioner and Board note that in Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982), the Appellate Division held that "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure * * *". Id. at 456. Finally, the Commissioner and the Board point to a recent decision of the State Board of Education in Guerriero v. Bd. of Ed. of Borough of Glen Rock, 1986 S.L.D. - , St. Bd. Dkt. No. 26-85 (Feb. 7, 1986), aff'd N.J. App. Div., (Dec. 17, 1986), A-3316-85T6 (unreported). Relying on Dore, supra, the State Board held that a nontenure teacher is entitled to litigate a nonreemployment decision only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively conferred rights. The reasons cited by the Glen Rock Board of Education for not renewing

You are viewing an archived copy from the New Jersey State Library.

Guerriero's employment were parental complaints regarding his methodology, presentation of course materials, and parental desires of having their children transferred from his classes. Guerriero argued that the parental complaints about him were from a small group of parents and that the complaints were solicited by board members opposed to him. The Appellate Division concurred with the State Board's conclusion that "even accepting [petitioner's] allegations as true, the [local board] was entitled to summary judgment as a matter of law" since Guerriero made no claim of deprivation of constitutional or statutory right.

The Commissioner and the Board argue that petitioner Sontupe seeks to litigate the underlying basis for the Board's decision not to reemploy her even though her allegations, if true, do not allege a violation of a constitutionally or legislatively conferred right. Accordingly, the Commissioner and the Board conclude Sontupe has no right to a hearing in this matter and no right to pursue an appeal. In their view, the sole forum available to Sontupe to "contest" her nonreemployment was the informal non-adversarial hearing before the local board as provided at N.J.A.C. 6:3-1.20. The Commissioner and the Board assert that despite the asserted issue of whether the memorandum of December 31, 1985 constitutes a "rule" for purposes of the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., the Act does not create a substantive right to a hearing but merely details the procedure to be followed where a hearing is otherwise required by statutory law or constitutional mandate. In sum, the Commissioner and Board argue that petitioner Sontupe is seeking rights to which she is not entitled by statute or case law. In effect, they contend Sontupe if granted a hearing would be granted the equivalent of a tenure hearing reserved only for those persons who have acquired the legislative status of tenure and whom the Board seeks to dismiss on charges under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

PETITIONERS OPPOSITION TO THE MOTION

Petitioners, in opposition to the motion for summary decision, contend that a genuine issue of material fact exists which precludes summary decision. That material fact has to do with whether the memorandum of December 31, 1985 promulgated a new "rule" and, if so, it was promulgated in violation of the Administrative Procedures Act. In this regard, petitioners contend that if the asserted rule was promulgated in violation of the Administyrative Procedures Act, the Board erroneously applied that rule in its determination not to offer petitioner reemployment for 1986-87. In petitioner's view, the

You are viewing an archived copy from the New Jersey State Library.

Board used the faulty premise that the rule was duly promulgated and, consequently, perceived petitioner's endorsement as elementary school teacher to be limited by the rule so as to exclude her from being authorized to teach basic skills mathematics at the secondary level, the course she had taught from her initial employment with it.

Petitioners contend that the asserted "rule" is, in effect, a substantive change in the existing administrative regulation at N.J.A.C. 6:11-6.2 cited above. The rule change, created by the asserted invalid rule, prohibits petitioner from teaching courses she was previously authorized to teach and which she did in fact teach. In petitioners' view, this restriction on her elementary school teacher endorsement invalidly intrudes upon her employability under that endorsement and, as such, impinges upon what Sontupe perceives as a property interest in that endorsement. The property interest claimed by Sontupe in the endorsement, restricted by the Commissioner's asserted new rule, is protected by the procedural safeguards of notice and hearing of the Administrative Procedures Act, the violation of which demands that the asserted rule be declared invalid and without force or effect. In this regard, petitioners cite In re Polk License Revocation, 90 N.J. 550 (1982); Matthews v. Eldridge, 424 U.S. 319 (1976); and, Bd. of Ed. of City of Plainfield v. Cooperman, 209 N.J. Super. 174 (App. Div. 1986). Accordingly, petitioners contend that the Board's determination not to reemploy her for 1986-87 for the reasons stated are in violation of her protected property interest in the elementary school teacher endorsement she possesses and as such she is entitled to a full plenary hearing because she claims a statutory right violation.

DISCUSSION AND CONCLUSIONS

Nontenured teachers enjoy no guarantee nor affirmative right of continued employment with an employing board of education from one academic year to the next. With the exception of constitutional and statutory proscriptions, a board has complete discretion to determine whether to offer continued employment to its nontenured teachers. A nontenured teacher whose employment is not continued is statutorily entitled to a statement of reasons for the nonreemployment, N.J.S.A. 18A:27-3.2. Administratively, such an employee is entitled to an informal opportunity to be heard by the board to persuade it that employment should be continued. N.J.A.C. 6:3-1.20(a)(b). Under the policy of the State Board of Education, pursuant to its authority at N.J.S.A. 18A:27-3.3, an appeal to the Commissioner under his authority at N.J.S.A. 18A:6-9 regarding nonreemployment of nontenured teachers, is in its scope "very limited" and not at all

You are viewing an archived copy from the New Jersey State Library.

concerned with whether the affected person "is a good teacher by objective criteria." Guerriero, supra. For an appeal to progress to a plenary hearing as sought here, it must allege facts which, if true, would constitute a violation of constitutional or legislatively conferred rights. Id.

In this case, the Board exercised its discretion not to offer Petitioner Sontupe continued employment for the reason it believed, based on the Commissioner's memorandum of December 31, that she was no longer authorized to teach basic skills mathematics for graduation credit to its secondary pupils. Upon the assumption this is the reason why the Board did not offer Sontupe continued employment, and if the Commissioner's memorandum constitutes an invalid rule, whatever harm flows therefrom is visited upon the Board by improperly denying it the opportunity to fully exercise its discretion regarding her continued employment in an otherwise valid assignment. Sontupe is not prohibited from gainful employment as a teacher within the scope of her endoresement with this Board or any other board of education. Whether the Commissioner's memorandum is a "rule" or a mere clarification of the existing rule, it does not circumscribe the discretion of the local board to determine who shall teach in its schools. The Board exercised its discretion to adhere to the Commissioner's memorandum, without legal challenge to its understanding of its substance, and elected not to continue the employment of Sontupe as a teacher of basic skills mathematics in its secondary schools or in any other teaching position in its schools. Even if the Board relied upon an asserted "wrong" reason regarding its nonreemployment of Sontupe, such reliance does not transfer into a constitutional or legislatively conferred right for Sontupe.

Paraphrasing the State Board in Guerriero, a board may determine not to continue the employment of a nontenured teacher upon its belief that the person is not a "good" teacher despite objective criteria which may exist to establish the person is a good teacher. The person's reputation as a "good" teacher is not a legally recognized interest in a nontenure-nonreemployment matter. Here, it is irrelevant whether the Board relied upon an asserted invalid rule promulgated by the Commissioner in the December 31 memorandum to determine not to offer Sontupe continued employment. As noted earlier, even if the Board wrongfully relied upon the memorandum that fact does not, if true, constitute a constitutional or legislatively conferred right of continued employment upon Sontupe.

You are viewing an archived copy from the New Jersey State Library.

Whatever property interest Petitioner Sontupe may have in the elementary school teacher endorsement has not been impaired by the Board's action not to continue her employment or by the Commissioner's memorandum. Clearly, the endorsement is valid for employment as a teacher by this Board or any other board of education. This Board determined, rightly or wrongly, that the elementary school teacher endorsement possessed does not authorize one to teach basic skills mathematics at the secondary level for graduation credit. If objective criteria is irrelevant to show a person is a good teacher whose employment as a nontenured teacher has not been continued for the reason of not being a good teacher, and that person has no legally recognized liberty interest in a reputation as a good teacher, I must **CONCLUDE** it is also irrelevant whether this Board relied upon an invalid rule promulgated by the Commissioner to determine not to offer Sontupe continued employment. I **CONCLUDE** that whether the memorandum is a "rule" promulgated in violation of the Act or a clarification of an existing rule is not a genuine issue of material fact which would preclude summary decision.

Moreover, even if Sontupe established that the memorandum is a rule and that as such the Commissioner violated the Administrative Procedures Act and that, therefore, the Board terminated its employment relationship with her upon an invalid rule, there is no affirmative relief which could be afforded her. It is uniquely the Board's decision whether to continue a nontenured teacher's employment. Nor could the Association be afforded relief in the form of an Order directing the Board not to adhere to the Commissioner's memorandum for no one else is individually named in the Petition of Appeal, this action is not a class action on behalf of all Association members, and there are no facts pleaded to show that except for Sontupe's nonreemployment, other nontenured teachers have not been offered continued employment for the same reason as Sontupe. Even if other nontenured teachers were not continued in their employment for the same reason, the result reached here that no relief may be afforded Sontupe would have to be applied to them. Finally, such an Order to the Board directing noncompliance with the substance of the memorandum would impinge upon the Board's authority to require greater certification requirements of its teachers than the minimum requirements set forth in the State's Board Rules and Regulations at N.J.A.C. 6:11-1.1 et seq.

Summary decision is designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits and the pleadings, depositions and admissions on file, together with affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring

You are viewing an archived copy from the New Jersey State Library.

disposition at trial. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). There is no genuine issue of material fact in this matter. The Commissioner of Education and the Upper Freehold Regional Board of Education are entitled individually and jointly to summary decision as a matter of law. Petitioner Bonnie Sontupe has raised no allegation of a recognized constitutional or statutory right in her petition which would demand a plenary hearing nor has she or the Upper Freehold Regional Education Association stated a claim upon which relief could be granted.

Accordingly, the Petition of Appeal is **DISMISSED.** The hearing scheduled to commence the week of February 9, 1987, is hereby **CANCELLED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

February 5, 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

FEB - 5 1987
DATE

Receipt Acknowledged:

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 10 1987
DATE

Ronald L. Rauh
OFFICE OF ADMINISTRATIVE LAW

ml

You are viewing an archived copy from the New Jersey State Library.

BONNIE SONTUPE AND UPPER FREEHOLD REGIONAL EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
DR. SAUL COOPERMAN, COMMISSIONER OF NEW JERSEY DEPARTMENT OF EDUCATION, AND BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were untimely filed pursuant to N.J.A.C. 1:1-16.4a.

Upon review of the record in this matter, the Commissioner affirms the decision of the Office of Administrative Law for the reasons stated therein, emphasizing the following statements of the ALJ made in the initial decision, ante:

> Under the policy of the State Board of Education, pursuant to its authority at N.J.S.A. 18A:27-3.3, an appeal to the Commissioner under this authority at N.J.S.A. 18A:6-9 regarding nonre-employment of nontenured teachers, is in its scope "very limited" and not at all concerned with whether the affected person "is a good teacher by objective criteria." Guerriero, supra. For an appeal to progress to a plenary hearing as sought here, it must allege facts which, if true, would constitute a violation of constitutional or legislatively conferred rights. Id.

Since Petitioner Sontupe has raised no allegation of a recognized constitutional or statutory right in her petition which would demand a plenary hearing, nor has she or the Upper Freehold Regional Education Association stated a claim upon which relief could be granted, summary decision is granted in favor of respondents. Accordingly, the Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 18, 1987

You are viewing an archived copy from the New Jersey State Library.

BONNIE SONTUPE AND UPPER FREEHOLD REGIONAL EDUCATION ASSOCIATION,

PETITIONERS-APPELLANTS, : STATE BOARD OF EDUCATION

V. : DECISION

DR. SAUL COOPERMAN, COMMISSIONER OF NEW JERSEY DEPARTMENT OF EDUCATION, AND BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS-RESPONDENTS.

Decided by the Commissioner of Education, March 18, 1987

For the Petitioners-Appellants, Ruhlman, Butrym and Friedman (Mary Jane Cullen, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Upper Freehold Regional School District, Kalac and Newman (Dennis Lavender, Esq., of Counsel)

For the Respondent-Respondent Commissioner of Education, Nancy Kaplen Miller, Deputy Attorney General (W. Cary Edwards, Attorney General)

For the reasons expressed therein, the State Board affirms the decision of the Commissioner of Education that neither Petitioner Bonnie Sontupe nor the Upper Freehold Regional Education Association has stated a claim upon which relief could be granted in this forum. In affirming the Commissioner's decision, we emphasize that, as expressed by the Administrative Law Judge,

> ...even if Sontupe established that the memorandum is a rule and that as such the Commissioner violated the Administrative Procedures Act and that, therefore, the Board terminated its employment relationship with her upon an invalid rule, there is no affirmative relief which could be afforded here...Nor could the Association be afforded relief in the form of an Order directing the Board not to adhere to the Commissioner's memorandum for no one else is individually named in the Petition of Appeal, this action is not a class action on behalf of all Association members, and there are no facts pleaded to show that...other nontenured teachers

You are viewing an archived copy from the New Jersey State Library.

> have not been offered continued employment for the same reason as Sontupe. Even if other nontenured teachers were not continued in their employment for the same reason, the result reached here that no relief may be afforded Sontupe would have been applied to them.

Initial Decision, at 9.

August 5, 1987

Pending N.J. Superior Court

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7150-86
AGENCY DKT. NO. 329-9/86

NEW BRUNSWICK BOARD OF EDUCATION,
Petitioner,
v.
JOSEPH HARRIS,
Respondent.

Ralph F. Stanzione, Esq., for petitioner

Stephen E. Klausner, Esq., for respondent (Klausner & Hunter, attorneys)

Record Closed: February 2, 1987 Decided: February 11, 1987

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The New Brunswick Board of Education (Board) filed charges of misbehavior and unbecoming conduct against Joseph Harris (respondent), a tenured attendance officer in its employ, on September 24, 1986. The charges were properly certified to the Commissioner of Education and there is no allegation of procedural deficiency in service, consideration or certification of the charges.

The respondent filed his answer with the Commissioner on October 20, 1986. On October 22, 1986, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held in the matter on November 26, 1986, at which issues and procedures were settled. The matter was set down for hearing on February 2 and 3, 1987. Hearing was convened on February 2 at the Middlesex Borough Municipal Court.

You are viewing an archived copy from the New Jersey State Library.

I

The present tenure charges arise from criminal charges against and a subsequent Grand Jury indictment of Harris. The underlying charge was possession of a controlled dangerous substance.

On July 11, 1986, the Honorable Wilfred P. Diana, AJSC, signed an order dismissing the indictment pursuant to a motion by the assistant prosecutor assigned to the case.

II

Mark Lewis, a member of the Franklin Township Police Department, testified. On the basis of information received from an informant, he and two members of the Middlesex County Prosecutor's Office went to the Sportsman Inn in Franklin Township at approximately 10:25 a.m. on January 3, 1986. The two other officers went into the establishment first. This officer, carrying a radio, entered the premises and positioned himself on the dance floor. All bar patrons raised their hands and were searched by other officers. An investigator for the Somerset County Prosecutor's Office, Adam Lund, searched Harris. Lund gave to Lewis a small packet and a straw. A third officer did a field test and the contents of the small packet tested positive for cocaine. Lewis was able satisfactorily to establish custody of the evidence from the time he took possession of it to the date of this hearing.

The witness could not recall what Harris wore that day. The witness did not see Harris in possession of either the packet or the straw nor did the witness see Lund remove either item from on or about Harris' person.

James Housell, a sergeant of the Franklin Township Police Department, also testified. He collects, stores and presents evidence as part of his duties. He also causes evidence to be tested when that is necessary. He took the evidence in this matter from the Franklin Township Police Department to New Jersey State Police Laboratories in West Trenton on January 8, 1986. The witness produced test results showing that the material in the packet allegedly taken from Harris was, in fact, cocaine.

You are viewing an archived copy from the New Jersey State Library.

III

The Board's Assistant Superintendent for Personnel since 1972 testified. He was not present at the search or arrest. He informed the Board upon learning of the indictment. He later learned the case was dismissed because the prosecutor's investigator had either resigned or been fired because he failed a urine test for marijuana use.

The witness went to Somerville and secured a copy of the dismissal. Nevertheless, he signed tenure charges against Harris on August 14, 1986.

The witness acknowledged that police reports indicate Lewis got his information from Lund. By August 1986, Lund had left the prosecutor's office and had moved out of state. The witness also stated he does not know if the present charge is true or not. He based his charge solely on the Grand Jury indictment. The respondent has been employed since 1969 and has had no problems of a disciplinary nature until now.

IV

Upon conclusion of the Board's case, the respondent moved to dismiss. He asserts that all the Board has been able to show is that he was arrested and indicted and that the indictment subsequently was dismissed. There is no competent evidence that he was, in fact, in possession of any controlled dangerous substance. All of Lewis' evidence is hearsay. He knew only what Lund told him and Lund has been discredited.

The Board counters that it is aware of problems with the evidence in this case but stresses that Lewis was present at the arrest. His testimony may have some value even though he did not conduct the search of the respondent on January 3, 1986.

V

DISCUSSION AND DETERMINATION

It is well established that the Commissioner of Education may sustain a tenure charge of unbecoming conduct arising from the same incident in which there has been an acquital of a criminal charge. Tenure of LaTronica, OAL DKT. EDU 7449-82 (July 21,

You are viewing an archived copy from the New Jersey State Library.

1983), adopted Comm'r of Ed. (Sept. 6, 1983). As long as there is a preponderance of competent evidence that misbehavior and/or unbecoming conduct occurred, tenure charges can be and must be sustained. In the present matter, however, I **FIND** no residuum of competent evidence upon which to base such a determination.

"It has long been settled that arrest and indictment of a person, without conviction, is not an acceptable index of character. This, on the theory that an accusation of misconduct is 'quite consistent with innocence and . . . is merely . . . somebody's hearsay assertion as to the . . . guilt' of the person accused." Costanzo v. N.J. Racing Comm., 126 N.J. Super. 187, 194 (App. Div. 1974), citing 3A Wigmore on Evidence, (Chadbourn rev. 1970), § 980a at 835. The Appellate Division went on to say that where the accusation has been dismissed, this holding is all the more supported. Id.

It is black letter law that the burden of proof in a tenure hearing is no more than the obligation to prove a charge by a preponderance of the credible in the record. See, N.J.A.C. 1:1-15.1. Hearay evidence may not be excluded except subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.2(a) or a valid claim of privilege. "Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.8(a). However, some legally competent evidence must exist to support each ultimate finding of fact sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.8(b). This is commonly referred to as the residuum rule.

As the respondent observes, all of the evidence surrounding the alleged criminal incident is hearsay. Arrest, indictment and dismissal of indictment are matters of public record. Under Costanzo, however, they do not even go to character let alone proscribed conduct.

Having carefully reviewed the record in this matter, I **FIND** no residuum of competent evidence to support the Board's tenure charges. Had the discredited investigator been produced, I would at least have had the opportunity to evaluate his credibility. This, conceivably, could have put a foundation under the Board's case. That did not happen and no other competent and credible evidence was forthcoming from any

You are viewing an archived copy from the New Jersey State Library.

other source. Consequently, I **CONCLUDE** that the tenure charges against Joseph Harris have not been proven. Accordingly, they are **DISMISSED.** It is so **ORDERED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

11 FEBRUARY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

FEB [illegible] 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 18 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

You are viewing an archived copy from the New Jersey State Library.

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH HARRIS, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEW	:	DECISION
BRUNSWICK, MIDDLESEX COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner agrees with the recommendation of the Office of Administrative Law dismissing the tenure charges herein and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

Pursuant to the provisions of N.J.S.A. 18A:6-14, the Commissioner finds and determines that the loss of the 120 days of salary imposed by the Board on respondent as a consequence of the filing of the herein tenure charges is restored, less mitigation.

However, in the absence of anything among the papers relative to the reason for withholding of respondent's 1986-87 increment, the Commissioner is unable to determine whether such increment withholding was an outgrowth of the same circumstances that led to the filing of these tenure charges.

In the absence of such information, the Commissioner remands the initial decision to the ALJ for the purpose of determining whether the dismissal of charges in this matter should similarly result in restoration of respondent's increment as well.

Accordingly, the instant matter is remanded to the Office of Administrative Law for action consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 18, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4955-87
AGENCY DKT. NO. 329-9/86
(EDU 7150-86 ON REMAND)

IN THE MATTER OF THE TENURE OF JOSEPH HARRIS, SCHOOL DISTRICT OF THE CITY OF NEW BRUNSWICK.

Ralph F. Stanzione, Esq., for petitioner

Stephen E. Klausner, Esq., for respondent (Klausner, Hunter & Oxfeld, attorneys)

Record Closed: September 15, 1987 Decided: September 22, 1987

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The New Brunswick Board of Education (Board) filed charges of misbehavior and unbecoming conduct against Joseph Harris (respondent), a tenured attendance officer in its employ, on September 24, 1986. After the respondent filed his answer with the Commissioner of Education, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held at which issues and procedures were settled. The matter was heard on February 2, 1987, at the Middlesex Borough Municipal Court.

My Initial Decision issued on February 11, 1987, holding that the tenure charges against Joseph Harris had not been proven. The Commissioner affirmed the Initial Decision as to the tenure charges on March 18, 1987. He remanded the matter for a determination of whether the Board had withheld the respondent's increment based on the same circumstances and whether the increment should be restored.

New Jersey Is An Equal Opportunity Employer

You are viewing an archived copy from the New Jersey State Library.

Before any action on my part, the Board restored Harris' increment. His attorney so advised me and requested that the matter be dismissed as moot.

I have reviewed the papers and **FIND** and **CONCLUDE** that there is no longer a justiciable issue before me. Accordingly, it is **ORDERED** that the present matter be and is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

22 SEPTEMBER 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

SEP 23 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 25 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

You are viewing an archived copy from the New Jersey State Library.

IN THE MATTER OF THE TENURE HEARING OF JOSEPH HARRIS, SCHOOL DISTRICT OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The Commissioner has reviewed the record of this matter including the initial decision on remand rendered by the Office of Administrative Law.

The Commissioner observes that the purpose of this remand was to determine whether or not the Board withheld respondent's increment based on the same circumstances which involved the earlier dismissal of the Board's tenure charges against him. See In the Matter of the Tenure Hearing of Joseph Harris, School District of the City of New Brunswick, Middlesex County, decided March 18, 1987.

In view of the fact that the ALJ has found and concluded that the Board has since restored respondent's salary increment, the issue on which this case was remanded to the Office of Administrative Law has become moot.

You are viewing an archived copy from the New Jersey State Library.

Accordingly, the Commissioner finds and determines that there is no longer a justiciable issue before him and that this matter can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

OCTOBER 28, 1987

DATE OF MAILING - OCTOBER 29, 1987

You are viewing an archived copy from the New Jersey State Library.

ROBERT BRUNNQUELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT AND DONALD E. SHELDON, UNION COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

For the Petitioner, Robert P. Glickman, Esq., of Counsel

For the Respondent, Casper P. Boehm, Jr., Esq., of Counsel

The Scotch Plains-Fanwood Regional Board of Education (Board) has filed a request for an interlocutory review from a Decision on Motion in the above-captioned matter before the Commissioner of Education in accordance with the applicable provisions of N.J.A.C. 1:1-9.7.

The Board is seeking a reversal of the ALJ's Decision on Motion of February 3, 1987 wherein he denied its Motion to Dismiss these proceedings which was advanced by the Board on the following grounds:

> The petition fails to state a cause of action for which relief may be granted (Board's Brief, Point I); and

You are viewing an archived copy from the New Jersey State Library.

> Even if the petition stated a cause of action, petitioner is barred by the 90-day rule set forth in N.J.A.C. 6:24-1.2. (Board's Brief, Point II)

In Point I of its legal argument, the Board relies on two prior school law decisions of the Commissioner which construe the provisions of N.J.S.A. 18A:28-8 and their effect upon voluntary resignations submitted by tenured employees to their respective boards of education and the formal acceptance of such resignations by those boards. Kozak v. Board of Education of the Township of Waterford, 1976 S.L.D. 633, Pedersen v. Board of Education of the Borough of Midland Park, 1977 S.L.D. 416

The Board avers that each of the above-cited school law decisions construes the provisions of N.J.S.A. 18A:28-8 as follows:

> 1. Any tenured teaching staff member may resign from the employ of a local board of education upon giving 60 days prior written notice of his or her intention to resign.
>
> 2. The board may approve the release of a tenured employee upon shorter written notice of resignation.
>
> 3. A resignation becomes final upon its formal acceptance by a board of education.

The Board argues that the facts of this matter clearly establish that petitioner had three weeks (April 1 to April 22, 1986) to withdraw his resignation before it acted to accept such resignation. Having failed to do so, the Board claims that petitioner cannot now be heard by the Commissioner to complain that it should not have accepted his resignation. Kozak, supra The Board submits that even in those prior school law decisions where petitioners alleged that their resignations were coerced or were the result of duress, they could not be rescinded given the fact that

You are viewing an archived copy from the New Jersey State Library.

petitioners therein had sufficient time to withdraw their resignations prior to formal acceptance of same by the respective boards. Kozak, supra; Pedersen, supra

Similarly, the Board argues for reversal of the ALJ's determination in Point II of its legal argument as follows:

> ***Our Courts have indentified (sic) the accrual of a cause of action as the date on which the right to institute and maintain a suit first arose. Rosenau v. City of New Brunswick and Gammon Meter Co., 51 N.J. 130, 137 (1968); Burd v. New Jersey Telephone Co., 149 N.J. Super 20, 30 (App. Div. 1977), cert. granted, 75 N.J. 21 (1977). Any wrongful act for which the law provides a remedy gives right to institute an action therefore, and a cause of action accrues at that time. Tortorello v. Reinfeld, 6 N.J. 58, 65 (1950); Lutz v. Semeer, 126 N.J. Super 288, 297 (Law Div. 1974).
>
> Therefore, pursuant to N.J.A.C. 6:24-1.2, petitioner was required to file a Petition with the Commissioner of Education within ninety (90) days of the Board's action of formally accepting his resignation; that is, no later than July 21, 1986. As stated earlier, the within Petition is dated September 22, 1986, well after the expiration of the period prescribed by the Code.
>
> It is recognized that the rules may be relaxed by the Commissioner where strict adherence thereto would be inappropriate, unnecessary or would result in an injustice. N.J.A.C. 6:24-1.19. However, there are no grounds for relaxation in this case. In interpreting a similar Court rule, our judiciary has continually held that rules of practice are more than mere guides. They are made to be complied with and should not be lightly disregarded. Abel v. Elizabeth Board of Works, 63 N.J. Super 500, 509 (App. Div. 1960). Rules should only be relaxed where it is manifested that strict adherence would work surprise or injustice. Diodato v. Camden County Park Comm., 136 N.J. Super 324, 327 (App. Div. 1975). Petitioner here can claim neither surprise nor injustice. On the contrary, it was petitioner's act of submitting his resignation that triggered the Board's action. In addition, petitioner was advised well in advance of the date on which the Board would act. (Board's Brief, Point II)

You are viewing an archived copy from the New Jersey State Library.

In opposing the Board's request for interlocutory review, petitioner urges the Commissioner to uphold the ALJ's determination denying the Board's Motion to Dismiss these proceedings by virtue of what he claims are essential underlying facts which warrant a further hearing on the merits of his charges that his resignation was not thoughtfully arrived at while he was in a sound state of mind, but rather was precipitated by the harassment, belittling and coercion of the Board and his supervisor, Donald Sheldon.

Petitioner argues that he is entitled to have an opportunity to submit any evidence including present psychiatric reports to establish the proof of his allegations against the Board and his mental state of mind throughout the periods of time commencing from the time he submitted his resignation (April 1, 1986) until the time he instituted his Petition of Appeal. (September 22, 1986)

Petitioner maintains that in order for the Commissioner to make a reasonable and sound decision in this matter there must be a factual basis established in order to determine whether or not the strict application of the 90-day rule pursuant to N.J.A.C. 6:24-1.17 should be invoked. According to petitioner, this cannot be accomplished without further inquiry into the basis of his claim.

Finally, petitioner argues that the New Jersey Court Rules dealing with interlocutory appeals are equally applicable to the Commissioner. In this regard petitioner relies on the language of the Courts in stating that:

> Leave to appeal is granted only in extraordinary circumstances. See Delbridge v. Jann Holding Company, 164 N.J. Super. 506, 509-510 (App. Div. 1978). "The power to permit an interlocutory

You are viewing an archived copy from the New Jersey State Library.

> appeal is sparingly exercised and leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Honorable M. Sullivan, "Interlocutory Appeals" 92 N.J.L.J. 161 (March 13, 1969), quoted in DiMarino v. Wishkin, 195 N.J. Super. 390, 394 (App. Div. 1984).
>
> The sparing exercise of such appellate discretion is mandated by the New Jersey Supreme Court's admonition against "piece meal appeals" from orders or judgments which dispose of only some of the claims in a case. Mortgage Corp. of New Jersey v. Aetna Casualty and Surety Co., 19 N.J. 24, 28 (1955).
> (Petitioner's Reply Letter Memorandum, at pp. 2-3)

The Commissioner has reviewed the respective arguments of the parties in connection with the review of the interlocutory appeal filed by the Board. In the Commissioner's judgment the record of this matter is sufficiently developed to reach a finding and determination that the Board's action in formally accepting petitioner's unsolicited written resignation from employment on April 22, 1986 was in all ways proper and legally correct in accordance with the provisions of N.J.S.A. 18A:28-8. The record further reveals that petitioner made no attempt between April 1, 1986 and April 22, 1986 to withdraw his resignation before it was accepted by the Board.

Moreover, petitioner failed to take any affirmative act to request that the Board reconsider his resignation within the 90-day period extending from April 22 to July 21, 1986. Rather, such request was made of the Board more than one month later on August 27, 1986. Additionally, petitioner's appeal before the Commissioner was not filed until September 29, 1986.

You are viewing an archived copy from the New Jersey State Library.

The Board's Motion to Dismiss in this matter is premised in part upon petitioner's violation of the 90-day rule pursuant to N.J.A.C. 6:24-1.2 and it has factually established that petitioner's appeal from its action of April 22, 1986 exceeds 150 days.

The ALJ on page 5 of the Decision on Motion has determined in part as follows:

> There is no evidence in the record to support petitioner's contention of his state of mind at the time he submitted his resignation on April 1, 1986 to deem his submission involuntary. This is also true of the 21 days between submission and the Board's acceptance, as well as the period in excess of four months after the Board's acceptance until he sought legal counsel on August 27, 1986.

Consequently, at the time that the Board's Motion to Dismiss was heard in this matter, the ALJ had no further evidential information from petitioner to support his claim except the naked allegations set forth in his Petition of Appeal.

Based on all of the foregoing, the Commissioner does not concur with the ALJ's determination to deny the Board's Motion to Dismiss these proceedings on the ground that the instant Petition of Appeal is barred by the 90-day rule pursuant to N.J.A.C. 6:24-1.2. The Commissioner finds that no compelling reason was offered by petitioner in opposition to the Board's Motion for a relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.17.

Thus, for the reasons expressed herein, the Decision on Motion is hereby reversed by virtue of petitioner's untimely appeal in this matter which constitutes a violation of N.J.A.C. 6:24-1.2.

You are viewing an archived copy from the New Jersey State Library.

Accordingly, the Board's Motion to Dismiss the Petition of Appeal is granted for the reasons set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 19, 1987

DATE OF MAILING - MARCH 19, 1987

You are viewing an archived copy from the New Jersey State Library.

ROBERT BRUNNQUELL,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT AND DONALD E. SHELDON, UNION COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decision on Motion by the Commissioner of Education,
March 19, 1987

For the Petitioner-Appellant, Robert P. Glickman

For the Respondents-Respondents, Casper P. Boehm, Esq.

Petitioner was a tenured School Social Worker who petitioned the Commissioner of Education on September 29, 1986, seeking recission of his letter of resignation from the Board's employ, which he submitted to the Board on April 1, 1986. In his petition, he alleged that his resignation was not voluntary, asserting among other claims that the resignation was invalid because of his mental and physical condition. Petition, at 20. The Board asserted that Petitioner failed to state a cause of action and also sought dismissal on the grounds that the petition was time-barred by N.J.A.C. 6:24-1.2.

The Administrative Law Judge (ALJ) found that there was no evidence in the record to support Petitioner's contention that his state of mind at the time he submitted his resignation rendered such resignation involuntary, or that such state of mind continued until he sought legal counsel on August 27, 1986, following which he filed his petition. Although the ALJ found that the petition was filed beyond the time period specified by N.J.A.C. 6:24-1.2, he concluded that the record did not provide any evidence concerning whether failure to relax the 90 day requirement of the regulation pursuant to N.J.A.C. 6:24-1.17 would result in injustice. The ALJ therefore denied the Board's motion to dismiss and directed plenary hearing to establish Petitioner's state of mind during the relevant periods, noting however that the Board was not precluded from resubmitting its motion to dismiss at the conclusion of the hearing.

Upon the Board's request, the Commissioner granted interlocutory review pursuant to N.J.A.C. 1:1-9.7. The Commissioner determined that the record in the matter was sufficiently developed to decide whether the Board's action in accepting Petitioner's

You are viewing an archived copy from the New Jersey State Library.

resignation was proper, concluding that it was correct in all ways in accordance with N.J.S.A. 18A:28-8. In the absence of any support for Petitioner's claim concerning his state of mind aside from the allegations in his petition, or other compelling reason offered by Petitioner to warrant relaxation, the Commissioner reversed the ALJ's determination and dismissed the petition pursuant to N.J.A.C. 6:24-1.2.

Petitioner appealed to the State Board, asserting that he has a right to a hearing and arguing that the record was not sufficiently developed to permit the Commissioner to determine the effect of his resignation. He further argues that relaxation of 90 day requirement is warranted because of his state of mind and that, in any event, he filed his petition within 90 days of his request to the Board that it reconsider its action. On appeal, Petitioner also has submitted a psychiatric report and has moved to supplement the evidentiary record with the report pursuant to N.J.A.C. 6:2-1.10(5)(c) so as to provide evidence of his state of mind.

We conclude that, as the ALJ determined, Petitioner in this case is entitled to an evidentiary hearing on the question of whether his state of mind during the relevant periods was such as to render his resignation involuntary and to warrant relaxation of the 90 day rule. We agree that the record before the Commissioner was not sufficiently developed to permit a conclusion that Petitioner's resignation was voluntary, and we find that to deny him the opportunity to present evidence concerning his state of mind, in light of his assertions in the pleadings, would be contrary to the principles of due process. Likewise, we conclude in light of the allegations, that dismissal for failure to comply with the 90 day rule without a determination concerning the circumstances surrounding Petitioner's failure to file within the specified time period would result in injustice. We therefore remand this matter to the Commissioner for proceedings consistent with our decision. In light of our determination, we however deny Petitioner's motion to supplement the evidentiary record on appeal. Finally, like the ALJ, we emphasize that the Board may resubmit its motion at the conclusion of the hearing in this matter.

JULY 1, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7427-86
AGENCY DKT. NO. 334-9/86

E. P. REID, INC.,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY

and

REXXON, INC.,

Respondents.

Robert R. Guida, Esq., for petitioner

James J. Seaman, Esq., for respondent, Board

Marc Rosen, pro se for respondent Rexxon, Inc.

Record Closed: February 4, 1987 Decided: February 9, 1987

BEFORE WARD. R. YOUNG, ALJ:

Petitioner, an unsuccessful bidder for a Fire Detection System Service contract for the 1986-87 school year with the Jersey City Board of Education (Board), seeks to have the contract awarded to Rexxon, Inc. (Rexxon) deemed null and void because of alleged violations of the Public School Contract Law, N.J.S.A. 18A:18A-1 et seq.

Respondents deny the allegations and seek a dismissal of the Petition of Appeal.

The matter was transmitted to the Office of Administrative Law as a contested case on October 30, 1986 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference

You are viewing an archived copy from the New Jersey State Library.

was held on December 4, 1986 and the matter proceeded to plenary hearing at the Office of Administrative Law, Newark on February 4, 1987. The record closed at the close of hearing on that date.

The following admissions in the pleadings are adopted herein as **FINDINGS OF FACT:**

1. Petitioner, E. P. Reid, Inc., is a corporation of the State of New Jersey and is in the electrical contracting business providing total security and electrical controls for the intrusion and fire alarm systems and is licensed by the State of New Jersey under State License and Permit #4065.

2. On Wednesday, August 20, 1986, the respondent, Jersey City Board of Education accepted bids (Bid #15-15) for the servicing and maintenance of a fire detection system throughout the buildings of the said Board in Jersey City.

3. Pursuant to the bid advertisement, petitioner, E. P. Reid, Inc., submitted a bid proposal which was opened together with one other bid submitted by the respondent, Rexxon, Inc.

4. The respondent, Jersey City Board of Education, awarded the bid for the aforesaid servicing and maintenance to the respondent, Rexxon, Inc.

5. Petitioner, E. P. Reid, Inc., submitted a pre-qualification Affidavit and copy of classification by the New Jersey Department of Treasury, Division of Building and Construction.

6. Petitioner, E. P. Reid, Inc., a licensed New Jersey Electrical Contractor and business permitee, has met all of the requirements of the Statutes of New Jersey regarding pre-qualification, and has met all of the bid requirements and qualifications in every material aspect.

You are viewing an archived copy from the New Jersey State Library.

TESTIMONIAL EVIDENCE:

Marc Rosen, a co-respondent, testified he is the President and only employee of Rexxon, Inc., and submitted a bid for repair and replacement of the fire detection systems in the buildings of the Jersey City Board of Education. He stated that contracted services has been and would be performed by Protective Alarm Systems operated by one Marc Dipple.

Rosen further testified he is the 100 per cent owner of Rexxon, Inc., but left the bid specification requirements concerning number of employees in Rexxon and identity of ownership by percentage blank in his proposal.

Rosen also stated he had been awarded the contract for the years 1984-85 and 1985-86, and his billing in 1985-86 exceeded $100,000.

Rosen further testified that the pre-qualfiication classification for electrical work by Rexxon by the Division of Building and Construction in the New Jersey Department of Treasury is $50,000, and the service required under the contract at issue is electrical work.

Upon examination by the undersigned as to why Protective Alarm Systems (PAS) did not submit a proposal, Rosen responded that he has had an arrangement with Dipple of PAS that Rexxon bids and then subcontracts to PAS. On redirect examination, Rosen indicated he did not know if PAS is pre-qualified.

Edward P. Reid, petitioner also testified that he was awarded the contract for 1973-74, 1982-83 and 1983-84, and that a bid proposal in another year was rejected by the Board due to his failure to include a pre-qualification Affidavit. Reid also stated he noticed the Board's Business Manager, Mr. Kaminsky, that Rexxon's pre-qualification for electrical work was limited to $50,000 and that Rexxon's proposal did not include a stockholder statement in accordance with P.L. 1977, Chapter 33. (See P-4).

You are viewing an archived copy from the New Jersey State Library.

Howard J. Cohen, an employee with the Division of Building Construction, N. J. Department of Treasury, testified he is responsible for determining pre-qualification ratings. He stated that applicants are pre-qualified with a single rating (per contract) and aggregate rating (combined contracts). He further testified that whether pre-qualification is required for specific contracts as a matter of law is not essential to the pre-qualification rating process.

Arsenio V. Sylvestri, Secretary of the respondent Board, testified he attested the signatures of Rosen and the Board President as a ministerial duty following the Board's award of the contract to Rexxon. See R-2 . Sylvestri also stated he transmitted a memo to the Board's counsel incorporating deficiencies in the Rexxon proposal, but is not aware of any discussions by the Board, its legal department, or business manager concerning them. See P-2.

The following is adopted as **FINDINGS OF FACT:**

1. Rexxon is a paper corporation with no employees to provide the services required under the contract awarded to it by the Board.

2. Rosen, President and sole "employee" of Rexxon, failed to include data required by Specification #15-15 in his proposal concerning the number of employees in Rexxon and the identity of ownership by percentage.

3. Rexxon is pre-qualified to a limit of $50,000 for electrical work.

4. The service required under the contract is electrical work.

5. The total cost of work pertaining to the contract shall not exceed $95,000.

6. Rosen subcontracts work performance to Protective Alarm Systems.

7. The Board's legal department was advised of deficiencies in the Rexxon proposal prior to the contract award by the Board.

You are viewing an archived copy from the New Jersey State Library.

The following stipulations, placed on the record by counsel for petitioner and the Board, are also adopted herein as **FINDINGS OF FACT:**

1. The only correspondence in the Board's records concerning the contract at issue is in evidence.

2. The Rexxon bid proposal was void of certification and pre-qualification classification.

3. There was no Board discussion or action on bid proposals other than its award of the contract to Rexxon on September 17, 1986.

EVIDENTIARY DOCUMENTS

Specifications #15-15 and the Rexxon bid proposal are both incorporated in P-1. A careful review of this exhibit reveals deficiencies other than those already incorporated herein which are compelling to note.

The Bidder's Affidavit executed by Rosen, void of seal and with a questionable attest signature, states that the bidder is "The only one interested in this bid; and that no one other than he has any interest in this bid or in the contract proposed to be entered in this bid or in the contract proposed to be entered into" and that "This bid is made without any previous understanding, agreement or connection with any other person, firm or corporation making a bid for the same purpose, and is in all respects fair and without collusion or fraud."

Rosen's own testimony conflicts with his executed Affdidavit in that Marc Dipple and Protective Alarm Systems perform all services required under the contract and therefore has a considerable interest on the bid and contract.

You are viewing an archived copy from the New Jersey State Library.

The Affidavit of Verification of Bid requires that "The officer taking the acknowledgement shall enter his title, the date of expiration of his commissions, etc." This requirement was not met nor does the printed name of Marion T. Cellitti, a notary public, appear to be a valid signature. (See the signature on the Affirmative Action Affidavit).

The Affidavit and pre-qualification classification requirements are clearly incorporated in the Special Notice To All Bidder Hereon incorporated in the specifications.

Specification #15-15 also incorporates under Qualifications that "The companies presenting a bid shall certify that they have in their organization a competent, efficient and experienced service department, parts department with a complete inventory of parts necessary for this type of service." Rosen's own testimony verified that Rexxon does not meet the qualifications required.

PUBLIC SCHOOLS CONTRACTS LAW

N.J.S.A. 18A:18A-26 states:

> Every board of education shall require that all persons proposing to bid on any contract requiring public advertisement for bids with the board for public work, the entire cost whereof will exceed $20,000, shall first be classified in accordance with article 6 of this chapter as to the character and amount of public work on which they shall be qualified to submit bids. So long as such requirement is in effect, the board of education shall accept such bids only from persons qualified in accordance with such classification.

The Qualification of Bidders is incorporated under Article 6. N.J.S.A. 18A:18A-27 provides the authority for the State Board of Education to adopt regulations providing for the qualification of bidders, and states at d:

> In lieu of adopting any qualification regulation under this section, the State Board may, in whole or in part, delegate by regulation to

You are viewing an archived copy from the New Jersey State Library.

> the Department of Treasury or other appropriate State agency with its consent, the authority to qualify bidders subject to this article.

N.J.A.C. 6:20-7.2 states:

> Pursuant to N.J.S.A. 18A:18A-27, the authority to qualify bidders for district board of education contracting or Department of Education contracting is delegated to the Department of Treasury. Such action is to be governed by rules adopted by the Department of Treasury for this purpose.

The Division of Building Construction in the Department of the Treasury has adopted regulations covering the classification of prospective bidders. They are codified in Title 17, Chapter 19. The rules are codified in subchapter 2.

Public work is defined in N.J.A.C. 17:19-1.1 which states:

> "Public work" means any public building or other public betterment, work or improvement constructed, repaired or improved wholly or in part at the expense of the public. (emphasis supplied)

N.J.A.C. 17:19-2.12 states at (e):

> Where a question arises as to whether a bid for a project is within a bidder's existing classification or rating limits, the bid shall be opened provisionally, and if it appears that the bid is at variance with the contractor's trade classification or dollar value ratings, the bid shall be rejected.

ARGUMENTS OF COUNSEL

Counsel for the Board refers to a Renewal of Classification Form DBC 36R (12/79). See R-1. The form incorporates regulations that "were formally adopted by the Director, Division of Building and Construction and became effective March 1, 1977. Regulation (13) in that form states:

> "Public Work" means all school building construction work including repairs and remodeling. "Public Work" does not include textbooks, uniforms, school supplies or maintenance services. (emphasis supplied)

You are viewing an archived copy from the New Jersey State Library.

Counsel for the Board argues that a pre-qualification classification rating is not required for the contract at issue because said contract calls for maintenance work.

The Board's argument is rejected for the following reasons:

1. Specification #15-15 is entitled Proposal for Repairs and Replacements.

2. The regulations incorporated in Form DBCV 36R (12/79) have clearly not been updated as it retains the $10,000 threshold, which was increased to $20,000 in N.J.S.A. 18A:18A-26 through amendment by L. 1983, c 266§2, eff. July 14, 1983.

3. The language of regulation 13) referred to in Form DBC 36R (12/79) does not now exist in Title 17, Chapter 19, Subchapter 2.

4. The definition of "Public Work" as codified in N.J.A.C. 17:19-1.1 is applicable to the contested contract herein as the service to be provided in same is indeed public "work or improvement . . ., repaired or improved wholly or in part at the expense of the public."

DISCUSSION AND CONCLUSION

The record in this matter is void of any documentary evidence that Rexxon has received pre-qualification classification rating by the Division of Building Construction. Rosen testified that he has a rating of $50,000 without indication whether it represents a single or aggregate rating. Nonetheless, that testimony was not disputed, possibly because Rexxon has made a rating or that rating would not prequalify Rexxon to bid on a contract not to exceed $95,000, and which Rosen testified he billed the Board for over $100,000 in the previous year.

You are viewing an archived copy from the New Jersey State Library.

Concerning N.J.A.C. 17:19-2.12(e), a question certainly arose by Reid's letter to Kaminsky (P-4), and Sylvestri's memo to the legal department (P-2) prior to the awarding of the contract to Rexxon on September 17, 1986.

I **FIND** that the Board of Education of the City of Jersey City:

1. Erred in not rejecting the Rexxon bid proposal due to its deficiencies as indicated herein.

2. Violated N.J.A.C. 17:19-2.12(e) because of its failure to reject the Rexxon bid proposal.

3. Violated N.J.S.A. 18A:18A-26 by awarding the contract at issue to Rexxon due to its pre-qualification limit of $50,000.

I **CONCLUDE**, therefore, that the contract for fire detection system services awarded by the Jersey City Board of Education to Rexxon, Inc. for the 1986-87 school year shall be and is hereby deemed to be **NULL AND VOID.**

Rexxon, Inc. is hereby **ORDERED** to cease and desist from providing any further services under the invalidated contract.

The Jersey City Board of Education is hereby **ORDERED** to expeditiously readvertise, rebid, and award the contract anew pursuant to law.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

You are viewing an archived copy from the New Jersey State Library.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

9 February 1987
DATE

WARD R. YOUNG, ALJ

FEB 12 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 13 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g

You are viewing an archived copy from the New Jersey State Library.

E.P. REID, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, AND REXXON CORPORATION,	:	DECISION
RESPONDENTS.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by Rexxon Corporation within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Rexxon Corporation posits eight exceptions to the initial decision which are summarized below.

Initially, Rexxon notes that it has been prequalified by the State of New Jersey, Department of the Treasury, Division of Building and Construction for aggregate work in the amount of $400,000.

Second, Rexxon disputes the relevance of Findings of Fact Nos. 1 and 2. It avers that the ALJ indicated on page 28 of the transcript of the hearing, which is incorporated into the herein record by reference, that such findings are irrelevant to the determination of the issues in dispute.

Third, Rexxon claims that Finding of Fact No. 2 in the initial decision, ante, which was placed on the record by counsel for the Board and petitioner, is inaccurate, in that a separate attachment to the Rexxon bid proposal was submitted at the time the bid was submitted by Rexxon. Rexxon avers that Marc Rosen, President of Rexxon, who appeared pro se at the hearing, "was not aware of the incompleteness of the documents submitted by Counsel for Respondent Board until the actual hearing itself, at which time it was deemed too late for him to object." (Rexxon's Exceptions, at p. 1)

Fourth, Rexxon contends that the findings made by the ALJ under the section captioned "Evidentiary Documents" all represent technical deficiencies of such minor nature that they do not justify the setting aside of the bid award.

Fifth, Rexxon objects to the ALJ's rejecting its argument and that of the Board that a prequalification classification rating is not required for the contract issued because said contract calls for maintenance work. Rexxon claims that pursuant to N.J.S.A.

You are viewing an archived copy from the New Jersey State Library.

18A:18A-27, the State Board of Education has delegated the prequalification of bidders to the Department of the Treasury, Division of Building and Construction. Therefore, Rexxon argues, "determinations of that State agency are to be followed in connection with the instant matter, including determinations as to whether particular work constitutes maintenance work under the contract." (Rexxon's Exceptions, at p. 2)

Sixth, Rexxon avers that both its attempt and the Board's at hearing to introduce testimony as to the fact that the Division of Building and Construction does not issue single amount prequalification ratings for contracts to be performed in the manner in which the instant contract was to be performed, i.e., on a maintenance basis, was disallowed by the ALJ. Rexxon excepts to the conclusion of the ALJ that the prequalification process of the Division of Building and Construction was not relevant to the issue at hand.

Rexxon further excepts to the ALJ's disallowing testimony on whether there was, in fact, a prequalification rating available through the Division of Building and Construction on this type of contract. Rexxon posits in exceptions that the issue as to whether or not the bidding documents require prequalification is separate from the issue as to whether or not the Division of Building and Construction will issue a prequalification rating for the type of contract involved in this matter. Rexxon argues:

> If the Division of Building and Construction in fact will not issue a single amount prequalification rating for this type of contract, then the only valid reference with respect to prequalification would be to the aggregate prequalification amount of the contract, which in this case is $400,000.00, an amount well over the anticipated $95,000.00 amount of the contract in question. Unfortunately, the Court excluded any inquiry into this area.
>
> Further, even if the bidding documents called for a prequalification rating, those documents cannot require something that is impossible to obtain. Thus, if the bidding documents themselves called for an impossibility, they would be defective with respect to that particular requirement.
>
> (Rexxon's Exceptions, at p. 4)

Rexxon argues that the instant matter concerns a maintenance contract, which requires the contractor to do a series of small projects at various times, which total a certain amount in the aggregate, rather than a single work project. Rexxon excepts to the ALJ's not permitting inquiry by either the Board or Rexxon into this issue and suggests that the ALJ could not have drawn a valid conclusion based upon what it avers is a resulting incomplete record.

You are viewing an archived copy from the New Jersey State Library.

Seventh, Rexxon avers that the Court failed to address the second issue set down in the Prehearing Order dated December 4, 1986, which reads as follows:

> Shall the Petition of Appeal be dismissed due to a lack of jurisdiction vested in the Commissioner of Education?

Eighth, Rexxon disputes the standing of Petitioner E.P. Reid to bring this action and avers the ALJ's failure to consider this matter in its decision renders the initial decision incomplete. Rexxon notes that it was counsel for the Board that raised this matter in its Third Affirmative Defense in its Answer dated October 10, 1986.

Rexxon prays for one or more of the following actions by way of relief:

1. The initial Decision should be rejected, and Respondent Rexxon should be permitted to continue its performance under a validly awarded contract.

2. The matter be remanded to either Judge Young or such other Administrative Law Judge deemed appropriate by the Commissioner for the taking of further testimony in order to complete the record in this matter.

3. The Petition be dismissed as not within the jurisdiction of the Commission (sic) of Education or the Office of Administrative Law.

4. The Petition be dismissed due to the lack of standing of Petitioner E.P. Reid, Inc. to bring this issue to the attention of the appropriate forum.

5. Respondent Rexxon be awarded costs and attorneys' fees in connection with this matter.

6. Such other and further relief as the Commissioner may deem equitable in the premises.

(Rexxon's Exceptions, at p. 6)

Upon review of the record in this matter, the Commissioner is unpersuaded by the exceptions submitted by the Rexxon Corporation for the reasons that follow.

Initially, the Commissioner will address the jurisdictional issue, which was not raised by the Rexxon Corporation during hearing, but rather only appeared in the exceptions filed by

You are viewing an archived copy from the New Jersey State Library.

Rexxon's newly acquired counsel. While it is evident that the Commissioner's jurisdiction to hear this controversy was listed as an issue in the Prehearing Order dated December 4, 1986, yet was not made part of the hearing conducted February 4, 1987, the Commissioner's jurisdiction in such matters is firmly established under the Public Schools Contract Law, N.J.S.A. 18A:18A-1 et seq. Hence, the Commissioner finds no merit in Rexxon's belated exception that the matter is not properly cognizable before him. Further, the Commissioner observes that the matter of standing was not an issue raised in the Prehearing Order, nor was it at any point in the proceedings thereafter raised or considered as an issue in this matter. Thus, the Commissioner will not entertain, by way of exceptions by Rexxon, an argument not broached at any juncture theretofore in the proceedings.

As to the merits of the instant matter, it borders on the absurd to suggest, as Rexxon does, that "[t]he findings made by Judge Young under the section captioned 'Evidentiary Documents,' all represent technical deficiencies of such a minor nature that they do not justify the setting aside of the bid award." (Rexxon's Exceptions, at p. 2) As noted by the ALJ in the initial decision, ante, under "Findings of Fact":

> 1. Rexxon is a paper corporation with no employees to provide the services required under the contract awarded to it by the Board.
>
> 2. Rosen, President and sole "employee" of Rexxon, failed to include data required by Specification #15-15 in his proposal concerning the number of employees in Rexxon and the identity of ownership by percentage.
>
> ***
>
> 6. Rosen subcontracts work performance to Protective Alarm Systems.

See also Tr. 12-14, wherein counsel for petitioner posited the following questions to Marc Rosen, President of Rexxon Corporation, which company was awarded the bid in question:

> A. I personally have been in the fire detection alarm business since 19 -- 1967.
>
> Q. How about in Rexxon Inc.?
>
> A. Rexxon Inc. was incorporated in 1975.
>
> Q. You've been with them since this?
>
> A. Yes.

You are viewing an archived copy from the New Jersey State Library.

Q. In 1986 you submitted a bid? How many employees did Rexxon have?

A. Rexxon had an arrangement with another company.

Q. I'm not talking about any arrangements with other companies. I'm talking about employees of Rexxon Inc.

A. One.

Q. That was you; was it not?

A. Yes.

Q. And did not this contract call for repairs, replacement and service of all the alarm systems in the City of Jersey City?

A. Yes.

Q. Did you personally take care of all those problems concerning all of those school systems when you made that bid? Were you at a corporation or --

A. Was I a corporation --

Q. Or its employees, meaning you, you were the only one?

A. Yes. I, as the employee, had the responsibility of filling all of the obligations, all of the requirements of the contract which I did.

Q. How did you intend to do that when you submitted the bid, being you were the only employee? Would you tell the Court?

A. Sure. I was working an arrangement out with another company.

Q. One company? Wait a minute. You're not one company; are you?

A. I suspect to some, we are one company.

Q. You are one company?

A. You know - - you're using technicalities.

Q. I'm asking you a question. Are you one company or two companies?

You are viewing an archived copy from the New Jersey State Library.

A. We are two companies.

Q. And your one company is Rexxon Inc. that made this bid?

A. Rexxon Corporation.

Q. Rexxon - - Corporation?

A. Yes.

Further, on redirect, the ALJ asked for the following clarifications:

THE COURT: I have one question for you. I have one question. What is your relationship with Protective Alarms?

A. I'm the contractor. He's subcontractor to me. That's the relationship we have.

THE COURT: Could you provide some enlightenment. I assume you have a pretty good personal relationship because of previous working arrangements. Could you enlighten the record as to why Rexxon -- let me rephrase it. Why Protective Alarms would not submit a bid?

MR. ROSEN: They have the opportunity to do it, but the way -- the arrangement that we have is that I submit the bid and we all do the work.

THE COURT: You subcontract out to them?

MR. ROSEN: Sure. It's a free country. No reason why he couldn't bid on his own. We do a lot of work together. (Tr. 27-28)

Further documentation of Rexxon's failure to submit a properly executed bid was noted by the ALJ in the initial decision, ante, which states:

The Affidavit of Verification of Bid requires that "The officer taking the acknowledgement shall enter his title, the date of expiration of his commissions, etc." This requirement was not met nor does the printed name of Marion T. Cellitti, a notary public, appear to be a valid signature. (See the signature on the Affirmative Action Affidavit).

The Affidavit and pre-qualification classification requirements are clearly incorporated in the Special Notice To All Bidder Hereon incorporated in the specifications.

You are viewing an archived copy from the New Jersey State Library.

> Specification #15-15 also incorporates under Qualifications that "The companies presenting a bid shall certify that they have in their organization a competent, efficient and experienced service department, parts department with a complete inventory of parts necessary for this type of service." Rosen's own testimony verified that Rexxon does not meet the qualifications required.

The Commissioner is entirely in accord with the ALJ's conclusions in the initial decision, ante, which state:

> The Bidder's Affidavit executed by Rosen, void of seal and with a questionable attest signature, states that the bidder is "The only one interested in this bid; and that no one other than he has any interest in this bid or in the contract proposed to be entered in this bid or in the contract proposed to be entered into" and that "This bid is made without any previous understanding, agreement or connection with any other person, firm or corporation making a bid for the same purpose, and is in all respects fair and without collusion or fraud."
>
> Rosen's own testimony conflicts with his executed Affdidavit (sic) in that Marc Dipple and Protective Alarm Systems perform all services required under the contract and therefore has a considerable interest on the bid and contract.

There is no question in the Commissioner's mind that Rexxon's failure to disclose its intent to subcontract its contract with respondent to Protective Alarms constitutes a major breach of not only the bid specifications, but also of the Public School Contracts Law as well, which states in pertinent part:

> 18A:18A-22. Bids to conform to specifications; rejection of bids
>
> No bid shall be accepted which does not conform to the specifications furnished therefor. Nothing contained in this chapter shall be construed as depriving any board of education of the right to reject all bids.

Since the bid expressly required disclosure of any other interested parties, such as the subcontractor with whom the Rexxon Corporation shared "an arrangement" and, in the absence of such disclosure, Rexxon was in substantial violation of the Public School Contracts Law, as well as the bid specifications. On this basis alone, the contract with the Board is void. The Commissioner so finds.

You are viewing an archived copy from the New Jersey State Library.

The same applies to the failure to disclose the number of employees in the employ of Rexxon, a bid specification. Since Rexxon's president and sole employee left such information blank, he failed to submit a bid in conformity with bid specification and is in breach of N.J.S.A. 18A:18A-22 thereby.

Moreover, the Commissioner is in agreement with the ALJ that, as clearly and boldly stated on the face of the bid specification, the bid was a "Proposal For Repairs and Replacements." (See Exhibit P-1; see also, Initial Decision at p. 8.) The Commissioner notes also the statement of petitioner that his bid for the year 1977 for precisely the same work was rejected because he failed to include the prequalification affidavit. On cross-examination Mr. Reid stated:

> Q. Mr. Reid, in the letter that you directed to Mr. Silvestri, you complained that Mr. Rosen for Rexxon Inc. -- or rather Incorporated, was not prequalified? What do you know about prequalification? What is your idea of this scope of prequalification? What was missing from Mr. Rosen?
>
> A. First, I take my direct examination from the document incorporated. In the first place, the bid by the Jersey City Board of Education, which specifically calls attention to the fact that it is required that the bidder be prequalified under the statute and that if he is not prequalified in accordance with it, that the bid will be rejected by the Board. Now, the prequalification, I believe that's on the same page of the specification direction, is the fact that the prequalification is issued by the DBC Division of the Treasury and is utilized by the Board of Education in the requirements for prequalification. So, I'm very familiar with the prequalification process. We complied with it in the years 1983 and 1984, and as a matter of fact, in one year, I believe it was 1977, our bid for this same work was rejected because we had failed to include the prequalification affidavit. So, it's in my impression, that that's an absolute requirement by the Board of Education of Jersey City. (Tr. 39-40)

The Commissioner determines that the Jersey City Board of Education may not have it both ways. If in the past, it has denied awarding the bid for this work on the basis that the bidder had not complied with prequalification requirements, it may not later argue that prequalification for the bid is unnecessary or impossible.

You are viewing an archived copy from the New Jersey State Library.

Accordingly, the initial decision is affirmed for the reasons expressed therein as amplified herein. The Commissioner finds and determines that the contract for fire detection system services awarded by the Jersey City Board of Education to the Rexxon Corporation for the 1986-87 school year shall be and is hereby deemed to be null and void. Rexxon Corporation is hereby directed to cease and desist from providing any further services under the invalidated contract. The Jersey City Board is hereby directed to expeditiously readvertise, rebid and award the contract anew pursuant to law.

COMMISSIONER OF EDUCATION

March 20, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5376-86
AGENCY DKT. NO. 262-7/86

THOMAS A. DALY, JR.,
Petitioner,
v.
RIVER VALE BOARD OF EDUCATION,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Richard H. Bauch, Esq., for respondent (Aron, Salsberg & Rosen, attorneys)

Record Closed: December 15, 1986 Decided: January 29, 1987

BEFORE BRUCE R. CAMPBELL, ALJ:

Thomas A. Daly, Jr., petitioner, alleges and the River Vale Board of Education (Board), respondent, denies that the Board improperly withheld his salary increment for the 1986-87 school year. The petitioner filed his appeal before the Commissioner of Education on July 24, 1986. The Board filed an answer on August 11, 1986. The Department of Education transmitted the case on August 14, 1986, to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held in the matter on September 29, 1986. Issues and procedures were settled and the matter was set down for hearing on November 18, 1986, at the Office of Administrative Law, Newark, at which time and place it was held.

New Jersey Is An Equal Opportunity Employer

You are viewing an archived copy from the New Jersey State Library.

I

Thomas A. Daly, petitioner, testified that he has served in the River Vale District for 21 years, nearly all of that time as principal of the Holdrum School.

In 1985-86, he was evaluated by the superintendent of schools (P-1). The petitioner states there was no discussion of the evaluation at the time he received it. At about the end of April, the superintendent informed him that the Board had denied the petitioner's increment for the 1986-87 school year (J-2).

On or about May 2, 1986, the petitioner wrote to the superintendent stating:

> I am returning my Contract Statement unsigned because it is not in keeping with the Contract Agreement arrived at between the River Vale Board of Education and the River Vale Association of Administrators and Supervisory Personnel, as per Article IV Section C.
>
> If there is some problem with this I would be happy to meet with members of the Board of Education concerning this matter. (J-3)

The petitioner met with the Board on May 27, 1986. He testified he received no reasons in writing for the denial of his increment before that meeting. However, the superintendent did say that the Board had questions concerning programs and evaluations allegedly turned in late. The evaluations concerned a teacher of the gifted and talented in a program called the GOAL program and a part-time music teacher.

The GOAL teacher taught less than full-time. The petitioner had not evaluated her before. In January or February of 1986, the petitioner was told by the superintendent that he should have evaluated her. The petitioner believed the GOAL program was being extended to grades above grade six. He testified he tried to contact the GOAL teacher. He advised the superintendent he was having difficulty meeting with the teacher. He had prepared a written evaluation, mainly of the program, not the teacher, but the teacher was not available to sign it. The petitioner testified he was hesitant to meet with the part-time music teacher because he believed his contract would not be renewed and because he was in rehearsal for a big program. He did write an evaluation of him dated

You are viewing an archived copy from the New Jersey State Library.

March 27, 1986 (R-18). He met with the music teacher after March 27 but before the scheduled music program.

In 1985-86, the petitioner wrote evaluations of 32 teachers. He prepared one evaluation for each tenured person and three evulations for each nontenured person. Perhaps three or four of the 32 teachers were nontenured. He wrote perhaps 40 evaluations and was late with three or four. The witness stated the evaluations were written on time, but not signed by staff. He did not turn them in until he had met with the affected staff members and they had signed the evaluations.

The petitioner stated he believed the superintendent was concerned about the GOAL program and a computer program. The GOAL program got a late start. It started in late October or early November and was late throughout the district. The program also ended early. It ended in December and not at the end of the semester as he had expected. Prior to April 22, 1986, the superintendent did not discuss early termination of the program with the petitioner.

Concerning the computer program, the superintendent had asked for a number of reports. A Board member had visited the school early in the year and, according to the petitioner, a misunderstanding was generated at that point. The Board member took away the belief that all pupils would be exposed for a certain number of weeks to the computer program. The petitioner said he hoped all pupils would be exposed.

The teacher in charge of the computer program said that some pupils were not ready for the program and the petitioner agreed. Most pupils finally did get into the computer room in late December. The petitioner and the superintendent discussed the computer program. The superintendent said nothing about the Board being concerned with the program.

At the meeting of May 27, 1986, all Board members were present. The petitioner stated his case. He asserted that he believed the withholding was a violation of the administrator's contract. The Board told him that it had the right to break the contract under the circumstances. One Board member stated that the meeting should be continued. The petitioner never received notice of another meeting. He recalls no discussion of his evaluation of April 11 (P-1) at the May 27 meeting.

You are viewing an archived copy from the New Jersey State Library.

The witness identified his evaluation of the GOAL teacher (R-4). Although he testified he had difficulty meeting with the teacher, he also testified she had an office in his building. In exhibit R-4, he states that the teacher spent most of the month of September in his building apparently researching and working on the development of the new Goal program. He used the word "apparently" because he did not physically observe what she did.

It was his understanding that fifth grade participants in the GOAL, program, as it was called, would "carry along" to the sixth grade. However, the teacher advised the petitioner she was told to screen all pupils; that is, all fifth grade pupils would not automatically participate when they entered the sixth grade.

The witness identified exhibit R-5, the report of the GOAL Committee. He met with the Committee during its study. A footnote on page 8 of the report states:

> The exception to this would be fifth grade G.O.A.L. students moving to sixth grade. These children would automatically be included in the traditional four month middle school G.O.A.L. program.

The petitioner stated it is his responsibility to know the curriculum in his school. The Goal Committee report he has may or may not be as complete as exhibit R-5.

The petitioner met with the teacher on a number of occasions. He indicated some past practices to her and urged her to get permission slips for new sixth grade participants as soon as possible. By the middle of October he knew the program hadn't begun. He directed the teacher to identify pupils, contact parents, set up meetings and "get rolling." After the program actually began, he did discuss her plan of lessons with her.

The program ended early for the two sixth grade pupils involved. The petitioner did not monitor the teacher or her plans after the Christmas vacation. She ended the program in December and he did not know immediately that she had. The program should have ended at the end of the semester. He did not monitor the teacher or the program for virtually the entire month of January. The teacher left the district. He wrote his evaluation of her three months after she left.

You are viewing an archived copy from the New Jersey State Library.

In the month of January, he may have failed to support and evaluate the teacher, but overall he believes he met his school goal to support and evaluate the program. He believes the teacher had some problems.

Although he learned in or about the third week of January that the teacher had ended the program early, he told the superintendent that fact sometime later. "It may have been the next week in a principals' meeting. It was sometime thereafter."

The superintendent had warned him about late submissions of evaluations and reports in the prior three school years.

The music teacher was not tenured; the petitioner did three evaluations of him as required by law. The evaluations of nontenured teachers were due on November 9, January 4 and April 3, respectively (R-10). The vice principal of the school signed several of the music teacher's evaluations. The witness stated he has ultimate responsibility for the evaluations and he was aware of the dates upon which they should have been submitted. If any were late, it was his responsibility.

II

The Board president testified that exhibit P-1, evaluation of the petitioner dated April 11, 1986, was submitted to the Board a week prior to April 22. However, the Board did not review it at that time because it was not signed. The Board did read the evaluation on April 22.

The Board had three areas of concern. The first was the supervision and success of the GOAL program and implementation. The petitioner's monthly report of February 14, 1986 indicated a different operation from what the Board expected. The Board expected seven pupils to be in the program for one-half year. They learned that two pupils had been in the program for approximately six weeks.

The week prior to April 22, 1986, the Board met to review evaluations. There was no evaluation of the GOAL teacher. On April 22, the Board saw the GOAL teacher's evaluation and read the superintendent's evaluation of the petitioner. It appeared that the petitioner was not aware the program ended early and, hence, the Board was not advised.

You are viewing an archived copy from the New Jersey State Library.

It was the president's understanding that when the Board accepted the curriculum, by vote, they expected close monitoring. Although the program was considerably revised, fifth grade pupils who had been in the program were expected to continue in the program in the sixth grade. When the Board reviewed the petitioner's evaluation of the GOAL teacher, it became apparent that he had not overseen either her or the program. The petitioner's instructional goal to support the GOAL program was not met. There was no evidence of direct assistance by him to the teacher or the program.

The Board read the petitioner's evaluation of the GOAL teacher on the same evening it read the evaluation of the petitioner but before it withheld his increment. The Board noted particularly the third paragraph that indicated he allowed the situation to drag on and, particularly in January, paid no attention to either the teacher or the program.

The Board's second area of concern was timeliness of submissions of required information such as reports. The Board had asked for a report concerning computer use and received it late. The Board came to its meeting in mid-April expecting to see all teacher evaluations but saw some evaluations not signed by the affected teacher and noticed that the GOAL teacher's evaluation was missing. The Board did not see that evaluation until April 22. The petitioner had been late with submissions before. The president recalled that the petitioner was late with three teacher evaluations in 1985-86.

The Board's third area of concern was the computer program in the seventh grade. The Board has tried diligently to provide computer experience to every child and has stated so publicly. The Board, by resolution, sent a member to the middle school to observe the computer program. The Board expressly wanted pupils to have significant time on the computer, at least twice per week for one quarter of the school year. The delegated Board member returned with this information. However, the Board later learned that pupils were not, in fact, receiving this amount of time on computers. Ultimately, the Board learned that pupils received only one month of instruction, contrary to its directions.

The witness identified exhibit R-21, the superintendent's monthly report of April 1986. A memo to the petitioner concerning use of computers is attached. In the third paragraph, reference is made to seventh graders reporting to the computer room in May

You are viewing an archived copy from the New Jersey State Library.

"for a couple of weeks." This was not the information given by the petitioner to the Board.

At the May 27 meeting of the petitioner and the Board, the petitioner was told of the three reasons for the Board's action.

The superintendent testified briefly. He stated that he wrote the evaluation of April 11, 1986 (P-1). He made no recommendation concerning granting or withholding the petitioner's increment for the 1986-87 school year.

III

The parties submitted a joint stipulation of facts on the day of hearing. The stipulation states:

1. Thomas A. Daly, Jr., is an elementary principal employed in the River Vale School District.

2. On April 22, 1986, the Respondent River Vale Board of Education, voted to withhold Mr. Daly's increment for the 1986-87 school term.

3. The contractual agreement between the River Vale Board of Education and the River Vale Association of Administrative and Supervisory Personnel provides a procedure for the withholding of increments in Article IV (C) of the Agreement.

4. The Superintendent of Schools was Mr. Daly's immediate supervisor and responsible for evaluating Mr. Daly's performance. The only written evaluation received by Mr. Daly during the 1985-86 academic year from the superintendent of schools was the evaluation of April 11, 1986.

5. The superintendent made no recommendation to withhold petitioner's increment prior to the increment withholding action voted upon by the Board of Education on April 22, 1986.

You are viewing an archived copy from the New Jersey State Library.

6. Mr. Daly met with members of the Board of Education at a personnel meeting on May 27, 1986.

I adopt the foregoing as **FACTS** in this matter.

IV

The petitioner argues that he received a positive evaluation from the superintendent of schools. The evaluation commended him and his staff for their preparation of pupils entering high school. The evaluation also credits the petitioner with spending "more of his time in direct supervision, observation and involvement with staff than in previous years."

The evaluation gives no indication that disciplinary action might be taken against the petitioner. There was no forewarning whatsoever of the April 22 action of the Board. Even after the Board acted, it failed to provide a statement of reasons.

The petitioner argues that the Board's failure to provide him with a statement of reasons in accordance with N.J.S.A. 18A:29-14 constitutes a fatal error that requires a reversal of the Board's action. Had the petitioner been advised by the superintendent by way of an evaluation or an observation that his performance was inefficient, the petitioner would at least have been on notice to improve his performance. However, the only notice he received was that his performance had improved over the previous year.

Although the petitioner met with the Board on May 27, 1986, he did not receive a forthright statement from the Board as to why his increment had been withheld. He only received information through the superintendent during casual conversation. This is not the intent of the statute. The statute requires the Board to provide written reasons within ten days. Admittedly, constructive notice by way of oral reasons from the superintendent could be sufficient. However, there must be some structure to the manner in which the reasons are given. The purpose of the requirement of reasons is to assist teaching staff members to improve on performance in subsequent years. That purpose was not accomplished here. In fact, the petitioner was not given a forthright summary of the reasons for his increment denial until after the petition of appeal had been filed.

You are viewing an archived copy from the New Jersey State Library.

In addition to the Board's failure to notify the petitioner within ten days of the reasons for the withholding, the petitioner urges that a withholding of an increment is not supposed to come as a surprise to a teaching staff member. In this case, the petitioner was not told that his increment was in jeopardy or that his performance needed improvement. The increment denial was, indeed, a surprise. The petitioner was given no time to improve his performance. Therefore, the action of the Board must be reversed.

V

The Board argues that the law is clear that it may withhold a teaching staff member's increment where it has a reasonable, factual basis for its conclusion. No reviewing agency may substitute its judgment for that of the Board, but must ascertain whether the Board had such a reasonable, factual basis for its ultimate conclusion. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960).

The Board had three clear reasons for its withholding action and these were clearly stated to the petitioner by the Board at their May 27, 1986 meeting and by the Board president at hearing in this matter. Those reasons were:

1. Failure of the petitioner to adequately monitor the GOAL program.

2. Submission by the petitioner of several untimely and unsigned evaluations of teaching staff members.

3. Failure of the petitioner to adequately implement the computer keyboarding program for seventh grade pupils in accordance with information provided by the petitioner to the Board concerning that program.

Any of the above incidents, if considered by the Board in good faith, is sufficient to warrant affirmance of its action to withhold the petitioner's increment. In Myers v. Glassboro Bd., of Ed., 1966 S.L.D. 66, 68, the Commissioner stated that "justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents." In the same decision, the Commissioner stated that "[t]he quantum of proof required to sustain a decision to

You are viewing an archived copy from the New Jersey State Library.

withhold a salary increment is less than that required to establish cause for dismissal of a teacher under tenure." Id.

Testimony at hearing showed that the Board's attention to the petitioner's failure to adequately monitor the GOAL program was not an eleventh hour consideration. As the petitioner testified, one of his performance goals, as approved by the Board, was for him to monitor and supervisor the program during the 1985-86 school year. He could not have been surprised that the Board would expect him to pay especially close attention to the program in view of the fact that the teacher was completely new to the program, a fact the petitioner admitted on cross-examination.

When the Board was finally presented with sufficient information to determine the petitioner's success in meeting this goal, it found an almost complete lack of monitoring of the program. In fact, the Board learned that the petitioner had exhibited a disregard of the GOAL program and such a failure to promote its success, that the Board was profoundly shocked by the superintendent's statement in his evaluation of the petitioner (P-1), "that 1985-1986 has been one of the more successful years for him."

What the Board discovered was that the GOAL teacher, in fact, failed to begin the program with the sixth grade pupils in the petitioner's school until the end of the first week in November, that she had terminated the program in the petitioner's school at least one month earlier than scheduled and that only two of seven eligible sixth grade pupils had taken part in the program (R-4). It is clear that based on exhibit R-4, the petitioner's evaluation of the GOAL teacher, the petitioner realized that the program had been terminated early. He also knew that there should have been automatic inclusion of fifth grade pupils participating in the program when they moved to sixth grade.

The petitioner has submitted evaluations in an untimely manner. This fact is known to the Board and was properly considered by the Board in its review of the petitioner's performance. One such late submission was the evaluation of the music teacher. The evaluation was dated March 27, 1986, the due date of the evaluation. However, the evaluation was not signed. An unsigned evaluation is of no use. The teaching staff member involved must be given the right to review the evaluation and acknowledge his receipt of it by affixing his signature to it. Further, the evaluated teacher must be given the opportunity to submit a rebuttal to the evaluation.

You are viewing an archived copy from the New Jersey State Library.

Concerning the petitioner's late submission of evaluations, his own evaluation (P-1) states:

> Just about all reports and evaluations have been submitted in a timely fashion. A mid year report on computer utilization was submitted one month later than requested and raised a question which contradicted an earlier statement concerning the length of 7th and 8th grade computer instruction. In addition three teacher evaluations were submitted after the March 27th deadline. He has kept me verbally informed of any problem situations however, almost on a daily basis.

Thus, the superintendent clearly informed the petitioner as early as April 11, 1986, that the petitioner had submitted several reports and evaluations in an untimely fashion.

The Board's final reason for withholding the petitioner's increment was the petitioner's failure to implement the computer keyboarding program for seventh grade pupils in accordance with information presented orally to a Board member earlier in the year. This information was presented, in turn, to the Board. The actual implementation of that program not only was not in accordance with what the petitioner had told the Board member, it was not in accordance with the computer utilization report submitted to the Board by the petitioner (R-20). As adduced at hearing, the seventh grade pupils had merely six sessions of computer keyboarding instruction as compared to the projected full marking period, two times per week, as related by the petitioner to the Board via exhibit R-20.

The petitioner asserts that he had no forewarning of the Board's dissatisfaction or action. In fact, he had more than adequate forewarning that the Board had concerns or at least he should have known that the Board would have concerns. Furthermore, his claim that he was not provided reasons for the Board's withholding action until his petition was filed is untrue. By his own testimony on cross-examination, he was provided with the reasons for the Board's action at the meeting of May 27, 1986.

The Board cites cases in which the Commissioner and the courts have held that substantial compliance with N.J.S.A. 18A:29-14 is sufficient. The cases indicate an examination must be made into whether the petitioner knew or should have known the basis of the action taken by the Board prior to and/or subsequent to the Board's action

You are viewing an archived copy from the New Jersey State Library.

and, also, as to whether the Board's actions toward the petitioner were fundamentally fair. Fitzpatrick v. Montvale Bd. of Ed., 1969 S.L.D. 4.

The petitioner admitted at hearing that the superintendent informed him of the Board's reasons for withholding shortly before the petitioner's meeting with the Board on May 27. Furthermore, the Board adequately revealed and discussed the reasons for its actions at that meeting.

That the formal evaluation of the petitioner by the superintendent was generally favorable cannot bind the Board to grant the petitioner his increment. Increments must clearly be earned and a Board need not rubber stamp evaluations. Sellers v. E. Orange Bd. of Ed., OAL DKT. NO. EDU 6756-81 (Dec. 14, 1982), adopted Comm'r of Ed (Jan. 26, 1983). The Board here had information through the superintendent and independent information concerning the petitioner. The Board discovered the petitioner's failure to adequately monitor the GOAL program through the petitioner's own evaluation of the GOAL teacher (R-4) and learned of problems relating to the computer keyboarding program through the memorandum of the typing teacher to the petitioner contained in the superintendent's monthly report (R-21). The Board clearly had a rational and nonarbitrary basis on which to withhold the petitioner's increment, independent of the superintendent's evaluation (P-1).

VI

In Sellars, cited by the Board above, it was held not only that a Board need not rubber stamp evaluations, but that it has the responsibility and duty to consider other factors outside of satisfactory teaching performance. And in Kopera, perhaps the signal case in this area, the Appellate Division has made clear that a board's action is discretionary and will not be overturned unless arbitrary and without rational basis or induced by improper motives. The record here demonstrates that the River Vale Board of Education has faithfully adhered to these standards.

Viewed as a whole, the record shows that the Board was dissatisfied, with good cause, with certain aspects of the petitioner's performance in the 1985-86 school year. Based upon its consideration of the facts before it, the Board exercised the right given to it by the Legislature in N.J.S.A. 18A:29-14. That statute, in pertinent part, states:

You are viewing an archived copy from the New Jersey State Library.

> Any board of education may withhold, for inefficiency or other good case, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action.

There is no adequate showing in this record that the Board acted arbitrarily, without rational basis or was induced by improper motives. To the contrary, I **FIND**, in addition to the findings of fact set forth above, that the action of the Board was based on reasonable grounds which, in turn, the Board took from the information it had before it concerning the petitioner's performance in 1985-86. I also **FIND** that, although the Board failed to give written notice of the reasons for its action within ten days of the action to the petitioner, the petitioner had actual and constructive notice of the Board's reasons from both the superintendent and the Board.

The River Vale Board of Education, and all boards of education, are strongly cautioned that literal compliance with N.J.S.A. 18A:29-14 is not only preferred to substantial compliance but is expected. The Legislature may not be presumed to have effected a statute for a vain purpose.

Article IV, section C of the contract between the Board and its administrators (J-1) provides procedures to be employed when the superintendent is to recommend a withholding of increment. I **FIND** that the superintendent did not here recommend a withholding. Therefore, the provisions of this section were not triggered and the Board did not violate it.

In consideration of the foregoing, I **CONCLUDE** that the present petition of appeal is without merit. Accordingly, the decision of the River Vale Board of Education to withhold the increment of Thomas A. Daly, Jr., for the 1986-87 school year is **AFFIRMED**. The petition of appeal is **DISMISSED**. It is so **ORDERED**.

You are viewing an archived copy from the New Jersey State Library.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

29 JANUARY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1.29.87
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 3 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

You are viewing an archived copy from the New Jersey State Library.

THOMAS A. DALY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that petitioner's exceptions to the initial decision and the Board's reply to those exceptions were filed with the Commissioner in accordance with the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner urges the Commissioner to set aside the ALJ's findings and conclusion in the initial decision which deny him his salary increment for the 1986-87 school year by virtue of what he claims was the Board's failure to provide him timely written notice together with the reasons for withholding his 1986-87 salary increment in accordance with the provisions of N.J.S.A. 18A:29-14 as amended. In this regard petitioner raises the following arguments by way of his exceptions to the initial decision:

> N.J.S.A. 18A:29-14 requires the Board of Education "within ten days" to give "written notice" of such action, together with the reasons therefor, to the member concerned. This was not done in the instant matter. The action was taken on April 22 and no reasons were given to the Petitioner by the Respondent Board of Education. A meeting took place on May 27 with the Respondent Board of Education, but still no reasons were given for the increment withholding either before the meeting or after. One Board member said the meeting was to be continued, but no further meetings between the Petitioner and the Board of Education took place. The essential due process ingredients of the statute were ignored by the Respondent Board of Education, thus requiring the Commissioner to reverse the initial decision in this matter.
>
> (Petitioner's Exceptions, at p. 3)

You are viewing an archived copy from the New Jersey State Library.

Petitioner further maintains that the Courts have consistently held that the wording of a statute, when clear on its face, must be construed according to its own terms. Duke Power Company Inc. v. Edward J. Patten, Secretary of State et al., 20 N.J. 42, 49 (1959); Zietko v. New Jersey Manufacturers Casualty Insurance Company, 132 N.J.L. 206, 211 (E.&A. 1944); Bass v. Allen Home Improvement Company, 8 N.J. 219, 226 (1951) The statute of reference upon which petitioner relies in this instance is N.J.S.A. 18A:29-14, as amended, which reads in pertinent part:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.***
> (emphasis supplied)

It is the precise language of the provisions of N.J.S.A. 18A:29-14 addressed by the Appellate Court in James Martin v. Board of Education of Northern Highlands Regional School District, 1977 S.L.D. 1031, reversed N.J. Superior Court, Appellate Division, 1979 S.L.D. 852 which is relied upon by petitioner herein. It reads in pertinent part as follows:

> "The Commissioner of Education set aside the school board's action for failure of strict compliance with N.J.S.A. 18A:29-14[***.]
>
> We conclude that the Commissioner's determination was hyper-technical and that the substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual affected is informed of the reasons for the action, whether before or after the public roll call vote. We regard the intent of the statutory requirement of notice within ten days as being to assure that the individual is apprised of the reasons for the action no later than ten days after the official action...." 1979 S.L.D. 852 at Page 853.
> (Petitioner's Exceptions, at pp. 2-3)

Petitioner claims that while the facts in Martin are distinguishable from those herein, nevertheless the Court's construction of N.J.S.A. 18A:29-14 applies because he is not seeking a hyper-technical ruling of the provisions of N.J.S.A. 18A:29-14 from the Commissioner. Petitioner maintains that the facts in the

You are viewing an archived copy from the New Jersey State Library.

instant matter clearly establish that no reasons for withholding his salary increment were forthcoming from the Board, either prior to its withholding action of April 22, 1986 or prior to his meeting with the Board on May 27, 1986. Consequently, petitioner urges the Commissioner to enforce the plain meaning of N.J.S.A. 18A:29-14 and to set aside the initial decision by virtue of the Board's failure to supply him with its reasons for withholding his salary increment in compliance with the provisions of the above-cited statute.

Additionally, petitioner claims that he received no prior notice during the 1985-86 school year apprising him of the fact that his salary increment was in jeopardy for the ensuing year or that his performance was unsatisfactory. Given these circumstances petitioner asserts that the Board also violated the conditions laid down by the Commissioner in Carney v. Board of Education of the Freehold Regional High School District, Monmouth County, decided by the Commissioner July 20, 1984, wherein it is stated in pertinent part:

> "In order for an increment to be withheld and the withholding to be sustained on review, the withholding must not come as a surprise to the teaching staff member.... The teaching staff member should have plenty of advance notice of the alleged deficiencies and there should be a reasonable length of time between evaluations to allow for improvement." [Slip Opinion, at p. 18]
> (Petitioner's Exceptions, at p. 4)

In its reply to petitioner's exceptions, the Board notes that the only issue raised by petitioner is his claim to untimely notification of the reasons for the withholding of his salary increment for the 1986-87 school year.

The Board maintains that its increment withholding action against petitioner on April 22, 1986 was for the following reasons:

1. Failure of the petitioner to adequately monitor the GOAL program.

2. Submission by the petitioner of several untimely and unsigned evaluations of teaching staff members.

3. Failure of the petitioner to adequately monitor the computer keyboarding program for seventh grade pupils in accordance with information provided by the petitioner to the board concerning that program.

(Board's Reply, at p. 2)

You are viewing an archived copy from the New Jersey State Library.

The Board acknowledges the admonition of the ALJ with regard to its failure to comply with the literal provisions of the time requirements set forth in N.J.S.A. 18A:29-14. However, the Board maintains that the ALJ correctly concluded its action to withhold petitioner's salary increment was in substantial compliance with N.J.S.A. 18A:29-14 for the reasons previously laid down by the Commissioner in Fitzpatrick, supra, as stated below:

> The cases indicate an examination must be made into whether the petitioner knew or should have known the basis of the action taken by the Board prior to and/or subsequent to the Board's action and, also, as to whether the Board's actions toward the petitioner were fundamentally fair. Fitzpatrick v. Montvale Board of Education, 1969 S.L.D. 4. (Board's Reply, at p. 2, quoting the Initial Decision, ante)

In this regard the Board also relies on several other prior school law decisions to support its claim that where there is substantial compliance with the statutory provisions of N.J.S.A. 18A:29-14, the action of a local board of education to withhold a salary increment was not deemed to be fatally flawed. See Martin, supra; Lutsky v. Board of Education of the Township of Clinton, 1982 S.L.D. 1183; Klein v. Board of Education of Cedar Grove, 1981 S.L.D. 1179; Marshall v. Board of Education of Southern Regional High School District, 1978 S.L.D. 593, 596; Baker v. Board of Education of Bergenfield, 1978 S.L.D. 740; and Shanklin v. Board of Education of the North Hunterdon Regional High School District, decided by the Commissioner July 25, 1983.

Contrary to petitioner's reliance on Carney, supra, the Board submits that the ALJ correctly concluded that petitioner knew or should have known the reasons for his increment withholding and also that his performance for the 1985-86 school year was substantially deficient. The basis for the Board's contention is that petitioner admitted that one of his performance goals was to monitor and supervise the GOAL program. This program ended one month early in petitioner's school in December 1985 without petitioner's knowledge or continuous involvement. Moreover, petitioner knew or should have known that the program was not successful due to his lack of monitoring and teacher supervision; however, he made no attempt to inform the Board of the status of this program until mid-April 1986.

Given petitioner's 20 years of service in the River Vale School District, the Board totally rejects his contention that he was unaware that his failure to complete teacher evaluations in a timely manner would constitute sufficient reason for the Board to withhold his salary increment. In the Board's view petitioner was apprised on April 11, 1986, in his evaluation by the superintendent, that his teacher evaluation reports were untimely.

You are viewing an archived copy from the New Jersey State Library.

Finally, the Board maintains that the ALJ's finding that the Board is under no obligation to "rubber stamp" the superintendent's evaluation of petitioner, even if favorable, is supported by prior school law decisions in re Sellers v. Board of Education of the City of East Orange, decided by the Commissioner January 26, 1983 and McElroy v. Board of Education of Hardyston Township, decided by the Commissioner February 14, 1985.

In its concluding argument the Board maintains the following:

> In this case, Judge [Campbell] found that the Board clearly derived information independently from the Superintendent's recommendation in support of the increment withholding. The Board discovered petitioner's failure to adequately monitor the GOAL program through Petitioner's own evaluation of the GOAL teacher and learned of the problems relating to computer keyboarding program through the memorandum of the typing teacher contained in the Superintendent's monthly report. Thus, and as held by Judge [Campbell] the Board clearly had a rational and nonarbitrary basis upon which to withhold Petitioner's increment independent of the Superintendent's evaluation of the Petitioner.
>
> (Board's Reply, at pp. 4-5)

The Commissioner has reviewed the respective positions of the parties in connection with the findings and conclusions set forth in the initial decision. In the Commissioner's judgment the exceptions taken by petitioner to the initial decision are misplaced and without merit essentially for those reasons set forth in the ALJ's findings and conclusion as supplemented by the Board in its reply to petitioner's exceptions.

Accordingly, the Commissioner affirms the initial decision and adopts the findings and conclusion stated therein as his own. The instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

March 24, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6383-86
AGENCY DKT. NO. 290-8/86

NOBLE YOUNG,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CITY OF WEST ORANGE,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Samuel A. Christiano, Esq., for respondent

Record Closed: January 8, 1987 Decided: February 20, 1987

BEFORE ELINOR R. REINER, ALJ:

On or about August 25, 1986, petitioner, Noble Young, appealed to the Commissioner of Education alleging that respondent had violated his tenure and seniority rights by failing to appoint him to an elementary school principal position to which he had seniority. Respondent filed an answer on August 28, 1986, alleging that petitioner, prior to leaving the district, had applied for and been granted his pension under the Teachers' Pension and Annuity Fund (TPAF). Respondent contended that by doing so petitioner effectively forfeited his position on the preferred eligibility list. On September 26, 1986, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

You are viewing an archived copy from the New Jersey State Library.

A prehearing conference was held on November 3, 1986 and the following issues were isolated:

1. Did petitioner's retirement and/or receipt of retirement benefits effectively remove him from the preferred eligibility list (seniority list) for reappointment to the position of elementary school principal?

2. If so, to what relief is petitioner entitled?

Pursuant to the prehearing order, the parties agreed to stipulate to all pertinent facts and to file cross motions for summary decision. A review of the parties' submissions reveals that there are no facts at issue and that this matter is ripe for determination. The stipulation of facts is incorporated by reference herein and constitutes this tribunal's findings of fact. The essential facts may be summarized as follows.

Petitioner began his employment with respondent on September 1, 1974 and served until June 30, 1985. On April 23, 1985, petitioner, who was serving as an elementary school principal, was subject to a reduction in force effective June 30, 1985. When his position was abolished, he was placed on the preferred eligibility list for the position of elementary school principal until date of retirement. At the time petitioner was placed on the preferred eligibility list, there was no other individual with greater seniority than petitioner for the position of elementary school principal. On May 30, 1985, petitioner applied for retirement to the New Jersey Teacher's Pension and Annuity Fund. The retirement was approved on July 11, 1985, effective July 1, 1985. On or about July 1, 1986, an elementary school principal position became available in respondent's school district. Petitioner was not advised of the position; respondent did not offer petitioner the position.

Based upon these essentially uncontroverted facts, the issue is whether petitioner's retirement and/or receipt of retirement benefits effectively removed him from the preferred eligibility list for reappointment to the position of elementary school principal. In support of his motion for summary decision, petitioner relies on N.J.S.A. 18A:28-12,

You are viewing an archived copy from the New Jersey State Library.

which requires that when a vacancy occurs, the person determined to have seniority shall be reemployed by the board that caused the dismissal as long as the person is qualified to hold the position. Petitioner contends there is no exception to this requirement. Petitioner argues that even if a voluntary retirement would constitute a resignation and a relinquishment of any tenure and seniority rights, in the instant case the abolishment of position preceded the retirement. Since petitioner would not have activated his pension but for the abolishment of position, respondent is not relieved of its statutory duty to notify petitioner of the vacancy and reemploy him. Noting that the statute does not relieve a school district of its responsibility to notify a teaching staff member if the teaching staff member leaves the school district, petitioner contends that the same result should flow even if a teaching staff member is forced to retire as a result of an abolishment of position. Thus, petitioner opines that he should have been advised that his former position of elementary school principal to which he had seniority was vacant and given an opportunity to decide whether he wanted to return to the position; his forced retirement did not obviate the board's responsibility.

In response, and in support of its motion for summary decison, respondent alleges that at his retirement, petitioner forfeited his position on the preferred eligibility list. His tenure and seniority status with respondent were effectively revoked. Petitioner cannot draw his pension and simultaneously preserve his eligibility for future return to an elementary school principalship or any other position in the West Orange district. To do so would enable a person to enjoy the benefits of retirement without actually retiring. In support of its position, petitioner, citing Laing v. Bd. of Ed. of the Tp. of Edison, Middlesex County, 1977 S.L.D. 422, aff'd State Bd. of Ed., 1977 S.L.D. 427, aff'd N.J. App.Div. (September 22, 1978) 1978 S.L.D. 1025, points out that membership in the TPAF ceases upon retirement. (See also, The School District of the City of Newark v. Kopel, 1982 S.L.D 17.) Therefore, previously eligible persons who retire from the TPAF can no longer claim the status of teacher for the purpose of employment. Based on this, respondent argues that when petitioner applied to the TPAF for his pension, his name was properly removed from the preferred eligibility list and all his tenure and seniority rights were rightfully terminated. Respondent also contends that pursuant to Laing, a letter of resignation is not required to effectuate petitioner's termination of employment with respondent.

You are viewing an archived copy from the New Jersey State Library.

Petitioner argues that Laing and Kopel have no applicability to the instant matter. Noting that in those cases, the teaching staff member voluntarily retired from the school district, petitioner points out that it was only after respondent took the action to abolish his position that he made his application to the TPAF. Petitioner further argues that the pension statutes do not preclude a member from reemployment in the school district in accordance with his placement on the preferred eligibility list, upon activation of a pension as a result of a reduction in force. Petitioner contends that his decision to activate his pension and retire should not be treated differently from a decision to obtain a job in another school district.

I have considered the arguments espoused by the parties and must agree with respondent's conclusion. N.J.S.A. 18A:28-12 requires that if any teaching staff member is dismissed as a result of a reduction in force, "such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified." Although petitioner would have this tribunal conclude that that statute requires he remain on the preferred eligibility list even if he retired, clearly the statute requires only that a teaching staff member remain on the preferred eligibility list in a position for which he shall be "qualified." As conceded by petitioner, if petitioner voluntarily retired from the school district, such retirement would constitute a resignation and a relinquishment of his tenure and seniority rights. Thus the Commissioner stated in Laing at 425 that "[P]reviously eligible persons who retire . . . can no longer claim the status of teacher for the purpose of employment." In fact, and as stated by the Appellate Division, a school board's decision to terminate Laing's employment and status as a teacher was "not altered by the action of the TPAF in rescinding her retirement." 1978 S.L.D. at 1027. See also, Kopel.

Petitioner's argument that he did not "voluntarily" retire from the school district because his action was necessitated by the reduction in force must be addressed next. It is necessary to clarify whether his decision to retire had to be voluntary under the relevant statutes in order to constitute a retirement. N.J.S.A. 18A:66-43(a) provides as follows:

You are viewing an archived copy from the New Jersey State Library.

> A member who has attained 60 years of age may retire on a service retirement allowance by filing with the retirement system a written application, duly attested, stating at which time subsequent to the execution and filing thereof he desires to be retired.

Inasmuch as the statute does not use the word "voluntary" and petitioner does not cite any cases to support the argument that voluntary retirement is necessary, it would appear that voluntariness is not essential. However, since the above-cited statute uses the conditional word "may," and pursuant to statute, there is a provision for involuntary retirement (N.J.S.A. 18A:66-43(b)) at age 70, petitioner's contention that retirement must be voluntary seems the more logical conclusion. Further support for this determination may be gleaned from Sobel v. Bd. of Trustees, Teacher's Pension and Annuity Fund, 139 N.J. Super. 55, 57 (App. Div. 1976) in which it is stated that "retirement for age and years of service is essentially voluntary."

In view of this tribunal's decision to require that a retirement be voluntary, consideration of what is meant by that term is necessary. This tribunal has looked at how voluntariness has been defined, albeit it in different contexts. In Jenkins v. Kaplin, 53 N.J. Super. 582, 588 (App. Div. 1959), voluntary was defined as involving a "choice" or acting "without compulsion." Similarly, in United States v. Sierra, 585 F. Supp. 1236, 1243 (D. N.J. 1984), a voluntary confession was defined as "free" and "unconstrained." Voluntary essentially means "intentional . . . involving free will . . . controlled by the will." Webster's New World Dictionary 536 (D. Grualinek, ed. 1970). Similarly, duress is definend as "means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." Black's Law Dictionary 452 (5th ed. 1980).

Considering petitioner's action in view of the above definitions, it appears clear that petitioner had the option of whether or not to retire. His determination to retire was his alone. There is no indication that he was compelled to retire or that he suffered duress sufficient to necessitate the determination that his choice was not a free one. It is quite

You are viewing an archived copy from the New Jersey State Library.

possible that petitioner did not like his options. Yet, it was essentially his decision either to be eligible for a new position as principal or to seek retirement. He chose retirement and must bear the consequences of his choice. Since petitioner's decision to apply for his pension was intentional and voluntary, his name was properly removed from the preferred eligibility list and his tenure and seniority rights were rightfully terminated.

Based upon the above discussion, I **CONCLUDE** that petitioner's retirement effectively removed him from the preferred eligibility list for reemployment to the position of elementary school principal.

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED** and that petitioner's appeal is **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

February 20, 1987 — Elinor R. Reiner
DATE — ELINOR R. REINER, ALJ

FEB 24 1987 — Receipt Acknowledged:
DATE — DEPARTMENT OF EDUCATION

FEB 25 1987 — Mailed To Parties:
DATE — FOR OFFICE OF ADMINISTRATIVE LAW
jrp

You are viewing an archived copy from the New Jersey State Library.

NOBLE YOUNG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions reiterate those arguments made in his post-hearing brief. Essentially, he contends that "***Petitioner's options were forced upon him by the reduction in force" that occurred in respondent's district on April 23, 1985, effective June 1, 1985. (Petitioner's Exceptions, at p. 4) He suggests that, therefore, "exercising the option of retirement should not now be used as a penalty to prevent Petitioner from again being able to be employed in the position to which he has seniority and tenure." (Id., at p. 4) Petitioner applied for pension benefits on May 30, 1985, approximately five weeks after he was first notified that his position was to be abolished. His retirement was approved on July 11, 1985, effective July 1, 1985. On July 1, 1986 an elementary school principal position became available. Petitioner contends that failure by the Board to first advise him of the available position, and then to offer him the position based on his seniority, constitutes a violation of his rights as protected by N.J.S.A. 18A:28-12.

Petitioner contends that his retiring as a result of a RIF should not be viewed as cancelling or forfeiting his tenure and seniority rights. Following the RIF announced on April 23, 1985, and thereafter having neither a position nor an income, "***Petitioner was forced to exercise his available options. One of those options was to apply for retirement. What cannot be lost upon the Commissioner is that the option of retirement was exercised only after a reduction in force was announced and only as a result of the reduction in force," petitioner claims. (Petitioner's Exceptions, at p. 3)

Petitioner claims the ALJ's conclusion that his option to retire was voluntary is in error.

> Had Petitioner's application for retirement been made prior to the notice of the reduction in force, his decision clearly would have been a voluntary one. However, the parties agree that

You are viewing an archived copy from the New Jersey State Library.

> Petitioner was advised first of the reduction in force and only later -- five weeks later -- did he apply for retirement. The reduction in force led to the retirement as it would have led to another position in another school district had Petitioner been so lucky as to have been able to find another position. Unfortunately, Petitioner was not so lucky. As a result, he activated his pension. (Petitioner's Exceptions, at p. 3)

Petitioner contends that the initial decision must be reversed.

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner's retirement did effectively remove him from the preferred eligibility list for reemployment to the position of elementary school principal. The Commissioner finds no new points come to light in exceptions that were not fully disposed of by the thorough discussion of the facts and law developed by the ALJ.

Accordingly, the initial decision is affirmed for the reasons expressed therein. The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

March 25, 1987

You are viewing an archived copy from the New Jersey State Library.

NOBEL YOUNG,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 25, 1987

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Christiano and Christiano
(Samuel A. Christiano, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 2, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 6128-86
AGENCY DKT. NO. 278-8/86

HARVEY FRIED,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,
Respondent.

Harold N. Springstead, Esq., for petitioner (Aronsohn & Springstead, attorneys)

Monica E. Olszewski, Esq., for respondent (Greenwood & Sayovitz, attorneys)

Record Closed: February 9, 1986 Decided: February 25, 1987

BEFORE **ARNOLD SAMUELS**, ALJ:

Petitioner Harvey Fried is a tenured teacher employed by the respondent, Board of Education of the Township of Teaneck. The Board withheld petitioner's employment increment and adjustment increment for the 1986-87 school year, based upon the application of a policy relating to excessive absenteeism and N.J.S.A. 18A:29-14. Mr. Fried appealed the Board's action to the Commissioner of Education, and on September 16, 1986 the matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

New Jersey Is An Equal Opportunity Employer

You are viewing an archived copy from the New Jersey State Library.

A prehearing conference was held at the Office of Administrative Law in Newark, New Jersey, on October 23, 1986, and a Prehearing Order was entered defining and limiting the issues to be decided, providing for discovery and regulating other procedural aspects of the dispute. Both parties agreed that there were no disputed issues of material fact and that the matter was capable of being decided as a matter of law, without the need for a plenary hearing. The parties subsequently filed motions for summary decision, stipulations of facts and briefs. Although the Prehearing Order provided that a date for oral argument would be fixed after all necessary papers had been filed, counsel for both parties waived their rights to oral argument by telephone on February 9, 1986. The record closed on that date.

The issues, as defined in the Prehearing Order, are:

A. Was the action of the Board in withholding the petitioner's salary increments (employment and adjustment) for the 1986-87 school year arbitrary, unreasonable, capricious and therefore unlawful?

B. Is the Board's Policy No. 334, under which it acted, arbitrary, capricious, unreasonable or in violation of N.J.S.A. 18A:29-14?

C. Was the Board's action taken against both the employment and adjustment increment proper in the light of the above two issues?

The **FACTS** stipulated by the parties are summarily stated as follows:

1. Petitioner Harvey Fried is a tenured teaching staff member employed by respondent Board of Education of the Township of Teaneck (Board).

2. Petitioner is a certified secondary school teacher of English and is on Step 15 of the Board's Salary Guide for the 1986-87 academic year.

3. During the 1985-86 academic year, petitioner was absent from school for a

You are viewing an archived copy from the New Jersey State Library.

total of 78 days. The major portion of those absences was a continuous period of time from January 8, 1986 through May 6, 1986.

4. The Board does not challenge petitioner's representation that the absences were due to illness.

5. The Board charged 21 1/2 days of petitioner's absence to accumulated sick days and then deducted the remaining 56 1/2 days from his salary.

6. On June 12, 1986, the Board notified petitioner that it had voted at its June 11, 1986 meeting to withhold his increment/adjustment for the 1986-87 year because he was "absent over 50 days." It is uncontested that the action was taken in accordance with Paragraph 1 of Board Policy No. 334.

7. Petitioner returned to work on May 6, 1986.

8. Board Policy No. 334 was formulated and proposed after many meetings and conferences by the Board over a period of months. The Board considered policies and practices of other school districts. Two public meetings were held preceding adoption of the policy, and no comments were received from the public or the Teachers' Association.

9. Board Policy No. 334, Paragraph 1, only affects those staff members who are absent 49 days beyond all statutory, accumulated or otherwise paid leave time.

10. Board Policy No. 334 was adopted because of a growing problem of staff absenteeism with its inherent adverse effect on student progress and general school operations. Increment withholding was deemed to be a suitable approach to curbing absenteeism because annual increments are designed to be a reward for meritorious service contributed to the educational process.

You are viewing an archived copy from the New Jersey State Library.

11. The first reading of Board Policy No. 334 entitled "Withholding Increments/Adjustments" was at the June 8, 1983 meeting of the Board.

12. On August 3, 1983, Board Policy No. 334 was adopted by the Board.

13. A copy of relevant portions of the Board minutes of August 3, 1983 are annexed to the stipulations.

The filed Stipulation of Facts, consisting of four pages with six exhibits attached, has been marked Exhibit J-1 in evidence, and is incorporated herein by reference.

The petitioner is challenging the validity and application to him of Paragraph 1 of Board Policy No. 334:

> Withholding Increments/Adjustments.
>
> 1. The Board shall withhold the employment increment and the adjustment increment of all teaching staff members who shall be on an uncompensated leave for 50 or more school days in any school year for 10-month employees and 60 or more days in any school year for 12-month employees. Such uncompensated leave shall include but not be limited to child rearing leave, medical leaves, home duties leave and educational leave. (Adopted August 3, 1983, effective August 4, 1983)

It is uncontested that the action taken by the Board was based solely on the application of the above policy, and that petitioner's absences were due to illness.

The statutory authority under which the Board is empowered to withhold increments is set forth in N.J.S.A. 18A:29-14, which provides as follows:

You are viewing an archived copy from the New Jersey State Library.

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education . . . .

The Board primarily bases its application for summary decision on the precedent created by a substantially similar test of Policy No. 334, Paragraph 1, decided less than two years ago: Bialek and Meehan v. Board of Education of the Township of Teaneck, Bergen County, OAL DKT. NO. EDU 7908-84 and 8107-84 (May 30, 1985), adopted Comm. of Education (July 19, 1985); aff'd State Board of Education (Dec. 4, 1985). Policy No. 334, Paragraph 1, has not been amended since Bialek, and it is still in force in the Teaneck school district.

Nevertheless, petitioner contends that the application of Policy No. 334 to him is arbitrary, unreasonable and capricious. He also claims that a teacher who suffers a medical catastrophe should not be penalized with loss of increment.

The facts, circumstances and arguments in the case at hand are virtually identical to those presented in Bialek and Meehan. Bialek was absent for a total of 110 days, of which 72 1/2 days were uncompensated. Meehan was absent for a total of 70 1/2 days, of which 60 1/2 days were uncompensated. Their absences were due to illness, and Policy No. 334, Paragraph 1, was applied in withholding their increments without regard to the underlying circumstances. (Petitioner was absent for 78 days, 56 1/2 of which were uncompensated.)

The illnesses of Bialek and Meehan were not specifically identified, nor were they challenged or doubted by the Board. A substantial portion of Mr. Fried's absences was due to back surgery, and the Board also did not challenge or doubt his veracity.

It is noted that there were 185 school days in the 1985-86 school year in the Teaneck district. Mr. Fried was absent from the classroom a total of 42.16 percent of those days. If only the uncompensated absences are calculated, those absences totaled

You are viewing an archived copy from the New Jersey State Library.

30.54 percent of the school year. As mentioned in Bialek and Meehan, 50 days of absence over a total period of 183 days in the 1983-84 school year was equal to 27 percent of the total classroom time. This statistic is virtually unchanged when applied to the 185 days in the 1985-86 school year.

An in-depth analysis of the applicable law is set forth in Bialek and Meehan. See Bialek OAL Initial Decision, pp. 11-17, and Commissioner of Education's decision, pp. 20-24. That discussion is incorporated herein and will not be repeated at length.

As indicated in the Commissioner's decison referred to above, the subject policy, under the facts and circumstances of this case, is not violative of the standards set forth in Kuehn v. Board of Education of Teaneck, OAL DKT. 1077-81 (Oct. 9, 1981), State Board of Education (Feb. 1, 1983) or Montville Twp. Ed. Assn. v. Board of Ed. of the Township of Montville, OAL DKT. 8247-83 (Feb. 29, 1984), State Board of Education (Nov. 7, 1984), where boards of education were compelled to consider individual circumstances in the absence of properly promulgated and applied policies. The promulgation of Paragraph 1 of Policy No. 334 and its application to this case fully comports with standards that were not satisfied in Kuehn or Montville. Since the 1984 decision in Montville, that case was subject to further proceedings in the Appellate Division (December 6, 1985)(unpublished) and again by the State Board (May 7, 1986). The final result does not adversely affect the conclusion in Bialek or the instant matter, since it dealt with an unsatisfactory evaluation rating that could result from an arbitrary attendance guideline. No unsatisfactory rating is involved here, where the result of application of the policy is to withhold a reward.

The petitioner also argues that the purpose of N.J.S.A. 18A:29-14 is in essence to discipline teaching staff members who do not in some way measure up to standards expected by the Board of Education. That point of view is rejected. While some boards might use the withholding of an increment as a disciplinary tool, discipline is not the generally recognized primary purpose of such an action.

You are viewing an archived copy from the New Jersey State Library.

> The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency." The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the board. Bernards Township Board of Ed. v. Bernards Township Education Association, 79 N.J. 311, 321 (1979).

In Bialek it was held that the Board fixed a reasonable minimum standard of necessary attendance, and a point was reached at or below that minimum standard where the services could no longer be regarded as meritorious. In that respect, Policy No. 334, Paragraph 1, was held to reflect a reasonable relationship to necessary educational goals. Kopera v. West Orange Board of Ed., 60 N.J. Super. 288 (App. Div. 1960). The teacher here is not being disciplined. He is being denied a merit reward because his absences, for whatever reason, became excessive to the point where his effectiveness as a classroom teacher was necessarily reduced. See Bialek, Initial Decision, pages 15 and 16.

In the circumstances of Bialek and the instant case, a primary determining factor is the lessened effect on the educational process, not the employee's personal reasons for the absenteeism. The students are no less affected by a teacher's excessive absence due to surgery than they are when the absences are due to a less urgent cause.

Petitioner also argues that only his employment increment should be withheld, if any. Both the statute, N.J.S.A. 18A:29-14, and Paragraph 1 of Policy No. 334 specifically refer to the Board's authority to withhold both the employment and the adjustment increments as a managerial prerogative.

This matter is virtually a repetition of Bialek; there are no appreciable differences in the facts. The petitioner is attempting to obtain a redetermination of a contest that has already been decided by the Office of Administrative Law, the Commissioner of Education and the State Board. Under the circumstances, no viable

You are viewing an archived copy from the New Jersey State Library.

reasons have been shown to upset those holdings or to distinguish Mr. Fried's petition from Bialek and Meehan.

It is therefore **CONCLUDED** that the petitioner has not proved that the withholding of his increments pursuant to Paragraph 1 of Policy No. 334 was arbitrary, capricious, unreasonable or unlawful. He also failed to prove that the Board policy itself is unreasonable, arbitrary, lacking in demonstrated rational basis or otherwise unlawful. On the contrary, paragraph 1 of Policy No. 334 represents a rational exercise of the Board's managerial authority. It was adopted as a formal written policy after careful consideration in public hearings, and its application begins only after allowance for accumulated and compensated leave. Furthermore, the rationale that compelled the passage of the policy is meritorious and conducive to the maintenance of sound educational goals.

It is therefore **ORDERED** that summary decision be granted to the respondent, and the petition **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

You are viewing an archived copy from the New Jersey State Library.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

February 25, 1987
DATE

ARNOLD SAMUELS, ALJ

MAR - 2 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 2 1987
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

You are viewing an archived copy from the New Jersey State Library.

HARVEY FRIED,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon examination of the record, the Commissioner concurs with the analysis and conclusions of the ALJ and adopts the initial decision as the final decision in this matter for the reasons expressed therein.

COMMISSIONER OF EDUCATION

March 31, 1987

You are viewing an archived copy from the New Jersey State Library.

HARVEY FRIED,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 31, 1987

For the Petitioner-Appellant, Aronsohn and Springstead
(Harold N. Springstead, Esq., of Counsel)

For the Respondent-Respondent, Greenwood and Sayovitz
(Monica E. Olszewski, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 2, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5377-86
AGENCY DKT. NO. 242-7/86

RAYMOND CARRATO,
Petitioner,
v.
MILLTOWN BOROUGH BOARD
OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Anthony V. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: January 12, 1987 Decided: February 26, 1987

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Raymond Carrato (petitioner) employed as a teacher by the Milltown Borough Board of Education (Board) claims the action of the Board taken by which a salary increment of approximately $3,000 for 1986-87 was withheld from him was arbitrary, capricious, unreasonable and in violation of N.J.S.A. 18A:29-14. Petitioner seeks an Order from the Commissioner of Education by which the Board would be directed to grant him the 1986-87 salary increment withheld from him. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted October 14, 1986 and the matter was scheduled and heard December 10, 1986 at the Sayreville Municipal Court, Sayreville. The record closed January 12, 1987 upon receipt of petitioner's memorandum in support of his position. A transcript of testimony at hearing is not part of this record.

You are viewing an archived copy from the New Jersey State Library.

BACKGROUND FACTS

Certain background facts which are not in dispute between the parties, except as otherwise noted, and as established by a preponderance of credible evidence are these. Petitioner, who began his employment with the Board in 1974, was assigned to teach science during all relevant times to one section of seventh grade pupils and four sections of eighth grade pupils each and every day. During the course of his employment petitioner's classroom teaching performance has been consistently rated positive (P-1 through P-29B). He has actively participated in pupil cocurricular activities as coach of soccer, basketball, baseball and softball teams. He served as timekeeper for basketball for a number of years and has been a member of the professional relations committee, chair of the science curricular committee, a member of the teacher evaluation committee, student discipline committee and he volunteered to supervise general detention.

From the date of petitioner's first employment during the 1974-75 academic year through the completion of the 1982-83 academic year, petitioner and other teachers, parents, and Board members acted as chaperones for the school's annual eighth grade three-day class trip to Washington, D.C. Petitioner views the Washington trip as a positive experience for the pupils. A fact not agreed upon between the parties is whether petitioner was and is obligated as a teacher of eighth grade pupils to serve as a chaperone on this trip as the Board claims or, as petitioner claims, whether his participation was and is voluntary. Petitioner advised the superintendent on October 1, 1985 of his desire not to be a chaperone on the Washington trip during May 1986 (P-33). In response, the superintendent advised petitioner three months later on January 3, 1986 that if he failed to chaperone the trip during May 1986 such conduct would be considered "* * * a major breach of your employment responsibilities and will result in my recommendation to the Board that disciplinary action be taken against you * * *" (P-34). Petitioner advised the superintendent the very same day, January 3, 1986, that his decision remained unchanged and that "I do not wish to be a chaperone on the 8th grade trip to Washington, D.C." (P-33). Petitioner was thereafter advised (P-36) that the Board would specially meet on April 17, 1986 to consider whether to withhold a salary increment for 1986-87. Petitioner requested that the meeting be opened to the public (P-37). Petitioner addressed the Board regarding the salary increment as the public meeting it conducted April 17. Petitioner was advised by the superintendent on April 22, 1986 that the Board, by a 9-0 vote, determined to withhold a salary increment for 1986-87 because of his "* * * refusal to

You are viewing an archived copy from the New Jersey State Library.

make your services available to the district * * *" for the upcoming annual three-day eighth grade Washington, D.C. trip as a chaperone. (P-38). The petition of appeal followed.

FACTUAL ISSUES

Petitioner claims the Board's action to withhold his salary increment is arbitrary, capricious and unreasonable because (1) he is under no duty by virtue of his employment relationship as a teacher with the Board or his assignment therein to chaperone the three day, two night annual Washington trip, particularly when the chaperone assignment conflicts with his personal family responsibility, (2) even if the assignment of chaperone is an obligatory duty assigned him, not all teachers of eighth grade pupils are required to act as chaperones on the trip and, consequently, he is being unfairly treated, and (3) petitioner claims his evidence shows the superintendent recommended his salary increment be withheld because of what the superintendent perceived to be his, petitioner's, future intention not to chaperone the trip again. Petitioner denies communicating or conveying such future intention to the superintendent and contends that but for that asserted faulty perception by the superintendent, the superintendent would not have recommended that the Board withhold his salary increment.

The Board, through its superintendent and principal, assert that teachers who spend more than 50 percent of their instructional day with eighth grade pupils are duty-bound as a matter of Board policy through past practice since 1975 to chaperone the annual eighth grade Washington trip. Accordingly, the Board claims petitioner is duty-bound to chaperone the trip, absent legitimate excuse approved by the superintendent, because his assignment is and has been to teach science more than 50 percent of the instructional day to eighth grade pupils. The Board admits that teachers who spend less than 50 percent of their instructional day are not duty-bound to chaperone the annual trip. Nevertheless, the Board contends that this fact standing by itself and in view of the reason for its policy does not render unfair the effect of the policy upon petitioner. Finally, the Board says petitioner did convey through oral and written statements to it and to its administrators his present and future intention to refuse to perform his duty to chaperone the trip. Alternatively, the Board maintains that petitioner's refusal to chaperone the 1986 trip is sufficient good cause under N.J.S.A. 18A:29-14 to withhold a salary increment without regard to his future intention.

You are viewing an archived copy from the New Jersey State Library.

DISPUTED FACT

Petitioner's Proofs

Obviously, a significant disputed fact between the parties is whether petitioner's attendance as chaperone on the annual three-day trip for eighth grade pupils is voluntary, he may elect to chaperone, or mandatory, he has no election; he must chaperone by virtue of his employment with it and assignment under that employment. In addition to his own testimony, petitioner called co-teachers Barbara Christian, Kenneth Logan, and Richard Hart, as well as retired teacher Beatrice Spiro, to testify in support of his position that teachers may volunteer to chaperone the annual school trip but are under no obligation to do so. The Board does not have an explicit written policy which requires petitioner and other similarly situated teachers to chaperone the annual Washington trip. Nevertheless, it asserts its written policies governing field trips (R-1), employee duties (R-7), leaves - unauthorized leave (R-2), goals and objectives of its educational administration (R-3), superintendent's job (R-4), teacher evaluation (R-5), the withholding of an increment (R-6), and its past practice clearly establish that petitioner is duty-bound to be a chaperone for the annual Washington trip. The school principal, Bertram Nussbaum, and the superintendent, Patrick Wilder, testified for the Board.

Petitioner testified that throughout his employment with the Board the principal's secretary always asked him whether he intended to chaperone the annual trip near the end of each academic year. Petitioner explained that no one at the time of initial employment or thereafter ever told him it was his obligation as a teacher in the Board's employ to act as chaperone. Furthermore, petitioner testified that not all teachers who teach eighth grade subjects are under any obligation to chaperone the annual Washington trip.

Petitioner, having reviewed school pictures taken in Washington and having talked with veteran teachers and having relied upon his own personal recollection, testified that during the 1975 trip, six teachers who taught eighth grade subjects were not in attendance on the trip although he was, as was the principal, four other subject area teachers, and the school nurse. In 1976, six teachers of eighth grade subjects did not attend, nor did those same six teachers attend in 1977, 1978 and generally through 1983, the last year petitioner chaperoned the trip. During one of the years petitioner chaperoned the trip he became ill in Washington, while on another occasion he had contracted pneumonia upon his return.

You are viewing an archived copy from the New Jersey State Library.

It is agreed that petitioner was excused from chaperoning the trip during May 1984 because of illness. During the next academic year, 1984-85, petitioner learned in February 1985 his wife was pregnant with their first child. He immediately advised Principal Nussbaum of that fact and that he chose not to chaperone the 1985 annual three-day eighth grade class trip to Washington. According to petitioner, Nussbaum told him to make every effort to attend the trip because his failure to do so could have adverse consequences for him. Nussbaum testified that at this meeting petitioner not only advised he chose not to chaperone the May 1985 trip but that he also advised he did not ever again expect to chaperone the trip. Nussbaum thereafter advised the superintendent of the meeting with petitioner.

In late February or early March 1985, the superintendent met with petitioner to discuss the matter of his decision not to chaperone the May 1985 trip and, more importantly according to the superintendent, petitioner's decision not to chaperone the trip ever again. Petitioner admits he told the superintendent he was not certain if he desired to chaperone the annual trip ever again and he admits that the superintendent was concerned about that expressed possible future intention. Petitioner testified that the superintendent, though agreeing to excuse him from the May 1985 trip so long as he submitted the request to be excused in writing, cautioned him that a refusal to chaperone future trips would be equivalent to his refusal to teach an assigned course.

Following the meeting petitioner advised the superintendent on March 8, 1985 regarding the May 1985 trip:

* * *

> I do not wish to chaperone the [May 1985] trip. I feel it necessary to stay at home and be available to my wife, who by May will be four months pregnant. I do not wish to be away from my wife for three days while she is awaiting the birth of our first child.
>
> (P-30)

In a memorandum (P-31) to file on March 27, 1985, the superintendent memorialized his meeting with petitioner regarding petitioner's involvement in the May 1985 and future Washington trips. The superintendent wrote that

You are viewing an archived copy from the New Jersey State Library.

* * *

[Petitioner] indicated he wished to be excused from the Washington trip this year and permission was granted for said request. We then discussed his participation in years to come. He indicated the possibility of his desire not to attend future trips. I explained to [petitioner] that if this was the case I would consider it to be a major problem inasmuch as the chaperoning of the Washington trip by eighth grade teachers is, and has been, considered part of the teacher'[s] regular assignment; and further, any teacher's refusal to accept any aspect of their regular school assignment would jeopardize their good standing in the district as well as their employment status.

[Petitioner] indicated he was aware of the concerns and the potential problems down the road. We agreed that the matter would be reviewed again around November 1, 1985 and all parties hoped that the situation would be mutually and agreeably resolved at that time.

(P-31)

This memorandum to file was signed by both the superintendent and petitioner on March 27, 1985. Consequently, petitioner, I **FIND**, knew the contents of the memorandum prior to or simultaneous to it being placed in his personal file. One month later, on April 24, 1985, petitioner responded to the file memorandum in which he states, inter alia, the following:

* * *

In my opinion, the following statement contained in your letter should be deleted at this time, '* * * and further, any teacher's refusal to accept any aspect of their regular school assignment would jeopardize their good standing in the district as well as their employment status.' I requested that you delete this sentence from your letter, and you felt it should remain. Even with your usage of the phrase 'any teacher', or putting any disciplinary action into a future tense, still makes the meaning very clear in my mind. I must conclude that applies to me as no other 8th grade teacher has received a similar letter in their Personnel Folder. I consider the phrase to be a thinly disguised threat to my standing in the district and my employment status. Technically, the sentence in question in not applicable at this time. You have excused me from the trip for this year due to my wife's pregnancy. Therefore, I have violated no aspect of my regular school assignments. If I have not, as yet, refused to attend any further trips to Washington, D.C., why place a statement in your letter citing penalties for failure to chaperone in the future?. If I say 'no' on November 1, 1985 (the agreed date I am to officially notify you of my intentions), this situation would change
* * *

(P-32)

You are viewing an archived copy from the New Jersey State Library.

Petitioner did not chaperone the May 1985 annual trip to Washington. In petitioner's view he elected not to chaperone this trip because of his wife's pregnancy, while in the superintendent's view he affirmatively excused petitioner from chaperone duty by reason of petitioner's written request detailing his wife's pregnancy as the reason for his requested excusal.

On October 1, 1985, petitioner advised the superintendent of his desire not to be a chaperone on the eighth grade trip to Washington in May 1986 (P-33). On or about the same date, petitioner's wife was in her ninth month of pregnancy. She delivered the baby on November 2, 1985. Between October 1, 1985, when petitioner wrote the superintendent of his desire not to chaperone the May 1986 trip, through January 3, 1986 neither the principal nor the superintendent responded in any way to petitioner's expressed desire. On January 3, 1986 the superintendent advised petitioner, among other things, of the following:

> * * *
>
> The policy and practice of our district will not allow us a favorable decision regarding your request. The chaperoning of the Washington trip by 8th grade teachers is and has always been considered a regular part of the 8th grade teacher's assignment. The class trip is directly related to your obligation as a teacher employed in the school district
> * * *
>
> During the school year 1984-85, the Board allowed you to excuse yourself from the Washington trip because of your wife's pregnancy and the imminent birth of your first child. No reasons, at all, have been provided for your current request.
>
> Your fulfillment of your expressed intention not to participate in the Washington trip in May 1986 will be viewed by the Administration as a major breach of your employment responsibilities and will result in my recommendation to the Board that disciplinary action be taken against you. The disciplinary action may consist of a reprimand, withholding of increment or even termination. I would request that your reconsider your current expressed intention.
>
> The Board cannot allow you to delay your final decision regarding your participation as a chaperone in the May 1986 Washington trip. Therefore, I must insist that some decision be communicated to my office, in writing, no later than March 1, 1986 * * *
>
> (P-34)

You are viewing an archived copy from the New Jersey State Library.

It is to be quickly noted that there is no evidence to show the "Board" was involved in this matter other than on April 17, 1986, when it acted to withhold petitioner's salary increment. The evidence does show the superintendent took no action to require petitioner to chaperone the 1985 trip and that the superintendent, not the Board, determined that petitioner could not be allowed "* * * to delay your final decision * * *" regarding the 1986 trip.

Petitioner, rather than wait until the March 1 deadline stated in the superintendent's letter, responded that very same day, January 3, 1986. Petitioner's response (P-33) is reproduced here in full:

> This is in response to your letter of January 3, 1986 concerning the chaperoning of the Washington trip.
>
> My intention is and has been since last year to not be a chaperone on the Washington trip. Simply stated, my reasons are: I do not feel that it is an equitable situation for me to be, in essence, forced to leave my young family for a period of three days whether I wish to or not. My feelings for my family and their welfare come first. At this point in time, I do not wish to leave them for that length of time.
>
> Secondly, past administrative decisions have permitted other 8th grade teachers to be released from their duties of chaperoning without disciplinary action being taken.
>
> Thirdly, there are other members of the faculty that have expressed to me a willingness to chaperone the trip.[1]
>
> In summary, my decision remains unchanged. On May 7th of 1986 I do not wish to be a chaperone on the 8th grade trip to Washington, D.C.

Thereafter, the Board met April 17 and determined to withhold a salary increment from petitioner for 1986-87 for the reasons stated above. At this meeting, petitioner advised the Board he did not intend to chaperone the Washington trip in May 1986 and that if it withheld a salary increment from him that evening he may not continue in its employ for 1986-87. Petitioner did not, in fact, chaperone the annual three day eighth grade trip to Washington, D.C. during May 1986.

[1] Petitioner testified two teachers had volunteered to chaperone the trip in his stead, while Nussbaum testified he is not awre of any volunteers who knows the eighth grade pupils as well as teachers who teach eighth grade pupils more than 50 percent of the instructional day.

You are viewing an archived copy from the New Jersey State Library.

Petitioner's wife testified that she suffered extreme nausea during the second trimester of her pregnancy in 1985 which is the reason she told her husband, petitioner, to stay home from the 1985 trip. During the 1986 spring, petitioner's wife testified she preferred that he not chaperone the three day Washington trip because she felt she needed him at home.

Petitioner, in support of his position that he voluntarily chaperoned the eighth grade Washington trip as opposed to being obligated as a teacher to chaperone the trip, relies not only upon his own testimony but also upon the testimony of teacher colleague, Barbara Christian. Ms. Christian, who has been employed by the Board as a teacher for 18 years, is and has been assigned to teach English to four classes of eighth grade pupils. For the past 17 years, Ms. Christian has chaperoned each and every eighth grade trip to Washington. On one occasion in 1974 she was graduated from Trenton State College the day the trip began. After participating in the baccalaureate services at the College, her husband then drove her to Washington to join the pupils and chaperones already there. Despite Ms. Christian's attendance as chaperone on the trip for the past 17 years and despite her being driven to Washington by her husband in 1974, she is of the view that no eighth grade teacher is obligated to act as a chaperone. Rather, Ms. Christian's understanding is that a teacher who elected not to chaperone was and is under no obligation to do so.

Petitioner also relies upon the testimony of teacher colleague, Richard Hart. Mr. Hart has been employed by the Board for 35 years as a shop teacher. His assignment is to teach shop to four classes of eighth grade pupils two times a week, four classes of seventh grade pupils four times a week, and a fifth and sixth grade class of pupils each once a week. Mr. Hart recalls that the annual trip existed in 1963 when he was an eighth grade advisor. In fact, he and the principal in the 1963 were responsible for the organization and conduct of the trip. No teacher was involuntarily assigned to chaperone the Washington trip in those days. He has not been involved at all with the Washington trip since 1966.

Kenneth Logan, who has been a teacher with the Board for 17 years, chaperoned the Washington trip between 1971 through 1973. Logan says he chaperoned only because he volunteered to do so. He was never directed or felt obligated to chaperone the trip. Mr. Logan teachers health and physical education and one science class in grades four through eight.

You are viewing an archived copy from the New Jersey State Library.

Finally, petitioner relies upon the testimony of Beatrice Spiro, who retired in 1984. Prior to her retirement, Ms. Spiro was employed by the Board as a teacher for 16 years. She taught mathematics to four classes of eighth grade pupils and to one class of seventh grade pupils. She testified she was never obligated to chaperone the Washington trip although in 1981 and 1982 she volunterred to chaperone the trip. In 1983, Ms. Spiro testified she was given an option of whether she wished to chaperone the trip. She chose not to do so and she retired the following year.

Board's Proofs

In support of the position that petitioner is obligated as part of his duties as a teacher of eighth grade pupils to chaperone the annual Washington trip each and every year, Principal Nussbaum explained that when he became principal in the 1973-74 academic year the then superintendent literally ran the trip. He and the superintendent chaperoned the trip in 1974, along with teacher chaperones selected by the former superintendent in a manner unknown to the principal. Several days before the 1975 annual trip, that superintendent was injured and could not attend the trip. In the meantime Nussbaum prevailed upon the then superintendent to assign teachers whose primary assignments was at the eighth grade level as chaperones. The following year, 1975-76, Nussbaum assumed total responsibility for planning the trip, selecting chaperones, and approving as chaperones parents, Board members, and other teachers who volunteered to act as chaperones. In short, Nussbaum testified that since 1975-76, he obligates those who teach eighth grade pupils more than 50 percent of their time to be chaperones for the annual trip, without regard to whether they volunteer. Teachers who spend less than 50 percent of their instructional day teaching eighth grade pupils are not obligated to be chaperones on the trip unless they desire to participate. Nussbaum says that in addition to petitioner being obligated to chaperone the trip because of his assignment to teach eighth grade pupils more than 50 percent of the instructional day, that obligation also extends to Barbara Christian, the teacher of English, Edward Vetter, since retired, the teacher of social studies, and the teacher of mathematics, Beatrice Spiro and her successor Anne Russell. The latter two named teachers have been regularly excused from the chaperone duties for reasons to be discussed later. Those who spend some part of the instructional day but less than 50 percent with eighth grade pupils and otherwise not obligated to chaperone the trip are teachers of art, instrumental and vocal music, shop, home economics, physical education, and the resource room teacher.

You are viewing an archived copy from the New Jersey State Library.

The principal is aware that his method of assignment is a change from years prior to 1975-76 when chaperones were volunteers. Thus, Nussbaum says that because petitioner and Ms. Christian teach more eighth grade classes than not both are obligated to chaperone. Nussbaum also explains that Mr. Hart teaches eighth grade pupils only 29 percent of the time; hence, he has no duty to chaperone. Mr. Logan does not teach eighth grade pupils more than 50 percent of the time; hence, he, too, is under no obligation to chaperone the trip. Nussbaum testified he now advises all potential replacements of teachers obligated to chaperone the trip of that duty during the interviewing process.

Principal Nussbaum is of the view that eighth grade teachers must be chaperones on the trip because those teachers know the pupils better than other teachers because of the time spent with them during the regular school day. In Nussbaum's view, it would not be appropriate for a teacher who teaches only one eighth grade class to chaperone the pupils on this trip because of that teacher's lack of familiarity with the pupils. Nussbaum testified that the eighth grade class trip to Washington, D.C. is necessary for the pupils' education because the local, state, and federal governmental structure is studied in the school's seventh and eighth grades. In Nussbaum's view, the class trip brings to the pupils the reality of that which they have studied. Nussbaum admits that on prior occasions teachers otherwise obligated to chaperone the trip have been excused. As examples, Nussbaum admits that in 1983 a teacher obligated to chaperone was excused because of a knee injury, petitioner was excused in 1984 and 1985, and Ms. Spiro was excused in 1983 and 1984 because, he says, she complained to him of having difficulty keeping up with the others on walking tours. Ms. Spiro denies ever telling Nussbaum of having difficulty keeping up with others on the trip. Rather, she says Nussbaum proffered to her the option of whether she wished to attend. Finally, Principal Nussbaum admits that Anne Russell, Ms. Spiro's successor, who is otherwise obligated to chaperone the trip was excused in May 1986 because that person is a single parent with young children at home.

The present superintendent who assumed the post in May 1975, testified that he understands Nussbaum's reason underlying selecting eight grade teachers who spend more than 50 percent of their time with eighth grade pupils to be chaperones. The superintendent supports that reasoning and since 1975 those teachers have been obligated to chaperone the eighth grade trip. Nevertheless, the superintendent admits there is no written administrative or Board policy in this regard. The superintendent readily admits that in his view petitioner, by adopting the position he did not ever intend to chaperone the trip in the future, forced his hand. The superintendent felt compelled that he had to

You are viewing an archived copy from the New Jersey State Library.

take decisive action so that the attitude displayed by petitioner in this matter would not spread to other teaching staff members in this or other matters.

The Board's field trip policy (R-1) states that field trips are encouraged by the Board, that the superintendent shall develop guidelines for planning trips and regulations governing distance, and that overnight trips must be submitted for prior Board approval. There is no evidence to show the superintendent developed written guidelines for trips and distances. Board policy regarding duties (R-7) states that all employees must comply with all requirements of law and perform all duties commonly performed in the position they hold. Furthermore, this policy requires all employees to carry out assignments given them by the superintendent and their immediate supervisors. The Board's policy regarding leaves -unauthorized leave (R-2) states in part that "An employee is deemed to be on unauthorized leave at such time and on such occasions as the employee may absent himself/herself from required duties." The Board's policy regarding goals and objectives is directed towards its administrators (R-3). Superintendent's job description states that the superintendent is the chief executive officer of the Board and that as such is responsible for all educational activity and all employees are subject to the superintendent's jurisdiction (R-4). Nussbaum testified that he finds the Board policy (R-5) regarding teacher evaluation to support his position that petitioner is obligated to chaperone the eighth grade trip in that part of the policy which states under "other duties" that the teacher is to respond to reasonable requests needed to carry out the goals, objectives and programs of the school.

Finally, both sides rely on the Board's policy "withholding an increment" (R-6) to support their respective positions. Petitioner claims that the Board violated its own policy in this regard, while the Board claims its controverted action is consistent with the policy. The policy, in pertinent part, provides as follows:

> The Board recognizes that * * * a staff member * * * may grievously violate a policy or rule of this district, forcing the Board to take disciplinary action against him/her.
>
> No advancement on a salary guide * * * shall be considered automatic. Advancement on any such guide shall require favorable reports covering * * * performance of duties assigned * * *
>
> As a general policy, the Board will not withhold a salary increment on a basis of a single poor evaluation or a single incident except in flagrant cases. A staff member should generally be given a year to demonstrate the effectiveness of the recommended remedial action before punitive action is taken.

You are viewing an archived copy from the New Jersey State Library.

> The superintendent must also show to the satisfaction of the Board that the standards by which an employee has been evaluated are not exceptional or unusual and are expected of all employees in a similar classification * * *

LAW

Teaching staff members are not automatically entitled to salary increments. The determination to withhold salary increments is a matter of managerial prerogative which has been delegated by the Legislature to local boards of education. Bernards Twp. Bd. of Ed. v. Bernards Twp. Educ. Assoc., 79 N.J. 311, 321 (1971). N.J.S.A. 18A:29-14 provides in part

> Any board of education may withhold, for inefficiency or other good cause, the employment increment or the adjustment increment, or both, of any member in any year by recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action together with reasons therefor, to the member concerned * * *

The determination of an employing board of education to withhold salary increments from a teaching staff member may not be reversed unless the action is found to be arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). The only question open for review when a board withholds an increment is whether the board had a reasonable basis for its factual conclusions. One who challenges the action of a board to withhold a salary increment carries the ultimate burden to demonstrate that the complained of withholding was arbitrary, capricious, or unreasonable because the board did not have a reasonable basis for its factual conclusion. The scope of review under the Kopera standard is to determine whether the underlying facts were as those who made the evaluation claimed and whether it was reasonable to conclude as they did based upon those facts, bearing in mind they are the experts, that the affected person did not earn a salary increment. See, Elliott Pollack v. Ridgefield Park Township Bd. of Ed., 1985 S.L.D. - (St. Bd. of Ed., Feb. 8, 1985).

You are viewing an archived copy from the New Jersey State Library.

FINDINGS OF FACT

I FIND the following facts based on a preponderance of credible evidence produced by the parties in addition to the foregoing undisputed background facts of the matter. Since at least the 1960's the Board has regularly approved and conducted an annual three day trip to Washington, D.C. for its eighth grade pupils. Between the 1960's through 1975, teachers volunteered to chaperone the annual trip. In 1975 Principal Nussbaum, with the then superintendent, obligated teachers of the eighth grade who spend more than 50 percent of their instructional time with eighth grade pupils to chaperone the trip. Between 1975, the end of petitioner's first year of employment with the Board as a teacher of eighth grade science, through May 1983 petitioner regularly chaperoned the annual three day trip.

From the May 1984 trip through the May 1986 trip, petitioner has not chaperoned the annual Washington trip. Petitioner was excused by the superintendent from chaperoning the trip in 1984 because of illness and in 1985 because of his wife's pregnancy. Petitioner refused to chaperone the trip in May 1986. In both 1984 and 1985 petitioner was affirmatively excused from chaperoning the trip because he requested such excusal from the principal and the superintendent. During 1985 when petitioner first advised the principal he did not intend to chaperone the 1985 trip, he was cautioned that he was obligated to do so absent a legitimate reason. Thereafter, petitioner submitted his wife's pregnancy as the reason requesting to be excused. Petitioner was then excused from the 1985 trip.

During the time petitioner, the principal, and the superintendent were discussing petitioner's obligation to chaperone the 1985 trip, he did express the intention of more likely than not electing not to chaperone the trip ever again. The superintendent and the principal cautioned him that such an intention would be looked upon negatively. Despite such advice, petitioner advised the superintendent on October 1, 1985 that he had no intention of chaperoning the May 1986 trip.

In sum, the evidence of record shows that as early as May 1984, petitioner knew, or reasonably should have known, that his obligation as a teacher of eighth grade pupils more than 50 percent of the instructional day carried with it the duty to chaperone the annual three day trip to Washington. The fact that he requested to be excused because of illness in 1984 and because of his wife's pregnancy in 1985 persuades me that petitioner

You are viewing an archived copy from the New Jersey State Library.

knew he was under some obligation to chaperone the trip. Consequently, I reject petitioner's contention that his participation as a chaperone was purely voluntary.

Nussbaum's policy of obligating teachers who spend more than 50 percent of their instructional day with eighth grade pupils to chaperone the annual three day trip is facially valid, absent evidence to the contrary. It is reasonable to believe that a teacher who spends the majority of their instructional day with eighth grade pupils would have a more effective rapport with those pupils in an out-of-classroom setting such as Washington, D.C. Thus, petitioner is not treated unfairly because he must chaperone and others are not required to chaperone. The trip to Washington itself is admitted to be a positive learning experience for pupils and, I FIND, the experience to be an extension of the classroom setting. While the obligation of petitioner to chaperone the trip on an annual basis carries with it some interference with his personal family life, the interference is minimal when compared with the purpose of the trip itself. Petitioner, as a public school teacher in the State of New Jersey, accepts the obligation to perform all reasonable duties to fulfill the constitutional mandate that all pupils receive a thorough and efficient program of public school education. It is not necessary that all special subject matter teachers of eighth grade pupils be obligated to chaperone the Washington trip so long as there is a reasonable basis to specifically assign other teachers, including petitioner, to that duty. In this case, it is reasonable for teachers who have the most contact time throughout the course of the academic year with the eighth grade pupils, which class includes petitioner, to chaperone the trip.

Petitioner's contention that he did not declare at any time he would not chaperone the trip in the future is wholly rejected. His words and conduct speak otherwise. Petitioner told Nussbaum in February 1985 of his likely intention not to chaperone the trip again; he told the superintendent of such intention during March 1985; he responded in writing in March 1985 to the superintendent's understanding of that declared intention; and, on October 1, 1985, he carried out for 1986 that declared intention. I am persuaded that given the words and conduct of petitioner between 1985 and 1986 that he did, in fact, declare to Nussbaum and to the superintendent his intention not to chaperone the trip in the future. Moreover, petitioner carried out that intention insofar as 1986 was concerned because he refused to chaperone the Washington trip. The fact that petitioner refused to chaperone the May 1986 trip is good cause, standing by itself, to support the Board's action without regard to his future conduct. Notwithstanding the superintendent's testimony that had petitioner not expressed a future intention not to

You are viewing an archived copy from the New Jersey State Library.

chaperone the trip the recommendation to withhold his salary increment more likely than not would not have been made to the Board is of no comfort to petitioner. The fact that petitioner refused to chaperone the trip when he otherwise knew he had such an obligation is good cause under N.J.S.A. 18A:29-14 for the Board to have withheld the increment.

Petitioner's argument that the Board's own policy regarding the withholding of increments prohibits it from taking the controverted action because he was not given a year to take remedial action is rejected. The portion of the policy wherein one year to take remedial action is stated also provides that "As a general policy, the Board will not withhold a salary increment on a basis of a single poor evaluation or a single incident except in flagrant cases." Obviously, the Board determined that this case is a 'flagrant case'.

I reviewed the cases cited by petitioner to support his position that the Board acted arbitrary, capricious and unreasonable in withholding his salary increment including Willingboro Education Association v. Willingboro Township Board of Education, 1986 S.L.D. - (Oct. 31, 1986), Cherry Hill Supportive Staff Assn. v. Cherry Hill Twp. Bd. of Ed., 1984 S.L.D. - (Aug. 16, 1984) and Barber, et al. v. Kearny Bd. of Ed., 1975 S.L.D. 58. No one of those cases support petitioner's position. The Willingboro case dealt with the assignment of teachers to security tasks; the Cherry Hill case dealt with janitors assigned to search out explosive devices; and the Barber case dealt with the use to which performance evaluations of teachers who volunteer for extracurricular activities could be put. These three cases are distinguishable from the present case in that the present case deals with what amounts to an act of insubordination. Petitioner knew he was obligated to chaperone the trip in May 1986; yet, he refused to do so for what he honestly, I FIND, believed were legitimate reasons.

CONCLUSION

Applying the Kopera standard to the present case, I must **CONCLUDE** that the Board of Education had a reasonable basis for its factual conclusions upon which it determined to withhold petitioner's salary increment. Nevertheless, it must be said that Raymond Carrato, since his first employment with the Board in 1974 and with the exception of this dispute, has been a teacher who has distinguished himself in all facets of his obligation as a teacher. Evaluations of his performance are singularly impressive and his contributions to the total school community as recited above are many. The Board and the administrators obviously are of the view that this case is a matter of principle.

You are viewing an archived copy from the New Jersey State Library.

Petitioner's failure to chaperone did not damage the success of the 1986 trip. The Board and school administrators desire to vindicate their right to exercise their management prerogative to assign petitioner to annual chaperone duty. It is probable that this case would have not reached the stage of litigation had Nussbaum and the superintendent encouraged its board of education to adopt a clear, written policy governing the obligation of teachers who spend more or less than 50 percent of their instructional day with eighth grade pupils to chaperone the annual eighth grade trip to Washington.

Under the Kopera standard, the action of the Board to withhold petitioner's salary increment under its implied acceptance of Nussbaum's policy as its policy must be **AFFIRMED.**

The Petition of Appeal is **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

February 26, 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

FEB 27 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
MAR 3 1987
DATE
OFFICE OF ADMINISTRATIVE LAW
sc

You are viewing an archived copy from the New Jersey State Library.

RAYMOND CARRATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions and replies thereto were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner sets forth six exceptions to the initial decision, which are summarized below.

EXCEPTION NUMBER ONE

THE ADMINISTRATIVE LAW JUDGE ERRED IN CONCLUDING THAT PETITIONER HAD STATED TO DISTRICT ADMINISTRATORS DURING THE 1985-86 SCHOOL YEAR THAT HE WOULD NOT CHAPERONE THE WASHINGTON, D.C. TRIP IN THE FUTURE.

Petitioner suggests that it is uncontroverted that Dr. Nussbaum, principal and evaluator of petitioner, did not recommend that petitioner's increments be withheld for the 1986-87 school year, notwithstanding his perception that petitioner was not interested in functioning as a chaperone on the Washington trip in the future. Further, petitioner contends that Mr. Wilder, the superintendent, stated that he would not have recommended the disciplinary action invoked against petitioner had he believed that Mr. Carrato would have resumed school chaperoning functions on the Washington trip in the near future. Petitioner refers the Commissioner to his post-hearing brief, which is incorporated herein by reference, for the evidence he avers establishes that "***he always left open the issue of his future participation as a chaperone in years subsequent to the 1985-86 school year." (Petitioner's Exceptions, at p. 2)

EXCEPTION NUMBER TWO

THE ADMINISTRATIVE LAW JUDGE ERRED IN NOT CONCLUDING THAT THE BOARD OF EDUCATION'S ACTIONS TO WITHHOLD THE EMPLOYMENT AND ADJUSTMENT INCREMENTS OF RAYMOND CARRATO WERE ARBITRARY,

You are viewing an archived copy from the New Jersey State Library.

CAPRICIOUS, UNREASONABLE, AND IN VIOLATION OF N.J.S.A. 18A:29-14 IN CONSIDERATION OF THE FAILURE OF THE MILLTOWN BOARD OF EDUCATION TO FORMALLY ADOPT ANY POLICY SPECIFICALLY REQUIRING ACADEMIC EIGHTH GRADE TEACHERS WITH RESPONSIBILITIES MORE THAN 50 PERCENT OF THE TIME FOR EIGHTH GRADE STUDENTS TO PARTICIPATE IN ALL WASHINGTON, D.C. TRIPS.

Petitioner's exception is founded on the testimony of the witnesses he presented suggesting that chaperoning the Washington trip was voluntary. Further, petitioner claims there was also testimony presented that "since [he] was first hired as a classroom teacher within the Milltown School District, seventh grade teachers had functioned as chaperones during the Washington, D.C. trip, along with retired teachers, educational services personnel, District administrators, Board members, and parents." (emphasis in text)(Id., at p. 4)

Petitioner submits that in consideration of all of the facts presented during the hearing, and in the absence of any written Board policy adopting the administration's averred "50 percent rule," there was no basis for the Board's action to withhold his increments based on his decision not to participate as a chaperone during the 1986 annual trip to Washington, D.C.

EXCEPTION NUMBER THREE

THE ADMINISTRATIVE LAW JUDGE ERRED IN HIS CONCLUSION THAT THE BOARD OF EDUCATION DID NOT VIOLATE ITS WITHHOLDING OF INCREMENT POLICY WHEN IT ACTED TO WITHHOLD RAYMOND CARRATO'S EMPLOYMENT AND ADJUSTMENT INCREMENTS FOR THE 1986-87 SCHOOL YEAR.

It is averred that petitioner was not given a year to demonstrate the effectiveness of a recommended remedial action before the drastic punitive action of the withholding of his employment and adjustment increments was taken, as required by the Board's own policy. Petitioner contends, inter alia, that

> even assuming arguendo, there was uncontroverted evidence that Carrato had expressed an intention not to function as a chaperone in years subsequent to the 1985-86 school year, the aforementioned portion of the Board of Education's withholding of increment policy required the Board of Education to issue no more than a letter of reprimand advising Carrato officially that an action would be taken to withhold his employment and/or adjustment increments in the future if in years subsequent to the 1985-86 school year he continued to refuse to function as an eighth grade chaperone. (emphasis in text) (Id., at p. 5)

You are viewing an archived copy from the New Jersey State Library.

Further, petitioner contends that

> no one could conclude that a request to spend time with one's wife and infant son, instead of performing security-type functions over a weekend when there were qualified School District volunteers available to perform said chaperone responsibilities, represented a flagrant act of defiance, especially in the absence of any written Board of Education policy on the Washington trip. (emphasis in text) (Id., at p. 6)

EXCEPTION NUMBER FOUR

> THE ADMINISTRATIVE LAW JUDGE FURTHER ERRED IN FAILING TO CONCLUDE THAT THE BOARD OF EDUCATION, MOREOVER, ALSO VIOLATED ITS WITHHOLDING OF INCREMENT POLICY BY APPROVING THE ESTABLISHMENT OF DISPARATE AND DISCRIMINATORY STANDARDS APPLIED ONLY TO RAYMOND CARRATO REGARDING ATTENDANCE AS A CHAPERONE DURING THE COURSE OF A WASHINGTON, D.C. TRIP.

Relying on his post-hearing brief as well as his previous exceptions, petitioner contends that he was evaluated based on standards that were not applied uniformly to other eighth grade academic teachers.

EXCEPTION NUMBER FIVE

> THE ADMINISTRATIVE LAW JUDGE, MOREOVER, ERRED IN NOT CONCLUDING THAT THE "NUSSBAUM 50 PERCENT RULE" WAS IN AND OF ITSELF ARBITRARY, CAPRICIOUS, AND UNREASONABLE.

Petitioner avers that the "50 percent rule" was not facially valid and represented an arbitrary and unreasonable approach to the procurement of teaching staff members as chaperones. Petitioner cites to Exhibit R-1, entitled Field Trips, as evidence that the Board-adopted policy generally on field trips did not require eighth grade academic teachers to participate all the time as chaperones during the Washington, D.C. field trip to the effective exclusion of other staff and other adult chaperones.

EXCEPTION NUMBER SIX

> JUDGE McKEOWN ERRED IN FAILING TO COMPLY WITH PRESCRIPTIONS OF THE RECENT COMMISSIONER OF EDUCATION DECISION ENTITLED WILLINGBORO EDUCATION ASSOCIATION VS. BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO 1986 S.L.D. (DECIDED BY THE COMMISSIONER OF EDUCATION ON OCTOBER 31, 1986).

You are viewing an archived copy from the New Jersey State Library.

Petitioner avers that the chaperone duties at issue here were police-like or security-related. Assuming arguendo that one could determine that the chaperone assignments at issue were not police-like or security-related within the intendment of Willingboro, it is averred that the Commissioner of Education in Willingboro stated that "the involuntary assignment of even non-security type functions to teaching staff was within a Board's management prerogative only 'when such tasks are necessary for the game/event to occur, and there is an absence or insufficient number of "volunteers" forthcoming.'" (emphasis in text) (Id., at pp. 7-8, citing Slip Opinion, at p. 31)

Petitioner avows that there were qualified teaching staff volunteers available who would have performed the chaperone duties at issue in the instant matter. Petitioner demands judgment as follows:

> a. an order directing that his employment and adjustment increments for the 1986-87 school year be paid with appropriate interest;
>
> b. an order expunging all records relating to the Board's withholding of increment decision for the 1986-87 school year;
>
> c. such other further relief the Commissioner deems just and proper.

The Board's reply exceptions initially state its support of the initial decision of the ALJ. In reply to Exception Number One, the Board cites to P-32, petitioner's letter of April 24, 1985, in which, the Board alleges, he confirmed that a confrontation would occur if he refused to attend future trips to Washington, D.C. "This letter highlighted the clear identification of the issue by the parties; which was Mr. Carrato's refusal to participate at any time in the future and not simply in the June 1986 scheduled trip." (Reply Exceptions, at p. 2) The Board agrees with the ALJ's conclusion that petitioner "conveyed the understanding to the Administration that he would not participate in any future trips." (Reply Exceptions, at p. 2, citing Initial Decision, ante)

In reply to Exception Number Two, the Board avers that contrary to petitioner's allegation that he was treated differently from all other similarly situated eighth grade teachers, all eighth grade instructional teaching staff members were required to participate. The Board reiterates that the ALJ accepted the standard used by Dr. Nussbaum, the 50 percent contact with eighth grade pupils rule, as a basis for mandatory participation by faculty.

As to Exception Number Three, the Board argues that petitioner "defied the past practice within the District and the direct instruction of the School Principal and Superintendent of Schools in stating that he would not attend in June of 1986 and in future years." (Reply Exceptions, at p. 3) The Board avers that

You are viewing an archived copy from the New Jersey State Library.

such conduct can only be classified as flagrant. Further, the Board posits that the legal obligation rests with petitioner to show that the basis for withholding the increment was arbitrary and unreasonable, citing Colavita v. Hillsborough Township Board of Education, 1983 S.L.D. ____ (decided by the Commissioner November 3, 1983), aff'd State Board May 2, 1984, rev'd/rem'd N.J. Superior Court, Appellate Division March 28, 1985, aff'd State Board October 2, 1985.

Concerning Exception Number Four, the Board avers that contrary to petitioner's contention, "the overwhelming facts elicited at the time of the trial in this matter indicated that the only basis for being excused from mandatory participation in prior years during the tenure of Dr. Nussbaum were (sic) medical. Only the Petitioner himself was excused for personal reasons in 1985." (Reply Exceptions, at p. 3)

In reply to Exception Number Five, the Board contends that apart from the mere assertion expressed by petitioner that the policy was arbitrary, capricious and unreasonable, "no factual basis was elicited at the time of trial nor is any reproduced in the Exception to support such a conclusion." (Reply Exceptions, at p. 4) The Board relies on its arguments expressed in its post-hearing brief, which is incorporated herein by reference, concerning the validity of the policy.

As to Exception Number Six, the Board argues that Willingboro, supra, is inapposite to the matter sub judice, since there is nothing in the record to indicate that there was anything which resembled police duties which were part of the assignment for chaperoning the trip in question.

The Board submits that the initial decision should be affirmed in its entirety.

Based upon his independent review of the record in this matter the Commissioner adopts the decision of the Office of Administrative Law for the reasons that follow.

Initially, the Commissioner observes the apparent confusion on the part of both petitioner and the Board herein as to whether the three-day trip to Washington is curricular or extracurricular. The Commissioner finds and determines that in this particular case, this event, undertaken annually as an extension of the classroom programs, constitutes "an integral part of student life *** intended to enrich and augment the standard curriculum. Activities of this nature are part of the process of education designed not only to teach but to develop the student into a whole person." (P-34) As such the Commissioner finds and determines that the chaperoning of the Washington, D.C. class trip was indeed "a regular part of the 8th grade teacher's assignment." (P-34) Thereby, it is not extracurricular in nature. See Initial Decision, ante, wherein the ALJ in his Findings of Fact stated:

You are viewing an archived copy from the New Jersey State Library.

> ***The trip to Washington itself is admitted to be a positive learning experience for pupils and, I FIND, the experience to be an extension of the classroom setting.*** (emphasis supplied)

Petitioner's and the Board's reliance on the case law cited in their respective briefs is inapposite, therefore, to the instant matter to the extent that they contest the "reasonableness" of what they aver is an extracurricular activity.

The Commissioner does note pertinent language from Penns Grove-Carneys Point Education Association v. Board of Education of Penns Grove-Carneys Point Regional School District, Salem County, 1983 S.L.D. ____ (decided by the Commissioner September 29, 1983), aff'd State Board May 1, 1985, aff'd New Jersey Superior Court, Appellate Division March 24, 1986, cert. denied 104 N.J. 439 (1986), however, on what teaching duties may be assigned a teacher outside of his classroom assignments as part of his regular curricular duties:

> ***Children are being trained for citizenship and leadership in such training is the teacher. *** Any teacher may be expected to take over a study hall; a teacher engaged in instruction in a given area may be expected to devote part of his day to student meetings where supervision of such teacher is, in the opinion of the board, educationally desirable. Teachers in the fields of English and Social Studies and undoubtedly in other areas may be expected to coach plays; physical training teachers may be required to coach both intramural and inter-school athletic teams; teachers may be assigned to supervise educational trips which are properly part of the school curriculum.***
>
> There are some activities that are part of instruction but, by their very nature, may be performed after the close of the regular school session. The athletic program, for instance, in many instances takes place under such circumstances. It has, nevertheless, over the years been always regarded as part of the school curriculum *** Coaching in athletic sports is teaching. It, therefore, does not follow that because an activity is conducted after regular class hours, it is not part of the regular curriculum.*** (emphasis in text) (Slip Opinion, at pp. 10-11, citing Parrish v. Moss, 200 Misc. 375, 382 (1951))

You are viewing an archived copy from the New Jersey State Library.

The Board's written policy governing field trips (R-1), along with those written policies concerning employee duties (R-7), leaves/unauthorized leave (R-2), goals and objectives of its educational administration (R-3), and withholding of an increment (R-6) can leave no doubt that petitioner and other similarly situated teachers were and are required to chaperone the annual Washington trip as part of their regular teaching duties.

Moreover, the Commissioner is in accord with the ALJ that the case law relied upon by petitioner is further distinguishable from this matter because "the present case deals with what amounts to an act of insubordination." (Initial Decision, ante) The Commissioner finds, as did the ALJ, that petitioner knew or should have known "he was obligated to chaperone the trip in May 1986; yet, he refused to do so ***." (Id., at p. 16) In so finding, the Commissioner finds particularly pertinent the letter written by petitioner to Mr. Wilder, dated April 24, 1985, wherein he states:

> ***If I have not, as yet, refused to attend any further trips to Washington, D.C., why place a statement in your letter citing penalties for failure to chaperone in the future? If I say "No" on November 1, 1985 (the agreed date I am to officially notify you of my intentions), the situation would change. (P-32)

Thereafter, on October 1, 1985, petitioner did indeed notify his principal that it was his "desire to not be a chaperone on the 8th grade trip to Washington D.C. in May of 1986." (P-33) The Commissioner finds, then, that petitioner made clear his intention not to chaperone trips to Washington in the future. Such refusal, in the Commissioner's mind, can be construed as insubordination, so long as the requirement of the Board which was refused was not arbitrary, capricious or unreasonable.

As to the Nussbaum "50 percent rule," requiring those teachers who taught academic subjects who spend more than 50 percent of their instructional day with eighth grade pupils to chaperone the annual eighth grade Washington trip, the Commissioner agrees with the ALJ that the policy, although unwritten, was valid and reasonably administered. The facts and reasoning of the ALJ as found in the initial decision ante, in this regard are adopted as the Commissioner's own.

Thus, under the standard articulated by our courts in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), the Commissioner finds that the Board herein did have a reasonable basis for withholding petitioner's increments for the 1986-87 school year.

You are viewing an archived copy from the New Jersey State Library.

Based upon his independent review of the record, the Commissioner adopts the findings of fact and conclusions of law of the ALJ as his own. Accordingly, the Commissioner adopts the recommended report and decision of the ALJ as his own. Consequently, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

April 2, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6474-86
AGENCY DKT. NO. 325-9/86

MARILYN ROMAN,
Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

William A. Massa, Esq., for respondent

Record Closed: February 27, 1987 Decided: March 6, 1987

BEFORE **JAMES A. OSPENSON, ALJ:**

Marilyn Roman, a tenured (under N.J.S.A. 18A:28-5) teaching staff member employed by the Board of Education of the City of Jersey City, Hudson County, alleged she was appointed and employed by the Board as acting supervisor of elementary

You are viewing an archived copy from the New Jersey State Library.

education in May and June 1982 and continued to serve as acting supervisor of elementary education throughout the 1982-83 academic year. She was supervisor of elementary education for the 1984-85 and 1985-86 academic years but was removed from the position by the Board on August 20, 1986, effective for the 1986-87 academic year. Because of her service, she alleged she acquired transfer or promotional tenure under N.J.S.A. 18A:28-6(c), her transfer by the Board, therefore, being violative of her supervisory tenure rights. In her petition filed before the Commissioner of Education she sought judgment of reinstatement, together with differential back pay and emoluments of office. The Board admitted petitioner's service generally but denied her claims of transfer or promotional tenure under N.J.S.A. 18A:28-6(c). Her removal, the Board alleged, was by virtue of a superior court judgment approving an arbitration award and was mandated thereby.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on September 19, 1986. The Board's answer was filed there on September 29, 1986. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on September 30, 1986 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on November 24, 1986 and an order was entered. It was acknowledged that the Board admitted paragraphs 1, 2, and 4 of the petition of appeal. The parties were directed to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact, together with documentation, which thereafter were to be filed in the cause no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision based on pleadings, admissions, stipulations, documentation and memoranda of law, pursuant to N.J.A.C. 1:1-13.1 et seq. Thereafter, all such submissions having been completed by the parties by February 27, 1987, the record closed.

As provided in the prehearing conference order, at issue in the matter generally were the following:

You are viewing an archived copy from the New Jersey State Library.

A. Legal effect of N.J.S.A. 18A:16-1.1 on petitioner's claim for acquisition of tenure based on service as acting supervisor of elementary education in 1982 and 1983;

B. Whether petitioner shall have proven by a preponderance of the credible evidence she gained transfer or promotional tenure as supervisor of elementary education based on periods of service from 1982 through 1986 (there was a hiatus of supervisory service in the academic year 1983-84). under standards and criteria of N.J.S.A. 18A:28-6(c) and Spiewak v. Bd. of Ed. Rutherford, 90 N.J. 63 (1982); and

C. If so, what remedy shall follow therefrom.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT (J-1)

The parties having admitted and so stipulated, I make the following **FINDINGS** of **FACT:**

1. Petitioner is a tenured teaching staff member employed by the Board of Education of the City of Jersey City, Hudson County.

2. Petitioner served in the position of classroom teacher and supervisor of elementary education while employed by the Board in accordance with her employment service card in J-3.

3. Petitioiner had requisite supervisory certification at all times during which she served as supervisor of elementary education. The certifications are J-4 and J-5.

You are viewing an archived copy from the New Jersey State Library.

4. Petitioner possessed qualifications required in the job description for supervisor of elementary education, the job description being J-6.

5. Petitioner served as acting supervisor of elementary education from May 3, 1982 until June 30, 1982. Petitioner served as acting supervisor of elementary education from September 1, 1982 until June 30, 1983. During the periods of service as acting supervisor, petitioner was not taking the place of any individual who is on leave for any reason whatsoever.

6. Petitioner served as supervisor of elementary education from September 1, 1984 until June 30, 1985 and again from September 1, 1985 until June 30, 1986.

7. Petitioner's employment service is thus tabulated as follows:

DATES OF SERVICE	POSITION	TOTAL SERVICE	ACADEMIC YEAR
5/3/82 to 6/30/82	acting supervisor of elementary education	2 months	1981-1982
9/82 to 6/30/83	acting supervisor of elementary education	10 months	1982-1983
9/83 to 6/30/84	(classroom teacher)		1983-1984
9/84 to 6/30/85	supervisor of elementary education	10 months	1984-1985
9/85 to 6/30/86	supervisor of elementary education	10 months	1985-1986

DISCUSSION

I

Petitioner's two periods of service as acting supervisor of elementary education in the academic years 1981-1982 and 1982-83 raise the issue of the legal effect of N.J.S.A. 18A:16-1.1 on her claim for supervisory tenure. The statute provides that a board may designate some person to act in the place of any officer or employee during absence, disability or disqualification of such officer or employee. It then provides:

You are viewing an archived copy from the New Jersey State Library.

> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting. [emphasis added].

The parties have stipulated, and it has been so found, however, that petitioner when serving in her acting capacity was not replacing another on leave. What is implicated, of course, is whether her periods of service in the "acting" supervisorship constitute creditable service for acquisition of tenure under N.J.S.A. 18A:28-6. Given the stipulation and findings, I shall assume, for sake of discussion, creditability of those periods of service as called for under the holding and spirit of Spiewak, supra. Cf. Sayreville Education Association v. Bd. of Ed. Borough of Sayreville, 193 N.J. Super 424 (App. Div. 1984):

> We construe the authorization of [N.J.S.A. 18A:16-1.1] as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. [Id. at 428].
>
> . . . In conformance with what we believe the holding and spirit of Spiewak to require, we hold that the three teachers here, all of whom were hired to fill a vacancy for a substantial balance of the 1980-81 academic year, were entitled to teaching staff membership during the time in which they so served and consequently to all of the rights and benefits of that status. [Id. at 434].

You are viewing an archived copy from the New Jersey State Library.

II

On the assumption all of petitioner's interrupted periods of supervisory service are otherwise creditable toward tenure, then, has she acquired it? The court in Spiewak said:

> We hold that all teaching staff members to work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure [under] N.J.S.A. 18A:28-5 [90 N.J. at 81].

Similar considerations, it has been held, apply to acquisition of transfer or promotional tenure under N.J.S.A. 18A:28-6(c), which provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter. . . shall not obtain tenure in the new position until after . . . (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years. . .

Proofs are clear that petitioner was employed in a supervisory position for which an appropriate certificate was required (J-6), that she held such certificates (J-4, J-5), and that she was indeed a teaching staff member within the definition of N.J.S.A. 18A:1-1. The sole remaining question, therefore, is whether her assumedly creditable interrupted service in a supervisory position was sufficient in total.

I hold it was not. Under N.J.S.A. 18A:1-1, "academic year" means the period between the time school opens after general summer vacation until the next succeeding summer vacation. Within the three consecutive academic years of 1981-82, 1982-83 and 1983-84, petitioner's total supervisory service was but twelve months. Within the three consecutive academic years of 1982-83, 1983-84 and 1984-85, such service was but twenty

You are viewing an archived copy from the New Jersey State Library.

months, that is, not for the equivalent of more than two academic years. For the three consecutive academic years of 1983-84, 1984-85 and 1985-86, her service likewise was but twenty months and not for the equivalent of more than two academic years.

CONCLUSION

Based on the foregoing, I **CONCLUDE** petitioner's claim for tenure in the supervisory position she served in the years 1982 through 1986 has failed of proof of sufficient length of service required under N.J.S.A. 18A:28-6(c) and Spiewak, supra. The petition of appeal, therefore, is **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION. SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

You are viewing an archived copy from the New Jersey State Library.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 6, 1987
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

MAR 10 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 13 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

You are viewing an archived copy from the New Jersey State Library.

MARILYN ROMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were submitted within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner contends that the initial decision is in error, alleging that it represents an overly strict interpretation of the tenure law. She contends that such interpretation defeats the purpose of the tenure law which is to afford security to teaching staff members. Specifically, she avows that because she served as Supervisor of Elementary Education on the last day of the 1981-82 school year (June 30, 1982), she acquired tenure three consecutive academic years later on June 30, 1985 since she was still serving in that capacity. Moreover, she contends that:

> What cannot be lost upon the Commissioner is that since May 3, 1982 Petitioner has served as the Supervisor of Elementary Education for all but one year. To agree with the Respondent's position that Petitioner has not accrued tenure as a Supervisor of Elementary Education because she did not serve in this capacity during the 1983-84 school term, despite her previous and subsequent service, only undermines the tenure law, increases the instability already evident in the administrative structure of the Respondent School District and sanctions the "musical chair scenario" being followed by the Respondent Board of Education, particularly with administrative and supervisory positions.
>
> (Petitioner's Exceptions, at pp. 3-4)

Upon a complete and thorough review of the record in this matter and petitioner's exceptions, the Commissioner concurs with and adopts as his own the findings and determination of the Administrative Law Judge. N.J.S.A. 18A:28-6 reads:

You are viewing an archived copy from the New Jersey State Library.

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years***. (emphasis supplied)

Petitioner's employment service upon transfer bears repeating.

ACADEMIC YEAR	DATES OF SERVICE	POSITION	TOTAL SERVICE
1981-82	5/3/82 to 6/30/82	acting supervisor of elem. ed.	2 months
1982-83	9/82 to 6/30/83	acting supervisor of elem. ed.	10 months
1983-84	9/83 to 6/30/84	(classroom teacher)	
1984-85	9/84 to 6/30/85	supervisor of elem. ed.	10 months
1985-86	9/85 to 6/30/86	supervisor of elem. ed.	10 months

No matter how vigorously petitioner argues to the contrary, she has clearly failed to meet the requirements of law to acquire tenure as Supervisor of Elementary Education even when crediting the period of time served in an "acting" capacity since she was not employed the requisite period of time set forth in statute. In order for one to acquire tenure one must fulfill the precise conditions set forth in law. Spiewak, supra In this instance, the ALJ is entirely correct in concluding that regardless of which combination of three consecutive academic years one looks to, petitioner did not serve the equivalent of more than two academic

You are viewing an archived copy from the New Jersey State Library.

years as required by N.J.S.A. 18A:28-6(c). Having been presented nothing in the exceptions to persuade him that the ALJ erred, the Commissioner adopts the recommended decision of the Office of Administrative Law as the final decision in this matter for the reasons expressed in the initial decision and herein.

COMMISSIONER OF EDUCATION

April 13, 1987

You are viewing an archived copy from the New Jersey State Library.

MARILYN ROMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 13, 1987

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, William A. Massa, Esq.

This is an appeal from a decision of the Commissioner which, adopting the Administrative Law Judge's recommendation, held that although Petitioner's service as supervisor of elementary education was creditable for tenure, she was not employed in that position the requisite period of time set forth in N.J.S.A. 18A:28-6(c) so as to have acquired tenure in the position as of June 30, 1986. For the reasons expressed in his decision, we affirm the decision of the Commissioner.

Following completion of the briefing schedule, Petitioner notified the State Board of Education of the Appellate Division's decision in Jersey City Education Association Inc. v. Board of Education of the City of Jersey City, Docket #A-34-86T7 (App. Div. May 27, 1987), which vacated the portion of an arbitration award disallowing certain promotions made by the Board and reversed the Superior Court judgment confirming that portion of the award. Petitioner now argues that she is entitled to reinstatement in this forum by virtue of the Appellate Division's decision. Although we take note of the court's decision, that determination does not alter our conclusion that Petitioner has no right to reinstatement based on her claim under the education laws that she had acquired tenure as of the date of her removal from the position of supervisor of elementary education.

September 2, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5140-86
AGENCY DKT. NO. 233-7/86

BARBARA GARRISON,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,
Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Paul E. Griggs, Esq., for respondent
(McConnell, Norton & Smith, attorneys)

Record Closed: January 23, 1987 Decided: March 4, 1987

BEFORE **PHILIP B. CUMMIS**, ALJ:

Barbara Garrison (petitioner) contends that the Mountain Lakes Board of Education (respondent) acted in an arbitrary, capricious and unreasonable manner in withholding her salary increment for the school year 1986-1987, under N.J.S.A. 18A:29-14. On June 30, 1986, a petition of appeal was filed with the Commissioner of Education. On

You are viewing an archived copy from the New Jersey State Library.

August 5, 1986, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on September 22, 1986 and the following issue was identified:

1. Was the withholding of petitioner's increment for the school year 1986-1987, by respondent arbitrary, capricious or unreasonable or in violation of N.J.S.A. 18A:29-14 et seq.

A hearing was held at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey on December 22, 1986. The witnesses who testified and the exhibits marked into evidence are set forth in the appendix attached hereto. The record was closed on January 23, 1987, when certain post-hearing documents and briefs were submitted.

The petitioner is a 1970 graduate of Ithaca College with a major in music. She is certified as an instrumental music teacher Kindergarten through twelveth grade by the State of New Jersey. Since 1975, she has been employed by the respondent school system as a high school instrumental music teacher and is the advisor of the marching band.

The petitioner advised that she is entitled to 15 sick days a year, three personal days, professional days as approved by the respondent and critical days. Petitioner admited that over the last five years, she has used up almost all her sick time. On numerous occasions, she was absent due to problems with her back, a virus or other short-term illness that ordinarily did not last for more than two or three days.

She further admitted that she had received both oral and written criticisms from her superiors over the last five years regarding her absences. She agreed that she

You are viewing an archived copy from the New Jersey State Library.

advised her supervisor of her intention to improve her attendance.

Dr. Michael F. Carey, Superintendent of Schools, testified that he has been an educator for 25 years. He has taught in elementary, middle and high school, has been a supervisor and a principal and a nonvoting member of the Board of Education. On April 7, 1986, a vote was taken by the Board of Education to withhold the petitioner's increment based upon his recommendation. He further testified that he did use a 3.2-days-a year absence standard as suggested by the Department of Education as a guide for excessive absences. He stated on cross-examination that he did not apply this standard in the petitioner's case because her absences were in excess of this and that the use of the standard was unnecessary. Dr. Carey also stated that there was no one else in the school district that had the petitioner's absence record or the type of absences that she had. He did state that there were others in the district who were out in a given year for a longer period of time but they were out for serious, chronic illnesses which eventually lead to hospitialization and in certain cases to death.

Richard Zanella a former principal in the school district who supervised Ms. Garrison testified that he had discussed her attendance during her evaluations and at other times. He stated that the petitioner said she would try to improve and that she did not seem overly upset by the criticism. He further stated that in the area of music it was very difficult, if not impossible, to get certified people as substitutes when petitioner was not in school. Many times, petitioner's classes had to be cancelled or turned into a supervised study hall.

Roger Weber another supervisor of the petitioner also stated that he had evaluated petitioner and discussed her absences with her. He confirmed Mr. Zanella's statement that it was very difficult to find qualified substitutes to replace the petitioner.

You are viewing an archived copy from the New Jersey State Library.

FINDINGS OF FACT

I make the following findings of fact and I incorporate them as a part of my decision.

1. Petitioner is a tenured teaching staff member employed by the respondent since 1975. At all relevant times, she was employed as a teacher of instrumental music.

2. The respondent is a designated authority charged with the administration and operation of the public schools within its boundaries.

3. On April 7, 1986, the respondent resolved to withhold the petitioner's employment increment for the 1986-1987 school year.

4. As a result of the respondent's action, the petitioner's salary for the 1986-87 school year is being maintained at the same level that her salary was in 1985-1986 school year.

5. The petitioner's salary for the 1986-1987 school year is $26,550. Had the respondent not acted to withhold the petitioner's employment increment, her salary for the 1986-87 school year would have been $27,420.

6. By letter dated April 10, 1986, the respondent stated that the reason for the withholding of petitioner's increment was "excessive absenteeism which detracts from teacher effectiveness and deprives students of valuable instructional time."

You are viewing an archived copy from the New Jersey State Library.

7. The petitioner was absent a total of 90 days between 1981 and 1986. These absences are delineated as follows:

Year	Total	Illness	Personal	Professional	Other
1981-82	19	14	1	2	2
1982-83	19	14	3	2	-
1983-84	19	17	-	2	-
1984-85	16	14	1	1	-
1985-86	17	14	2	1	-

8. According to the Agreement between the respondent and the Mountain Lakes Education Association, teachers are allowed 15 days of sick leave per year and 3 personal days per year.

9. Professional leave days are approved by the respondent's administrators.

10. There was no probative testimony which indicated that the petitioner utilized her sick leave days for other than legitimate reasons.

11. On at least seven occasions during the 1981-86 period, the petitioner was given notice by the respondent's representatives that the petitioner's number of absences was excessive.

12. The standard used by the respondent's superintendent of schools determine that the petitioner's number of absences was excessive was subjective. The superintendent used as guidelines both his experience as a school administrator and the standard set forth in the school monitoring guidelines established by the New Jersey Department of Education.

You are viewing an archived copy from the New Jersey State Library.

13. Frequent absences from school on the part of a teacher have a detrimental effect on the students. This is especially true in the case of a music teacher, for whom it is especially difficult to obtain a qualified substitute.

14. During the 1985-86 school year, at least four other teachers were absent the same amount of, if not more, days than the petitioner. All of these four were found to have been absent for legitimate reasons.

15. There is no evidence to suggest that the petitioner is anything other than a highly effective teacher when she is in class.

THE RESPONDENT'S ACTION IN WITHHOLDING THE PETITIONER'S INCREMENT SHOULD BE UPHELD

The legal issue to be considered in the present case is whether the respondent acted properly in withholding the petitioner's employment increment based on its subjective determination that the petitioner was absent from school for an excessive amount of time. In order to resolve this issue, it is first necessary to establish the respondent's authority in this matter and to articulate the proper standard for reviewing the respondent's actions. In this regard, N.J.S.A. 18A:29-14 provides:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment. . .of any member in any year by majority vote of all the members of the board of education.

The decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the board. Board of Education of Bernards Township v. Bernards Township Education Association, 79 N.J. 311, 321 (1979). Thus, a board's decision to withhold an increment will not be overturned unless patently arbitrary, without rational basis or induced by improper motives. See, Kopera v. West Orange Board

You are viewing an archived copy from the New Jersey State Library.

of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). The burden of proving the unreasonableness of the board's actions is on the challenging party. [Id. at 297.]

In seeking to meet her burden, the petitioner points to the fact that the respondent, in formulating its position of what constitutes excessive absenteeism, relied on the guidelines established by the Department of Education. The petitioner asserts that use of this standard has been held by the State Board to be an arbitrary action in Burlington Education Association v. Burlington City Board of Education, OAL DKt. NO. 5114-84 (OAL May 16, 1985), aff'd by Commissioner (July 1, 1985), aff'd State Board (November 8, 1985). In that case, the Commissioner of Education held that the Department of Education's standard was not intended for use in evaluating individual absenteeism rates. The Commissioner further held that individual absenteeism policies are a matter of local determination and should provide for a case-by-case review. Thus, the Burlington City Board's policy of automatically issuing warnings to teachers who exceeded the established standard was struck down as an arbitrary exercise of administrative discretion.

The Burlington decision followed the principles established in two prior cases: Montville Township Education Association v. Montville Board of Education, OAL DKT. NO. EDU 8247-83 (February 29, 1984), rejected, Commissioner of Education (April 16, 1984), rev'd State Board (Nov. 7, 1984) rev'd (N.J. App. Div., December 6, 1985, A-1178-84T7) (unreported). Kuehn v. Teaneck Bd. of Ed., 1981 S.L.D. 1290, rev'd Comm'r of Ed., 1981 S.L.D. 1299, rev'd State Board (Feb. 1, 1983).

In Kuehn, the petitioner was denied a salary and adjustment increment by the respondent because she was absent more than 90 school days in one year. The respondent relied upon an unwritten policy which provided that any staff member who was absent more than 90 school days in a year was ineligible for a salary and adjustment increment. In overruling the respondent's action, the State Board stated:

> To simply state that a teacher by sheer number exceeds the 90 day maximum allowance for absence and forfeits an increment, without considering the particular circumstances for absence is not good cause for the withholding of increment as required by N.J.S.A. 18:29-14. For the Teaneck Board to determine that petitioner's

You are viewing an archived copy from the New Jersey State Library.

> absence exceeding 90 days, in and of itself, is sufficient reason for the withholding for increment, without consideration of the particular circumstances for the absence, is arbitrary and without demonstrated rational basis. [Id. at 4.]

In Montville Township Education Association, the respondent board adopted teacher attendance guidelines for the purpose of improving overall teacher attendance. Those guidelines correlated the number of days absent with ratings of satisfactory, needs improvement or unsatisfactory. The guidelines also required the inclusion of a narrative explanation to be placed in the comment section of the teacher's yearly summary evaluation. The Appellate Division, in reversing the State Board's decision upholding the guidelines, stated:

> We are satisfied that the record does not support the State Board's finding that the evaluation system as presently constructed does take legitimate illnesses into proper account. We so conclude because irrespective of the narrative information which may be included in the evaluation report, the simple fact remains that the assigned rating is a merely mathematical consequence and unaffected by the reason for the absence. A rating so assigned is, in our view, arbitrary. We are therefore persuaded that the local board's action is indeed unreasonable [citation omitted].
>
> At the outset we note that petitioners do not contest either the significance of good staff attendance in achieving quality education or the right of a local board to include attendance as a component in the evaluation of overall performance. Their contention is, simply, that a board may not "mark down" a staff member's performance based on his recourse, when he is ill or disabled, to a statutorily provided sick leave. We agree both with this contention and the Commissioner's response to it. [Id. at 4-5.]

The petitioner in the present case argues that the Burlington Education Association, Kuehn and Montville Education Association decisions proscribe the use of a standard for determining what constitutes excessive absenteeism. She points to the admission by the respondent's superintendent of schools that he utilized the Department of Education's standard for absenteeism as a guideline in determining what was excessive absenteeism as proof of arbitrary action on the respondent's part. The petitioner asserts that she is contractually entitled to use her 15 sick days, and that where the Board cannot

You are viewing an archived copy from the New Jersey State Library.

prove that she used her sick time for illegitimate reasons, she cannot be said to have been absent for an excessive number of days.

The difficulty with the petitioner's argument is that it relies on an overly broad reading of the Burlington Education Association, Kuehn and Montville Education Association decisions. These decisions do not stand for the proposition that a school board may never rely on an attendance standard. Instead, these cases hold that a school board may not rely solely on an arbitrarily arrived at figure in making a determination of what constitutes excessive absenteeism in a particular case. Cases of excessive absenteeism must be resolved on a case-by-case basis.

In the present case, it appears that an individualized determination has been conducted. Evidence was presented that four teachers were absent the same or a greater number of days than petitioner during the 1985-86 school year. The respondent, however, did not withhold the increments of any of these four teachers. The decision to withhold the petitioner's increment was made only after she had been repeatedly warned that she must improve her attendance. Furthermore, the petitioner, as an experienced teacher, was aware of the difficulty in replacing her with a substitute because of the specialized nature of her subject. This difficulty was exacerbated by the episodic nature of the petitioner's absences. Finally, the respondent has produced a sufficient amount of credible evidence to show that even where it is possible to find a qualified substitute, an excessive number of absences has a detrimental effect on the students.

In light of the above-stated facts, it is clear that the respondent based its decision to withhold the petitioner's increment on significantly more than the guideline pointed to by petitioner. It is indisputable that a good cause for withholding an employee's increment is excessive absenteeism. Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd State Board 1979 S.L.D. 876, rev'd per curiam 1980 S.L.D. 1539 (N.J. App. Div.) certif. den. 84 N.J. 469 (1980); Angelucci v. West Orange Board of Education, 1980 S.L.D. 1066, aff'd Comm'r of Ed., 1980 S.L.D. 1077, aff'd State Board 1981 S.L.D. 1386.

You are viewing an archived copy from the New Jersey State Library.

In Trautwein, the Bound Brook Board of Education decided to withhold the increment of a teacher who had been absent 238 and one-half days from 1964 until 1976, despite the fact that the teacher's performance was consistently rated from excellent to good and the teacher's absences were found to be legitimate. The Commissioner reversed the action of the local board and his decision was upheld by the State Board. The local board's decision was reinstated by the Appellate Division which commented:

> It is clear to us that we have here no more than a difference of opinion between the local board and the State Board on whether, in the circumstances, the teacher's absences. . .warranted the withholding of the increment. Such divergence, in our view, is an insufficient basis for affirming the commissioner's reversal of the local board's decision. There was no determination that the board's decision was arbitrary or unreasonable or in any way constituted an abuse of the board's legislatively vested discretion in the matter. 1980 S.L.D. at 1542.

In the present case, the policy enunciated by the Appellate Division in Trautwein should be applied so as to uphold the respondent's decision. The petitioner points to the respondent's use of the Department of Education absenteeism guidelines as proof of her case that the respondent acted arbitrarily. In light of the fact that the respondent can only be said to have used the standard as a guideline, and because the respondent relied on other factors in arriving at its decision, it must be found that the mere use of the Department of Education standard is not sufficient to render the respondent's action invalid. The only other actions that the petitioner relies on to support her claim of arbitrary action are the fact that the respondent utilized the petitioner's previous five years of absenteeism, and the fact that no evidence was produced that showed that the petitioner's students suffered as a result of her absences.

The Trautwein case dealt with the former of these two contentions. In that case, it was the State Board's view that "a teacher's entire record of absenteeism may properly be considered by the Board, although as time recedes into the past, the earlier record becomes less relevant to the present." 1979 S.L.D. at 876. This part of the State Board's holding was affirmed by the Appellate Division which considered the teacher's entire record, Trautwein 1980 S.L.D. at 1540. Thus, it does not seem unreasonable in the present case to consider the petitioner's previous five years of employment.

You are viewing an archived copy from the New Jersey State Library.

The issue that the respondent must present evidence of the detrimental effect petitioner's absences have on students has been litigated previously. In Angelucci, the Commissioner ruled that having to produce such evidence improperly shifts the burden of proof to local boards. Angelucci, 1980 S.L.D. at 1077. In that case, the Commisioner further stated:

> The Commissioner can only sympathize with teachers who suffer from debilitating illness but cannot agree that the continued absence of any teacher has no effect on the pupils. If such be true, the Commissioner is constrained to wonder the need for the presence of the teacher at all, which wonderment reduces to a legal absurdity [citation omitted]. [Id at 1078.]

In view of the Commissioner's statement, it is clear that the petitioner's position in the present case is untenable. Therefore, the petitioner is left with no grounds for contesting the respondent's decision, and it should thus be upheld.

I therefore **CONCLUDE** that the respondent, Board of Education of Mountain Lakes, acted properly in withholding the petitioner's increment for the school year 1986-1987.

I therefore **ORDER** that the action in withholding the increment by the respondent be **AFFIRMED** and that the increment for the school year 1986-1987 be withheld.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

You are viewing an archived copy from the New Jersey State Library.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

3/4/87
DATE

PHILIP B. CUMMIS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 9 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

You are viewing an archived copy from the New Jersey State Library.

BARBARA GARRISON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter including the initial decision has been reviewed by the Commissioner.

It is observed that petitioner's exceptions to the initial decision and the Board's reply to exceptions were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The exceptions of petitioner, as well as the Board's reply, are the same arguments raised by the parties in their post-hearing briefs before the ALJ and discussed at length by him in the initial decision, ante. These submissions by the parties are noted by the Commissioner and incorporated by reference herein. It is further noted that although the parties rely in part upon the testimony of witnesses in support of their respective positions, there has been no submission of a transcript of testimony which would permit the Commissioner to independently evaluate the full testimony in context.

The Commissioner has considered the record of this matter including the initial decision rendered by the ALJ.

In the Commissioner's judgment, the conclusion reached in part in the initial decision by the ALJ that petitioner was aware of the difficulty experienced by the Board in obtaining a substitute instrumental music teacher during her absence is of no moment with respect to these proceedings. It is clear that the responsibility to obtain qualified substitutes to replace teachers during absences from employment rests solely with the Board. Consequently, the rationale developed by the ALJ in this regard in affirming the Board's action is misplaced and may not be considered by the Commissioner in rendering his final determination herein.

The Commissioner further observes that the ALJ properly relied on the testimony of the superintendent which establishes that the State guidelines which generally set forth a standard for teacher absences for the purpose of monitoring school districts were not relied upon by the superintendent in determining that petitioner's absences from employment were excessive. This

You are viewing an archived copy from the New Jersey State Library.

conclusion by the ALJ is based upon his assessment of the superintendent's testimony on cross-examination which appears in the initial decision, ante, and reads in pertinent part:

> He stated on cross-examination that he did not apply this standard in the petitioner's case because her absences were in excess of this and that the use of the standard was unnecessary. Dr. Carey also stated that there was no one else in the school district that had the petitioner's absence record or the type of absences that she had. He did state that there were others in the district who were out in a given year for a longer period of time but they were out for serious, chronic illnesses which eventually lead to hospitialization (sic) and in certain cases to death. (emphasis supplied)

While the State guidelines have general applicability for the assessment of the average number of teacher absences on a district-wide basis for monitoring purposes, the Commissioner would not condone the use of such standard if it were solely employed by the Board as the criterion in assessing individual teacher absences. Burlington, supra

However, frequent absences of teachers from regular classroom experiences disrupt the continuity of instruction. This principle has been previously ennuciated by the Commissioner in In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403, wherein it is stated:

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process. (at 414)

You are viewing an archived copy from the New Jersey State Library.

Finally, while it is true, in fact, that four other teachers were absent legitimately during the 1985-86 school year the same amount, if not more, days than petitioner without having their salary increments withheld, it must be pointed out that the Board's decision, ante, to withhold petitioner's salary increment was not solely predicated upon her absences during the 1985-86 school year but rather her periods of absences for illness which extended from the 1981-82 school year through the 1985-86 school year. The pattern of these absences for illness which appears in the initial decision, ante, establishes that she was absent at least 14 days in each of the respective school years for a total of 72 days. This, added to the other absences by petitioner during the same time periods, totals 90 days of absences.

While petitioner cites the fact that four other teachers had similar absentee records during the 1985-86 school year without having their increments withheld as proof of discrminatory treatment, the very distinction drawn between absenteeism in a single year as opposed to a record of absenteeism over a period of five years is demonstration that the Board did not arbitrarily set a specific number of absences as the basis for an automatic increment withholding.

Accordingly, the Commissioner has considered the record of this matter including the initial decision, and, having made an independent evaluation of the record, hereby accepts the findings and conclusions set forth in the initial decision except as modified above.

In the Commissioner's judgment, the action of the Board to withhold petitioner's salary increment for the 1986-87 school year by reason of excessive absenteeism was not arbitrary or capricious, but rather it constituted a proper exercise of its discretionary authority pursuant to N.J.S.A. 18A:29-14 essentially for those reasons expressed by the Appellate Division in Trautwein, supra, and by the Commissioner in Angelucci, supra, and Reilly, supra.

Thus, in the Commissioner's judgment, the standard of review in increment withholding cases set forth in Kopera, supra, has been satisfied inasmuch as it has been determined that the Board's action complained of herein was not arbitrary, without a rational basis or induced by improper motives.

Accordingly, the Commissioner adopts the recommended report and decision of the ALJ as his own. The instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

April 14, 1987

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5200-86
AGENCY DKT. NO. 229-6/86

SHIRLEY VANDERHOOF,
Petitioner,
v.
SCOTCH PLAINS-FANWOOD REGIONAL
SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

Casper Boehm, Esq., for respondent

Record Closed: January 30, 1987 Decided: March 11, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

Shirley Vanderhoof (petitioner) a teaching staff member in the employ of the Scotch Plains-Fanwood Regional Board of Education (Board) a sufficient period of time to have acquired tenure, claims the Board violated her tenure and/or seniority rights by assigning her to the position of in-school suspension teacher. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted January 5, 1987 at the Office of Administrative Law, Newark. Although the record remained open until January 30, 1987 the parties filed respective letter memoranda by January 22, 1987.

New Jersey Is An Equal Opportunity Employer

You are viewing an archived copy from the New Jersey State Library.

ISSUES

The issue of the case as agreed upon at a prehearing conference conducted September 25, 1986 is whether petitioner is unlawfully assigned, or assigned for arbitrary or capricious reasons by her employer, Scotch Plains-Fanwood Regional Board of Education, to the position of in-school suspension teacher allegedly because:

a. "In-school suspension" is an unrecognized title in the State Board rules and regulations under N.J.A.C. 6:1-1 et seq., and/or

b. The position "in-school suspension" teacher has no job description formally adopted by the Board and/or approved by the County Superintendent of Schools, and/or

c. Petitioner's 26 years seniority as an elementary music teacher in the Board's employ creates a legally enforceable right as against all other claimants to the position, or to a position, of elementary music teacher.

During the hearing the Board withdrew its affirmative defenses of waiver and timeliness.

BACKGROUND FACTS

The parties stipulated the following facts into the record at the hearing conducted January 5, 1987.

At the commencement of her employment with the Board on or about September 1, 1960, petitioner was in possession of a music endorsement, grades kindergarten through 12, and an English endorsement, grades seven through 12. During November 1960, petitioner acquired an endorsement as a guidance counsellor. During 1960-61, petitioner was assigned to teach vocal music at the elementary level. During 1961-62, petitioner was assigned to teach vocal music and general music at the junior high school level. The parties stipulate that since petitioner's initial employment with the Board in September 1960, her assignment has always been to teach vocal music and general music at either the elementary or junior high school level until April 1, 1986.

You are viewing an archived copy from the New Jersey State Library.

On or about April 1, 1986, petitioner returned from a medical leave of absence which she began on December 4, 1985. Prior to her return petitioner was advised in writing by the Board's personnel specialist, Robert Raiford, that because the substitute music teacher assigned during her leave of absence had done an outstanding job, and having reviewed petitioner's "* * * areas of certification, we [school administrators] would like to utilize your services in the area of guidance at the high school level in the In-School Suspension program * * *" (P-1). For the remainder of the 1985-86 academic year, petitioner was in fact assigned to be the full time in-school suspension teacher.

On or about June 5, 1986 Mr. Raiford advised petitioner in writing (P-2) that "Your assignment will remain at the high school in the in-school suspension program for the 1986-1987 school year * * *". By memorandum dated June 11, 1986, petitioner advised Mr. Raiford "I accept that assignment under protest and based upon legal advice I do not believe the administration has acted properly in making this assignment." (P-3).

The parties stipulate that while the in-school suspension program has been in effect since September 1, 1982 a written job description for the full time position in-school suspension teacher had not been prepared nor had the Board approved any such job description. Nevertheless, Raiford sought approval of the Union County superintendent of schools at the beginning of the present 1986-87 academic year for the continued use of the position title "in-school suspension teacher". After being advised by a representative of the Union County superintendent of schools that a job description of the unrecognized position title was necessary prior to approval, a job description (R-2) was prepared on or about October 15, 1986 by school administrators. This job description, without Board approval, was sent along to the Union County superintendent of schools to support the application for the continued use of the position title "in-school suspension teacher". On November 6, 1986 the Union County superintendent of schools advised that the use of the title was approved along with the use of five other unrecognized titles for the 1986-87 year. (R-1).

Raiford explained that with the Union County superintendent of schools' approval for the use of the title in-school suspension teacher in hand, the job description is presently before the superintendent. What is intended to occur is to secure the approval of the local superintendent of the job description who, in turn, will forward the job

You are viewing an archived copy from the New Jersey State Library.

description to the Board for its approval. Preliminarily, a committee of the Board will review the job description and, if the committee approves, the description will be referred to the full Board for approval.[1]

The purported job description (R-2) states the basic function of the position in-school suspension teacher is to monitor the activity of students who have been removed from regular classroom instruction activities. Specific responsibilities of the in-school suspension teacher are stated thusly:

1. Receives lesson assignments from regular classroom teacher(s).

2. Distributes assignment(s) to students in In-School Suspension classroom.

3. Establishes and maintains standards of pupil behavior needed to provide an orderly and productive environment.

4. Supervises pupils in out-of-classroom activities during the assigned working day.

5. Collects assignments from students and returns information to regular classroom teacher.

6. Maintains basic attendance accounting as required.

7. Upholds and enforces school rules, administrative regulations, and board policy.

The stated certification requirement for in-school suspension teacher is the possession of "Permanent teaching certification". Petitioner, since on or about April 1, 1986, has been performing the basic function together with the duties and responsibilities of in-school suspension teacher. Petitioner's salary has not been reduced nor has any salary increment otherwise earned by her been withheld by the Board by virtue of her assignment to the controverted position.

[1]In its letter memorandum filed after the hearing the Board explains it approved the job description on January 15, 1987 and without change from the description as earlier approved by the Union County superintendent of schools.

You are viewing an archived copy from the New Jersey State Library.

While this concludes a recitation of the facts stipulated by the parties, it is necessary and proper to note that these facts establish by a preponderance of credible evidence the following conclusionary facts.

1. Petitioner has served the Board as a teacher of music for nearly 26 years, a position of employment for which she is appropriately certificated.

2. As a teacher of music petitioner had to actively engage in the teaching-learning process by creating an environment necessary for her pupils to accept and be guided by her instruction in skills, attitudes, values and techniques in the field of music.

3. The in-school suspension teacher job description (R-2), belatedly adopted by the Board after it had been prematurely approved by the Union County superintendent of schools, does not on its face allow for the "teacher" to actively nor creatively engage in the teaching-learning process. This is so for the person assigned this position is engaged full time for the basic function to ensure proper behavior for pupils assigned this class by monitoring their activity. The teacher does not creatively instruct the pupils. She receives lesson assignments from regular classroom teachers and, in a ministerial fashion, distributes the assignments to the affected pupils. When the pupils complete the assignments, the asserted in-school suspension teacher "Collects assignments from students and returns information to regular classroom teacher." Clearly, these ministerial functions do not create the expectation that the person assigned to be the in-school suspension teacher will be an integral part of the teaching-learning process.

4. The job description for the position in-school suspension teacher is not equal to the position, function or duties of a regularly assigned teacher because in the former position there is an absence of active involvement in the teaching-learning process, including planning, organizing, implementing and evaluating the instruction and learning which occurs in the in-school suspension classroom. In fact, according to the job description it is unlikely that any substantive pupil learning occurs in this classroom.

You are viewing an archived copy from the New Jersey State Library.

ARGUMENTS OF THE PARTIES

Petitioner, while acknowledging the authority of a board of education to transfer teaching staff members, contends that no board has the authority to transfer a teaching staff member who has acquired tenure to a position with an unrecognized title and cites Turner v. Camden City Bd. of Ed., 1984 S.L.D. - (May 15, 1984). But even if this Board had the authority to transfer her to a position with an unrecognized title petitioner maintains that the conduct of the Board in securing from the Union County superintendent of schools approval to use the unrecognized title on the strength of a job description not initially approved by the Board is sufficient reason to set aside her assignment and return her to the assignment of teacher of music. Finally, petitioner contends that the power of a board to transfer a teaching staff member authorizes transfers only to equivalent positions within the same field in which tenure is acquired and for which the teacher holds appropriate certification and cites several cases in this regard.

The Board to the contrary relies upon Old Bridge Educ. Assoc. v. Old Bridge Twp. Bd. of Ed., 1986 S.L.D. - (Jul. 16, 1986) to support its position that petitioner's assignment to in-school suspension teacher is proper because the assignment is of general supervision which, under Old Bridge, requires any endorsement upon any of the three major categories of certificates.

DISCUSSION AND CONCLUSIONS

I must reject the Board's position that Old Bridge controls in this matter. In the Old Bridge case the issue presented was whether subject area teachers who were assigned to supervise pupils during a library period were in fact assigned such periods not merely to supervise but to teach library skills. The finding was made in Old Bridge that all teaching staff members may be assigned to supervise pupils in the library without the result that such teachers were teaching library skills. Moreover, it was pointed out in Old Bridge that the assignment of teachers to the general supervision of pupils who are gathered in large numbers in school cafeterias, playgrounds and libraries has long be recognized by the Commissioner as an appropriate and valid assignment by the boards of education for all certified teachers. This proposition is still true. Nevertheless, that proposition does not support the principle that a board of education may assign a teaching staff member who has acquired tenure as a teacher to a full time position not equal to that of a teaching staff member.

You are viewing an archived copy from the New Jersey State Library.

While the position in-school suspension teacher is not a recognized title in State Board rules and regulations, N.J.A.C. 6:11-3.6, the facts here demonstrate that the Board, through its administrators, did seek and secure the approval for the use of the title from the Union County superintendent of schools. While it is true the school administrators did put the cart before the horse in the sense they secured county approval prior to their own Board approving the job description, the intent of N.J.A.C. 6:11-3.6 has, in the final analysis, been met. Nevertheless, the approval by the Union County superintendent of schools for the position title in-school suspension teacher is not dispositive of the issues in this case.

The issue in this case does not turn on whether petitioner's seniority as an elementary music teacher creates a legally enforceable right as against all other claimants to the position of elementary music teacher. There is no dispute that petitioner has acquired the legislative status of tenure in the Board's employ. The position in which she has acquired tenure is that of teacher. N.J.S.A. 18A:28-5. Petitioner, having acquired the legislative status of tenure, is entitled to exercise her inchoate seniority rights when necessary. Seniority rights are enforceable upon abolition of one's position. N.J.S.A. 18A:28-9 et seq. The Board did not abolish positions of employment. Rather, the Board transferred petitioner from one assignment as teacher to another assignment purportedly as teacher. Consequently, whatever seniority claim petitioner may have is irrelevant in this case.

Clearly, petitioner was transferred from a position of teacher in which she has acquired a tenure status to a nonteacher position of in-school suspension teacher. As noted by petitioner, the Board has no authority to transfer a teacher who has acquired tenure in its employ in that position to an assignment not comparable to an assignment as a teacher. This is exactly what this Board did with petitioner. By doing so, the Board demoted petitioner regardless of the absence of a salary reduction because the in-school suspension teacher position is not comparable to the position of teacher. Consequently, the Board violated petitioner's tenure rights in the position of teacher. Accordingly, the action of the Board assigning petitioner to the position of in-school suspension teacher, a position not comparable to that of the position of teacher, is hereby **SET ASIDE**. The Board is **DIRECTED** to assign petitioner as a teacher in its employ and it is further **DIRECTED** to credit her service as in-school suspension teacher as in fact service as a teacher of music for seniority purposes.

You are viewing an archived copy from the New Jersey State Library.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 11, 1987
DATE

Daniel B McKeown
DANIEL B. MC KEOWN, ALJ

MAR 17 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 16 1987
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

sc

You are viewing an archived copy from the New Jersey State Library.

SHIRLEY VANDERHOOF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's response were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board's exceptions reiterate the argument that Old Bridge Education Association, supra, is controlling for it held that it is appropriate and valid to have certified teachers supervise pupils and that such general supervisory assignments require any endorsement on any of the three categories of certificates - instructional, educational services or administrative. The Board also takes the position that petitioner's assignment as in-school suspension teacher was not a transfer within the meaning of N.J.S.A. 18A:25-1 et seq. However, it does not offer any explanation as to why it was not. Moreover, it avows that petitioner's reliance on Turner, supra, is inappropriate as (1) it is not on point, (2) it goes beyond N.J.S.A. 18A and (3) it is not good law and should not be followed in the case at bar.

Petitioner's reply avers that the ALJ correctly distinguished the facts of the instant matter from Old Bridge, supra, by finding that her transfer was not equivalent to a teaching staff position. (Findings of Fact, Nos. 3 and 4) Moreover, the ALJ's statement that Old Bridge does not support the principle that a board may assign a tenured teacher to a full-time position not equal to that of a teaching staff member alone mandates affirmance of his decision. She relies on her post-hearing brief in support of this position.

Upon review of the record and exceptions, the Commissioner concurs with the ALJ's rejection of the Board's argument that Old Bridge, supra, is controlling. The facts in Old Bridge are clearly distinguishable from the instant matter in that Old Bridge stands for the proposition that the general supervision of pupils in a library does not constitute the teaching of library skills. While it also serves for the proposition that the assignment of teachers to general supervision of pupils gathered in such places as cafeterias, playgrounds and libraries is an appropriate and valid

You are viewing an archived copy from the New Jersey State Library.

assignment, the Commissioner agrees with the ALJ's conclusion that the Old Bridge decision does not stand for the principle that a board may assign a teaching staff member who has acquired tenure as a teacher to a full-time position not equal to that of a teaching staff member. (Initial Decision, ante) Thus, an important issue to be addressed in the instant matter is not whether a board can assign tenured teaching staff to unrecognized titles or to full-time "general supervision" positions but whether or not the position of in-school suspension teacher is equivalent to that of a teaching staff member.

As stated in Bigart v. Bd. of Ed. of Paramus, 1979 S.L.D. 123:

> No teacher, in acquiring a tenure status, is guaranteed continuity of assignment or thereby acquires a vested right to any particular assignment, class, or school. The Legislature has clearly so provided boards of education with the power of transfer under N.J.S.A. 18A:25-1 as follows:
>
> > No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed. (at 131)

Notwithstanding the Board's assertion to the contrary, petitioner's reassignment from an elementary music teacher to a high school in-school suspension teacher constitutes a transfer within the meaning of N.J.S.A. 18A:25-1. As such, the Board's transfer action is to be reviewed in accordance with the standard articulated by the Commissioner in Bigart, supra, and applied in Turner, supra. This standard states that while boards of education have the power and right to assign/reassign teachers in accordance with their judgment, the power is not unfettered. Bigart specifically expresses that:

1. The power and right to assign/reassign must be reasonably and properly exercised in good faith;

2. It must be for the best interests of the school district;

3. The work assigned must be of a rank equivalent to that by which the tenure status was acquired;

4. The assignment must be one for which the teacher is properly certified; and

You are viewing an archived copy from the New Jersey State Library.

5. The board must not seek to evade the plain intention of the tenure statute inasmuch as evasion and subterfuge in defeating the legislative purpose of the tenure statute has been condemned by the courts.

The Turner, supra, matter did not meet this standard of review because, inter alia, the board therein had assigned the petitioner to a position less than that of a teaching staff member, namely, a nontenure-eligible position as a substitute because of perceived deficiencies. Moreover, the transfer was undertaken as a disciplinary measure and her assignment to clerical tasks ceased only upon the matter being brought to hearing under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

In the instant matter, petitioner was not transferred due to poor performance or disciplinary reasons. Rather, it was for the purpose of continuity of instruction upon her return from a lengthy sick leave in April 1986. (P-1) The record contains no evidence of bad faith motivation nor does the ALJ reach a finding to that effect. Likewise, there is neither an allegation nor evidence that the transfer was a subterfuge to remove petitioner from her position in music to avoid invoking N.J.S.A. 18A:6-10 proceedings or to rob her of her tenure status as a teacher. Thus, under the Bigart standard of review, for the transfer to be improper, it would have to have been found that the transfer was to a rank less than that of teacher or to a position for which petitioner was not properly certified.

The Union County Superintendent of Schools approved the use of the title "in-school suspension teacher," albeit subsequent to petitioner's transfer (R-1) and prior to actual approval of the job description by the Board. With respect to this point, the Commissioner concurs with the ALJ's conclusion that while the Board's administrators had put "the cart before the horse," the intent of N.J.A.C. 6:11-3.6 has been met. It needs to be emphasized, however, that this case should serve as a caution to this and all boards of education that failure to comply with the regulation can well end in costly litigation.

Notwithstanding the above, the Commissioner does not agree with the ALJ's finding and conclusion that the county superintendent's approval is not dispositive and that the position of in-school suspension teacher is not comparable to the position of teacher. The authority to determine what certification, if any, is required for positions bearing an unrecognized title is vested in the county superintendent by virtue of N.J.A.C. 6:11-3.6. In this matter, the county superintendent's approval of the title indicated that teacher certification was appropriate, thus any instructional certificate would enable one to serve in the in-school suspension teacher position. By requiring instructional certification, the position became that of "teaching staff member" as defined by N.J.S.A. 18A:1-1. By being a full-time, as opposed to a substitute,

You are viewing an archived copy from the New Jersey State Library.

position it is a tenure-eligible position under Spiewak v. Rutherford, 90 N.J. 63 (1982).

The issue of in-school suspension teaching positions is not a new one to come before the Commissioner. In Sharon Rogan v. Bd. of Ed. of Edison, decided by the Commissioner, May 17, 1985 a tenured teacher, upon a reduction in force, alleged violation of her seniority rights when the board failed to appoint her to a full-time in-school suspension teaching position which required a valid instructional certificate. Petitioner therein prevailed, gaining reinstatement as a full-time teacher with reimbursement of any salary wrongfully withheld. Such a decision would not have been rendered if the position had been deemed to be of a rank not equal to that of teacher.

The issue was also addressed in Nicholas Cucolo v. Bd. of Ed. of Essex County Vocational Technical School District, decided by the Commissioner June 27, 1985. Cucolo was also transferred to an in-school suspension teaching position when a reduction in force occurred for English teaching positions. He alleged that the in-school suspension teaching position was of lesser expectancy. Cucolo prevailed on the inappropriateness of the transfer because such transfer was governed by N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10 since a reduction in force was implicated and he had greater seniority than other teachers retained in English positions. Nonetheless, the Commissioner expressly rejected the ALJ's finding that an in-school suspension teacher position is one of lesser expectancy. That decision reads in pertinent part:

> ***[T]here are several findings with which the Commissioner does not agree and therefore corrects them as follows. Firstly, he does not agree with the findings that the [in-school suspension teacher] position to which petitioner was transferred is one of lesser expectancy. The Board is correct in arguing that only a certificated staff member could fill the "in-school suspension" position; thus, any teaching staff member filling such position would have all the rights, benefits and emoluments enjoyed by regular staff members.
> (Slip Opinion, at pp. 14-15)

While petitioner's seniority rights are not implicated in the instant matter because she has not been subject to a reduction in force, the determination that "in-school suspension teacher" positions are equal to other teacher positions remains valid.

Therefore, the Commissioner rejects the recommended decision reinstating petitioner to her music position, there being nothing in statute and code to preclude the Board's exercise of its management judgment to transfer her to a position within the scope

You are viewing an archived copy from the New Jersey State Library.

of her certificate, so long as the standard of review in Bigart, supra, has been met.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 15, 1987

Pending State Board

You are viewing an archived copy from the New Jersey State Library.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4722-86
AGENCY DKT. NO. 205-6/86

IN THE MATTER OF THE TENURE HEARING OF RONALD E. ROEMMELT, SCHOOL DISTRICT OF THE BOROUGH OF WASHINGTON, WARREN COUNTY

James W. Broscious, Esq., for petitioner
(Broscious & Cooke, attorneys)

Stephen E. Klausner, Esq., for respondent
(Klausner & Hunter, attorneys)

Record Closed: February 6, 1987 Decided: March 9, 1987

BEFORE **STEPHEN G. WEISS**, ALJ:

This is a tenure case in which the petitioner, the Board of Education of the Borough of Washington, in June 1986 certified several charges of unbecoming conduct against the respondent, a tenured teaching staff member. Three of the charges relate to one incident involving the alleged striking, shoving and putting a "headlock" upon a male pupil. The four others involve the alleged kicking of a desk into the side of a male pupil, the alleged placing of a headlock on another male pupil, the alleged grabbing of a pencil sharpener from the hand of a female pupil and throwing it to the floor, and the alleged pressing of respondent's hands into the neck of a female pupil. This last charge was withdrawn at the hearing.

You are viewing an archived copy from the New Jersey State Library.

Following certification of the charges to the Commissioner, respondent filed an answer in which he denied the allegations and raised a variety of separate defenses, including the Board's alleged failure to comply with the requirements of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., and collateral estoppel as to the first three charges stemming from respondent's acquittal in the Washington Township Municipal Court on June 18, 1986 on simple assault charges filed against him on behalf of the student involved.

On July 16, 1986, the file was transmitted to the Office of Administrative Law by the Commissioner pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. and a prehearing conference was conducted on September 3, 1986. Five separate issues were identified in the prehearing order as follows:

a) Did respondent engage in any one or more of the acts alleged to constitute unbecoming conduct and, if so, what penalty should be imposed for such conduct?

b) What is the effect, if any, of the municipal court proceedings involving respondent insofar as the circumstances set forth in Charges 1, 2 and 3 are concerned?

c) Did the conduct of any Board member or members prior to certification of the charges to the Commissioner so taint the proceedings as to require dismissal?

d) Did the Board comply with the requirements of N.J.S.A. 18A:6-10 et seq. with respect to the preparation and filing of the charges and, if not, to what relief is respondent entitled?

e) Are any of the charges against the respondent barred by application of the doctrine of laches?[1]

[1]Subsequently, the respondent determined not to pursue issues (c) and (e) and they will no longer be considered in this initial decision.

You are viewing an archived copy from the New Jersey State Library.

In addition, paragraph 12 of the prehearing order anticipated that with respect to the separate defenses, respondent could move prior to the hearing for a dismissal. Although no such motion was filed, respondent, at the outset of the hearing, moved to dismiss the first three charges upon the ground that since the complaint against him in the Washington Township Municipal Court stemming from the incident cited in Charges 1, 2 and 3 had been dismissed, the Board was collaterally estopped from now pursuing those charges in the administrative forum. Although substantial oral argument was then heard in connection with the motion, I reserved decision pending the filing of posthearing briefs.

TESTIMONY FOR THE BOARD

At the outset of the hearing, the Board withdrew Charge 4 which alleged that respondent had pressed his hands into the neck of a female pupil. Accordingly, only Charges 1, 2, 3, 5, 6 and 7 were left for consideration.

Charges 1, 2 and 3 alleged that on May 1, 1986, at the Taylor Street School, respondent struck, shoved and then placed a "headlock" upon a certain male pupil, G. J., which charges, if credited, constitute unbecoming conduct warranting respondent's dismissal. The student concerned is now 12 years old and in the sixth grade. In May 1986, he was in the fifth grade and respondent was his homeroom teacher. On the morning of May 1, 1986, G. J. had been with another teacher for a class in science and had returned to Roemmelt's homeroom. A ten-minute break was scheduled before the next lesson began. Earlier that same day, respondent had brought a baby rabbit to class in a shoe box and had placed it on a table in the classroom. According to G. J., during the break he went to look at the rabbit and put his fingers on the table and leaned over for a better view. At that point, Roemmelt came over to where he was, hit him, pushed him and placed him in a "headlock."

G. J. agreed that earlier in the day respondent had warned the children not to put their hands on the table, but insisted the incident occurred suddenly, without respondent saying anything to him first. As G. J. put it, the teacher first pushed him slightly, hit him on the back of his shoulder, pushing him away from the table, and then placed him in a headlock and pulled him to the back of the room while increasing the pressure around his

You are viewing an archived copy from the New Jersey State Library.

head. G. J. was frightened and cried because the teacher had hurt him. Also, red finger marks soon appeared on the back of G. J.'s shoulder and he displayed them that day to other students in the boys' room. G. J. did not complain to the principal that day because he was afraid of Roemmelt. Five days later, however, he wrote a statement about the incident (Exhibit P-1).

On cross-examination, G. J. agreed that the table which held the shoe box was "wobbly," that there also was a lamp on it, and that Roemmelt had warned the students not to touch the table. With regard to the actual striking, he said that Roemmelt slapped him with an open hand, which came down hard on the back of his shoulder. It caused him pain and he began to cry. Although red marks appeared, there was no bruising. Finally, G. J. agreed that he did not get along with Roemmelt and he received "C's" and "D's" as grades.

The Board's second witness was J. G., who was also in Roemmelt's homeroom class during 1985-86. He was one of the pupils who accompanied G. J. to the boys' room, said he saw four red finger marks on G. J.'s right shoulder, and confirmed that his fellow pupil was crying. In a written statement which he gave to the principal on May 6, 1986, J. G. noted that "I saw the red marks on [G. J.'s] back. I think Mr. Roemmelt had no reason to hit [G. J.]" (Exhibit P-2).

J. G. also testified with respect to Charge 6, which alleged that in March 1986 he had been put in a headlock by respondent. J. G. explained that this incident occurred while the class was proceeding down the hall to another classroom. J. G. described the incident as involving a "light headlock" and that he was walking in the hallway and Roemmelt held him in the grip for about 20 feet. J. G. was not upset by the incident.

With respect to Charge 5, which alleged that on or about April 30, 1986, Roemmelt kicked the desk of D. W., a male pupil, J. G. said he was an observer. He maintained that the teacher kicked the front lip of D. W.'s desk because the student was not paying attention and that the desk was lifted up and hit D. W. as a result.

You are viewing an archived copy from the New Jersey State Library.

On cross-examination, J. G. said that during the headlock incident involving respondent and himself, Roemmelt used his right arm. With respect to the desk-kicking incident, he explained that he could see it even though D. W.'s desk was forward and to the right of his own. When respondent kicked the lip of the desk, it "tilted up" and hit D. W. He told his mother about it that same day or the next day.

D. W. then testified for the Board with respect to Charges 1, 2, 3. Roemmelt, he said, hit G. J. in the right shoulder because the boy had been leaning on the table, causing it to rock back and forth. Roemmelt came up behind G. J., hit him with his open hand and then moved him back into a corner of the room while holding him in a headlock. G. J.'s face was red and he was crying. According to D. W., the teacher moved the child about 15 feet. After taking G. J. away from the table, the respondent, according to D. W., took him to the teacher's desk where he talked to him. Then G. J. returned to his own seat. Later, D. W. accompanied G. J. to the boys' room and saw red finger marks on G. J.'s right shoulder.

With respect to the desk-kicking incident (Charge 5), D. W. recalled that it hit him in the right rib area. D. W. believed the incident occurred because he had not followed directions during a fire drill and it was soon after the children returned to the classroom that the incident occurred. According to D. W., Roemmelt kicked the leg of the desk and it was pushed into his side. Roemmelt did not explain to D. W. why he kicked the desk.

During cross-examination, D. W. repeated that G. J. was leaning on the table, that there was a lamp on it and that the table was rocking and the teacher had previously told the class that the situation was dangerous because of the table and the lamp.

Finally, D. W. recalled that G. J. stayed after school to play on the day he was hit and did not go directly home. D. W. also maintained that when Roemmelt kicked the desk into him, it was done without any preliminary statement to D. W. The teacher did not tell him after it occurred why he did it. It was D. W.'s guess that the incident occurred because shortly before he had gone the wrong way down a fire escape during a fire drill.

You are viewing an archived copy from the New Jersey State Library.

The next student to testify for the Board was A. H., who was also in Roemmelt's fifth-grade homeroom class. She corroborated that Roemmelt brought a baby rabbit into class and that G. J., during a break, was leaning on the table when the incident occurred. Roemmelt, she said, came over to G. J., put his arm around him and hit him with his open hand. As she put it, Roemmelt then "walked him" to the back of the room, but she could not hear what they were saying to one another. G. J. did, however, begin to cry, and after being talked to by respondent for about five minutes, went back to his desk.

A. H. also witnessed the headlock incident involving J. G. She said it occurred while the class was going down the hall to the library. Roemmelt, she said, put a headlock on J. G. and kept it there for about 50 feet. However, she described the teacher as "just joking."

On cross-examination A. H. agreed the table containing the rabbit and lamp was not sturdy. However, G. J.'s face was not close to the lamp or the shoe box at the time he was pulled away by respondent. With regard to the force applied when Roemmelt allegedly hit G. J., she said that it "wasn't that light or that hard. I did not hear a slap."

A. H. also recalled that Roemmelt did have his left arm in a sling during the fifth-grade year, but she did not know precisely when. She also stated that the incident involving the headlock placed on J. G. did not happen while they were going down any stairs.[2]

---

[2]During the course of J. G's testimony, he was cross-examined with respect to testimony he had given in the municipal court hearing involving his own headlock incident. During that hearing, he stated that it occurred while they were, "going down one flight of stairs," that the teacher, "just took me, he just took me down the stairs and he let go" (Exhibit R-1, pages 131-8 to -18). On cross-examination at that hearing he again stated that it occurred on the stairs (Exhibit R-1, page 132-10). At the hearing before me, of course, J. G. said the incident took place in a hallway.

You are viewing an archived copy from the New Jersey State Library.

Following completion of the testimony of A. H., the Board indicated it intended to rest its case. At that time, counsel for respondent moved to dismiss Charges 1, 2, 3 and 6, as well as Charge 7. With respect to Charge 7, which maintained that Roemmelt had grabbed a pencil sharpener from the hand of a female pupil at the beginning of April 1986 and thrown it to the floor with sufficient force to break it, the Board, of course, had not called the student allegedly involved in that incident—N.K. or introduced any other evidence relating to the charge. During the course of colloquy with counsel in connection with the motion to dismiss Charge 7, I indicated that, in my opinion, N. K. should have been called as a witness, if available. Counsel for the Board immediately indicated that he would appreciate an opportunity to reopen the case and to call N. K. since, although she had moved from Washington Township, she continued to reside in New Jersey. Counsel for respondent vigorously objected to the request. However, I found no undue prejudice, overruled the objection and both N. K. and her mother were called to testify on the following day.

According to N. K., who is now 11 years old, she was involved in an incident the previous school year with Roemmelt. As she described it, the teacher was standing in front of the class giving a social studies lesson and apparently asked her a question. N. K. did not hear the question. However, Roemmelt immediately walked over to N. K., grabbed a pencil sharpener out of her open hand and threw it vigorously six feet to the floor where it shattered. The pencil sharpener, she said, almost hit another student. N. K. said that Roemmelt looked angry when the incident occurred and she was scared and upset about it.

On cross-examination, N. K. was not able to specifically identify when the incident actually occurred, but said it could have been anywhere between January and April 1986. She insisted that she was upset and complained to her mother about it, although she was not sure if her mother and/or the principal ever met with respondent concerning the matter. She was fairly sure that Roemmelt grabbed the pencil sharpener from her with his right hand.

You are viewing an archived copy from the New Jersey State Library.

TESTIMONY FOR RESPONDENT

Roemmelt called as his first witness B. K., the mother of N. K. She identified two letters she had sent to the principal of the Taylor Street School in early May 1986 concerning her daughter and the pencil sharpener incident (Exhibits R-3 and R-4). She agreed that it was only in those letters that for the first time she brought the incident to the attention of the principal, even though it happened in March or April. She also conceded that on April 23, 1986, she had a parent-teacher conference with Roemmelt and did not mention the pencil sharpener incident to him at that time.

On cross-examination, B. K. explained that the reason she pursued the incident in May 1986 was because her daughter was increasingly unhappy with Roemmelt for a variety of reasons, and the teacher did not seem to be working with the parents to help her. B. K. said she wrote the letters because N. K. complained that she was afraid of Roemmelt. N. K., she said, described the teacher as being "like black and white." Thus, concerned over her daughter's welfare, B. K. pursued the matter with the school principal.

The final witness was the respondent, Ronald E. Roemmelt.[3] He has been employed as a teacher in Washington for 16 years. During 1985-86 he taught three classes in addition to his homeroom and G. J., J. G., D. W., A. H. and N. K. were his students. He also taught two other classes which included some students from other homeroom classes.

Roemmelt described the classroom as about 30-feet square and essentially intact, even though the school building itself is about 100 years old. However, the floor did slant from a wall to an outside hallway down toward the center of the room. The blackboards were in the front of the room, his desk was in the rear, and the seats faced forward toward the blackboards. However, to teach the class, Roemmelt generally would go to the front and sit in a chair slightly forward of the midway point between the front row of desks and the blackboards. D. W.'s desk was directly in front of him.

---

[3]Although only two witnesses testified at the hearing, B. K. and Roemmelt himself, counsel stipulated into evidence the testimony in the municipal court of another teacher, Jeff Johnson, who had supervised an afterschool intramural activity on the day of the G. J. incident and testified that G. J. participated fully (Exhibit R-1, pages 86-7 to 93-1).

You are viewing an archived copy from the New Jersey State Library.

With respect, specifically, to Charge 5, the alleged kicking of D. W.'s desk, Roemmelt agreed that he probably did kick that desk, and several others, many times out of pure clumsiness. Since he sat directly in front of D. W.'s desk, and often would cross his legs, he sometimes accidentally would come in contact with the desk. At no time, however, was any such contact other than totally unintentional. He described the desks as being about two and one-half to three-feet high with a formica or hard plastic top about one and one-half by two feet in dimension. There was a metal book container under the top, and each desk had four steel legs with a ring around them to keep the legs stable. The front did have a metal lip about one inch wide. At no time prior to the service of the tenure charges upon him was respondent made aware that D. W. ever complained that his desk had been kicked, and Roemmelt categorically denied ever kicking the desk as described either by J. G. or D. W.

Roemmelt also noted he had fallen and fractured his left arm in early March 1986 and, as a result, had to keep his arm in a sling. A report from his physician (Exhibit R-6) noted that the injury occurred on March 3, 1986, and that the patient was allowed to remove his left arm from the sling after March 17, 1986. Roemmelt demonstrated with the actual sling how it was used and said that he followed his doctor's advice. Although he could use the arm after removing it from the sling, it had no flexibility or freedom of movement for some time.

With respect to the J. G. headlock incident alleged in Charge 6, Roemmelt denied ever putting the child in a headlock or dragging him down either a hallway or any stairs.

As far as the N. K. pencil sharpener incident was concerned (Charge 7) Roemmelt insisted that at no time did he ever grab any pencil sharpener from her hand or throw it across the room. Indeed, he denied ever throwing any object across the room in anger. He also pointed out that he was never accused of the pencil sharpener incident until charges were certified against him, and neither N. K., her mother, nor any administrator ever called him to talk about it. He did recall the parent-teacher conference in April 1986 with B. K. and insisted he made a special effort during that discussion to understand N. K.'s difficulties and to make suggestions to both N. K. and her mother concerning the

You are viewing an archived copy from the New Jersey State Library.

problems. Since N. K.'s best friend had left the district, she had trouble fitting into a new group of girls and was unhappy over it. According to Roemmelt, he devoted a great deal of time at the conference discussing the matter and offering his help in a variety of ways. He pointed out, as well, that he followed up with N. K. the next day, and, thereafter, made it a point to attempt to find out how she was feeling each day. At no time did he ever receive any negative feedback from the principal or the parents.

With respect to Charges 1, 2 and 3, the incident with G. J., Roemmelt explained that he brought a small bunny to class that day which his daughter had given him after a neighbor found it. He took it to his class that day because his daughter was going to have a substitute at her own school. Thus, respondent brought the rabbit in the shoe box where his daughter kept it and a high-intensity tensor lamp used to keep the rabbit warm. He described the lamp as having a base about two inches high and three inches wide. It had an arm extending up, with a joint in the middle so that it could be adjusted. The top contained a circular reflector with a bulb in it. Since the lamp was metal, the reflector got hot after the bulb was on.

Roemmelt explained that when he arrived at school, he put the shoe box and the lamp on a table in the front of his class. The table was against a wall, not far from an alcove, and he plugged the lamp into an outlet in the middle of the wall in the alcove. He normally used the table to keep his papers, etc., and the chair which he often used in front of the class was located next to it. Although the table was wobbly, the joints were loose, and the floor did slant, all four legs were always on the floor.

The children arrived for class that day at about 8:55 a.m. Roemmelt made it a point to first close the classroom door behind him so he could talk to them in the hallway and explain that when they entered the room they would be seeing a small rabbit in a box on the table, being kept warm by a lamp. He cautioned them against touching or bumping the table because it might cause injury to the rabbit or to themselves. The children later left homeroom class to go to another lesson, and then returned and were on a break. By then, the lamp had been on for about two and one-half hours. G. J. went over to the table to look at the rabbit, and when Roemmelt saw him leaning on the table with his face close to the lamp, and the table beginning to shake with other children around, he spontaneously

You are viewing an archived copy from the New Jersey State Library.

reached over and pulled the boy away. As he described it, he moved over to the boy and put his right arm around him from the back, with his right hand on the left side of G. J.'s face. Roemmelt was holding a piece of chalk in his left hand and held that hand against the boy's left shoulder as he pulled him to the side to remove him from danger. Roemmelt denied that he had G. J. in a "headlock" with increasing pressure or that he dragged him to the back of the room. As soon as he pulled the boy away from danger, Roemmelt let go of him with his right arm and with his left hand on the boy's shoulder walked him to his seat. Roemmelt insisted that his only intent was to remove G. J. from what he perceived to be a dangerous situation. He categorically denied that he challenged the boy about leaning on the table or that he had him in any sort of "headlock." He never observed finger marks or bruises on the boy's body and does not believe he caused any physical damage to G. J. as a result of the incident.

On cross-examination, Roemmelt maintained that he is familiar with 10- to 12-year-old children and agreed that it is up to a teacher to maintain discipline and control. He again denied the D. W. desk-kicking incident and insisted that he could not even kick a desk to make it move as much as one foot. With regard to N. K., he insisted he tried to help her overcome problems that she had because her friend had left. As far as he knew, she was never frightened of him or otherwise upset on any day that she left his class.

With respect to his use of the sling, he agreed that although the injury to his left arm was a fracture, there was no bone displacement and that by May 1, 1986, he had stopped using the sling altogether.

With specific regard to the G. J. incident, he again explained that he felt the circumstances called for him immediately to act without first addressing G. J., and that was the only time he had to do it the entire school year. He maintained that he did not "strike" the boy; he simply touched him on the back with his left hand while he had his right hand around the front of the boy and on the side of his face as he pulled him back a step. As he put it, no particular force was exerted. He simply guided G. J. away from the scene and to his seat. G. J. did begin to wimper after he sat down, although Roemmelt did not see his face turn red.

You are viewing an archived copy from the New Jersey State Library.

DISCUSSION

A. Procedural Issues

Prior to reaching the merits of the case, it is necessary first to address two procedural issues raised by respondent which, he contends, require dismissal of the charges filed against him. One issue preserved in the prehearing order involves a claim by Roemmelt that the procedure followed by the Board with respect to the bringing of the charges against him violated the provisions of N.J.S.A. 18A:6-11 in that the statement of evidence which was supplied to the Board on May 12, 1986, was that of the principal, Martin Burne, who had no personal knowledge of any of the underlying circumstances.

In support of the argument, Roemmelt points out that the charges which were submitted to the Board for consideration consisted merely of a statement of evidence executed by Burne which contained his recitation of information given to him by others, in certain interviews, together with unsworn statements by students and/or their parents. According to Roemmelt, since the "statement of evidence" is based upon information which does not include any evidence of which the affiant had personal knowledge, it, therefore, is procedurally defective. Roemmelt cites the decisions of the Commissioner in the cases of In the Matter of the Tenure Hearing of Peter Loria, OAL DKT. EDU 646-84 (October 18, 1984), aff'd by Commissioner (November 29, 1984), and In the Matter of the Tenure Hearing of Nicholas Demetrius, OAL DKT. EDU 6466-82 (September 9, 1983), (decided October 27, 1983) in which tenure charges were dismissed on the grounds that the allegations, as here, were based upon hearsay evidence alone.

Although the Board's posthearing brief does not even address the issue, and respondent's brief does not mention it, my research has disclosed a more recent and particularly apt decision of the Commissioner, Board of Education of the Town of West New York v. Apkarian, OAL DKT. EDU 2896-85 (August 13, 1985) rev'd by Commissioner (September 27, 1985), affirmed State Board (September 3, 1986). In that case, the administrative law judge granted a motion to dismiss tenure charges of inefficiency upon the grounds that the "statement of evidence" filed with the Board consisted merely of a series of unsworn documents contained in the Board's records. According to the

You are viewing an archived copy from the New Jersey State Library.

administrative law judge, the requirements of N.J.S.A. 18A:6-11 were not met since the documentation which the Board acted upon did not constitute "a written statement of evidence under oath." Thus, citing the decision in Loria, the administrative law judge determined that it is the evidence recited in "the statement under oath" which must be based upon the personal knowledge of the affiant, and such evidence must not be based solely upon hearsay.

The initial decision in Apkarian which recommended dismissal of the charges was rejected by the Commissioner. He held that pursuant to N.J.S.A. 18A:6-11, the written statement of evidence under oath need not be the equivalent of "supporting evidence." Rather, at the preliminary stage of tenure proceedings involving submission of evidence to the Board, the essential inquiry is whether or not the charges "are predicated on actual reported information." As the Commissioner went on to point out, "[n]owhere in the statute does it require, however, that each piece of evidence presented to the Board for its consideration need be taken under oath nor that the person bringing the charge must have personal knowledge of the facts." Apkarian, at 12. In reaching his determination to reject the recommendation of the administrative law judge, the Commissioner also analyzed the decisions in the Loria and Demetrius cases and distinguished both of them as follows:

> Neither Loria nor Demetrius is helpful because neither sets forth what a statement of evidence, under oath, should contain. Demetrius is a stipulation agreement; there is no language in the decision related to the statement of evidence. Loria, relying on Demetrius, merely affirms the determination of the ALJ that the board failed to comply with the procedural requirement of N.J.S.A. 18A:6-11. The ALJ in Loria found that "no statement of evidence under oath was submitted based on the personal knowlege of the affiant." . . . The Commissioner agrees with the ALJ in that case that the absence of any statement of evidence was a fatal flaw warranting the dismissal of tenure charges. However, the Commissioner does not agree with the ALJ in Loria or herein that a written statement of evidence under oath must be predicated on the personal knowledge of the individual who is bringing the charge to the Board's attention for certifying tenure charges. Were such personal knowledge of the facts a prerequisite for preferring tenure charges, the burden placed upon a school district would be insurmountable since the actions providing the bases of the charges often occur outside the personal knowledge or purview of the individual bringing such charges to the Board's attention.

Apakarian, at 13-14.

You are viewing an archived copy from the New Jersey State Library.

In view of the Commissioner's language in Apkarian, which not only distinguishes but in some respects criticizes the Demetrius and Loria determinations, and further in view of the fact that the State Board affirmed the decision of the Commissioner, it is clear that the claim by Roemmelt in which he seeks dismissal of the tenure charges against him in this case because N.J.S.A. 18A:6-11 has been violated must be decided in favor of the Board. Burne's affidavit and its attachments were adequate evidence upon which the Board could act.

The other procedural issue raised by Roemmelt with respect to a dismissal of charges has to do with his contention, already adverted to, that his acquittal in the municipal court of the simple assault charge should on the ground of collateral estoppel result in a dismissal in these proceedings of Charges 1, 2 and 3 which concern the allegations made by G. J.

In his brief, counsel for Roemmelt maintains that all of the essential facts surrounding the three charges involving G. J. were fully and completely litigated in the municipal court, which in dismissing the complaint determined that the actions of the teacher with respect to his use of physical force were justified, and that collateral estoppel bars consideration of the subject charges.

A copy of the summons and complaint served on Roemmelt was admitted into evidence in the proceedings before me (Exhibit R-2). It alleged that Roemmelt did "attempt to . . . purposely, recklessly and knowingly [cause] bodily injury to [G. J.] a child of 11 years specifically by: hitting child with fist and then putting child in headlock, in violation of: N.J.S. 2C:12-1(a)(1)" (Exhibit R-2). The cited statute provides that a person may be guilty of a simple assault if he attempts to cause or purposely, knowingly or recklessly causes bodily injury to another. In dismissing the charge against Roemmelt, the municipal court judge specifically determined that based upon the evidence he heard in the case, Roemmelt's action with respect to G. J. was justified since the defendant reasonably considered that the child was in danger. Thus, according to the municipal court judge, Roemmelt was not angry or out of control when he acted on the day in question. As he put it: "A person angry, out of control, would probably have not acted in

You are viewing an archived copy from the New Jersey State Library.

that way, but I think there's no question that, that [G. J.] was struck and pulled away, ah, although I think it's for a different reason than [G. J.] thinks it was" (Exhibit R-1, p. 147-14 to - 18).

In support of the motion to dismiss, counsel cites the unreported decision in the case of In the Matter of the Application of the Licensure of Nicholas Andrian to Practice Medicine in the State of New Jersey, (N.J. App. Div., July 10, 1986, A1058-84T7) (unreported). I brought that opinion to the attention of counsel at the hearing, and I have studied it closely and continue to believe, as I stated during the course of oral argument, that it supports rather than precludes the pursuit of Charges 1, 2 and 3 in this case. Andrian holds that where an issue has been fully and fairly litigated in another action, the doctrine of collateral estoppel may be applied to preclude relitigation of that issue in a subsequent administrative proceeding. The basic principle which must be taken into account in determining whether to apply the preclusion involves a common sense balancing of the essential futility and wastefulness in doing the same thing all over again, against the practicality of measuring the goal sought to be achieved by the respective hearings.[4] Indeed, in the Andrian decision itself, the court specifically referred to and distinguished the decisions in In re Darcy, 114 N.J. Super. 454 (App. Div. 1971) and Sabia v. City of Elizabeth, 132 N.J. Super. 6 (App. Div. 1974). Both of those cases stand for the proposition that the acquittal of a defendant in a criminal case does not automatically provide him with the benefit of an estoppel when a later administrative agency action is brought which involves the same underlying facts since the quantum of proof in the criminal action is decidedly different and higher than that required in the administrative agency proceedings.

---

[4]In this respect, it is not inappropriate to mention that even though the prehearing order which I entered in this case on September 5, 1986 expressly anticipated that respondent would move prior to the hearing to dismiss the first thr e charges, at least, based upon his separate defense of collateral estoppel, and thereby achieve the very avoidance of "wastefulness in doing the same thing all over again," counsel chose not to so move until the first day of the hearing.

You are viewing an archived copy from the New Jersey State Library.

It seems clear to me that a review of all of the pertinent factors leads inexorably to the conclusion that in a tenure hearing of this sort, wherein charges of unbecoming conduct involving physical action against students of tender years is involved, the acquittal of the teacher in a municipal court proceeding does not stand as a bar to the Board's pursuit of the tenure charges since the policy considerations which support review by the Commissioner of tenure matters, generally, and those involving alleged unjustified physical action against students, in particular, are to be given paramount consideration.

B. The Merits

Having rejected the two procedural arguments raised by Roemmelt with respect to dismissal of the tenure charges certified against him, I will now address the "merits" of the case. In this respect, I agree, of course, with the fundamental principle cited by Roemmelt that the testimony of child witnesses must be viewed with extreme caution, and that in some instances it may be dangerous to use such testimony against a teacher. See, e.g., School District of Red Bank v. Williams, 3 N.J.A.R. 237, 244 (1981), and cases cited therein. In this case, the various child witnesses were only 11 or 12 years old and I made a special effort to pay close attention to their credibility, taking into account their ages and whatever biases they might have in the matter.[5] On balance, I found them to be perfectly competent and, in some instances, particularly convincing in terms of credibility.

Charges 1, 2 and 3 involve allegations that Roemmelt did "strike a male pupil," did "shove a male pupil" and did "place a single headlock on a male pupil." All allegations relate to the G. J. incident. Having had the opportunity to carefully observe G. J. during the course of his testimony and to consider the testimony, as well, of J. G., D. W. and A. H., I entertain no doubt that Roemmelt's conduct on the day in question was "unbecoming" as alleged. It is undisputed that as G. J. leaned over and touched the table,

---

[5]Each minor was first questioned by me prior to being examined and cross-examined, and each attorney was afforded an opportunity, as well, to conduct a voir dire.

You are viewing an archived copy from the New Jersey State Library.

Roemmelt quickly moved over to him and, without warning, struck him on the back with his open hand, placed his right arm around his head and rapidly moved him several feet away from the site to another part of the room without any preliminary oral admonition or other similar effort to alert G. J. of any perceived threat to his safety or that of others. The actions taken by Roemmelt and the force he used were inappropriate under the circumstances.

I do not entertain any doubt that the force used by Roemmelt was excessive, as demonstrated by the appearance of red finger marks on G. J.'s back 15 or so minutes following the incident. Two other male students corroborated the presence of the physical manifestation of the striking, and I believe their testimony. The fact that G. J. did not go to the nurse or otherwise complain immediately to anyone in authority about the actions by Roemmelt does not, in my judgment, take away from the fact that the teacher acted improperly. A student need not suffer a bruise or have to see the nurse or a doctor in order for a charge of this sort to be sustained. Clearly, Roemmelt did strike and shove G. J., and did use excessive force by placing his arm around his head and pulling him several feet from the table. Whether or not Roemmelt's actions also constituted a violation of the criminal laws is not relevant; under the circumstances here they did rise to the level of unbecoming conduct as charged against him. I must also reject his claim that G. J. and his two fellow male students overstated his actions, or lacked credibility with respect to the red marks that they observed on G. J.'s body. To the contrary, all three students, and A. H. as well, were entirely credible and Roemmelt's version of the events does not dictate a contrary conclusion.

With respect to Charge 5, which alleged that Roemmelt kicked the desk of D. W. into the boy's side, there is some degree of inconsistency with regard to the Board's own evidence. Although both D. W. and J. G. maintained that Roemmelt did kick D. W.'s desk, the surrounding circumstances and the exact nature of that kicking are ambiguous. According to D. W., Roemmelt kicked the leg of the desk, causing it to move along the floor and into his right rib area. No part of the desk appears to have lifted off the floor, insofar as D. W. could recall. On the other hand, J. G. claimed with respect to the same incident that Roemmelt kicked the front lid of the desk causing it to rise off the floor and to hit D. W. For his part, Roemmelt denied ever kicking D. W.'s desk, or any

You are viewing an archived copy from the New Jersey State Library.

other desk, in anger and stated that if his body ever came in contact with a student's desk, it was unintentional and probably occurred while he was uncrossing his legs while seated in the front of the class, or otherwise moving in the vicinity of the desk. He insisted that at no time did he ever act in anger with regard to kicking any desk.

Although the testimony of D. W. and J. G. is at variance with respect to the precise nature of the incident, I find that the act of kicking the desk, causing it to move into D. W., did occur. Although the circumstances might have been as D. W. described and not as blatant as J. G. maintained, the kicking did take place and it does constitute conduct unbecoming a tenured teacher. Having observed D. W. and J. G. during their testimony, I am convinced they were credible witnesses, and the presence of certain inconsistencies between their versions does not require rejection of the basic event of the kicking itself.

With respect to Charge 6, which alleged that Roemmelt placed J. G. in a "headlock," the evidence of unbecoming conduct is extremely tenuous. J. G., himself, observed that he was placed in a "light headlock" while he and Roemmelt were walking from the homeroom class and J. G. did not feel upset by the incident. Another witness, A. H., also described Roemmelt's having put J. G. in a headlock while they were walking in a hallway, but she believed Roemmelt was "just joking." Roemmelt denied the incident altogether. Moreover, there was, as well, a variance in the testimony given by J. G. at the municipal court hearing and in the proceedings before me with regard to where the alleged incident actually took place. Given the weaknesses surrounding the precise nature of the incident, I believe that this charge must be dismissed. While placing a 10- or 11-year-old male student in a headlock is certainly not to be condoned, both J. G. and A. H. were of the opinion that when the incident occurred (assuming it even did), it was done in a friendly, almost jocular fashion. I do not believe that under those circumstances a finding that the conduct was unbecoming can be supported.

The final charge against Roemmelt (Charge 7) stems from the allegation by N. K. that he grabbed a pencil sharpener from her hand and threw it forcefully to the floor, causing it to break. Having had the opportunity to hear N. K.'s and respondent's testimony with respect to the incident, I am convinced that it occurred essentially as N. K. described. She struck me as a young person who was quite credible and not fabricating

You are viewing an archived copy from the New Jersey State Library.

her version of the event at all. I believe her testimony that Roemmelt grabbed the item from her open hand and threw it forcefully to the floor causing the blade to break off. I also believe her when she said that respondent had an angry facial countenance when he committed the act and that she was upset by the event. While Roemmelt denied that the incident ever took place and insisted that he never threw an item in his classroom except, perhaps, to throw some scrap paper into the wastebasket, I must reject his testimony in this regard. While I do not dispute that he may have made efforts to help N. K. with some socialization problems she was having in class, this does not, in my judgment, detract from the essential credibility of her firm recollection of the pencil sharpener incident.

Accordingly, by way of summary, based upon the evidence presented to me, I have determined that the Board has proved by a preponderance of the credible evidence the allegations contained in Charges 1, 2, 3, 5 and 7. Charge 4 was previously withdrawn and Charge 6 should be dismissed.

FINDINGS OF FACT

Accordingly, I herewith make the following specific findings of fact:

1. Respondent, Ronald E. Roemmelt, is a tenured teaching staff member who has been employed by the respondent, Board of Education of Washington, for approximately 16 years.

2. On or about May 1, 1986, respondent brought a baby rabbit to his homeroom class in a shoe box and put it on a table. He also placed on the table a tensor-type lamp which extended above the box.

3. On that same date, prior to his class going into the room, Roemmelt advised the students of the presence of the baby rabbit and cautioned them about putting their hands on the table since it was not steady.

4. Later that day one of the students, G. J., during the course of a break between lessons, walked over to the table to look at the baby rabbit.

You are viewing an archived copy from the New Jersey State Library.

5. G. J. placed his fingertips on the table and leaned toward the box and the lamp. At that point, Roemmelt moved quickly over to G. J. and without any prior oral warning, pushed him away from the table, struck him on the back or shoulder with his open hand, grabbed him around the head with his right arm in a headlock and pulled him at least 15 or 20 feet away while tightly maintaining his grip.

6. As a result of this action, G. J. became very upset and suffered sufficient pain to cause him to cry.

7. In addition, as a result of the striking, red finger marks appeared on G. J.'s back or right shoulder after the incident, which marks were personally observed by two other students, J. G. and D. W.

8. On or about April 30, 1986, Roemmelt, without provocation or explanation, kicked the desk of a male pupil, D. W., causing it to move a short distance along the floor and into the right rib area of D. W. D. W. suffered no pain as a result of the incident. He was not bruised or otherwise physically harmed.

10. Sometime during March or April 1986, respondent, without provocation, grabbed a pencil sharpener from the hand of N. K., a ten-year-old female pupil, and threw it forcefully to the floor causing it to break. This action was upsetting to N. K. and she was put in fear of Roemmelt at the time it occurred and thereafter.

PENALTY

In view of the foregoing discussion and findings of fact in which I have determined that five of the six charges of unbecoming conduct against Roemmelt have been proved, the remaining question is what penalty should be imposed upon him as a result of my determination. In this respect, the Board cites several decisions of the Commissioner involving use of physical force by tenured employees against pupils which led to their

You are viewing an archived copy from the New Jersey State Library.

dismissal. See, e.g., In the Matter of the Tenure Hearing of Nancy Simonic, OAL DKT. EDU 730-85 (July 3, 1985), rev'd by commissioner (August 23, 1985), aff'd by State Board (Jan. 10, 1986). In that case, a teacher threw a pair of pliers across a room which struck and injured a student. Although the administrative law judge determined that a lengthy suspension without pay was appropriate for that conduct, the Commissioner overruled the judge and ordered dismissal of the teacher. According to the Board in this case, Roemmelt's conduct was similar to that of Simonic and, in some respects, arguably even more serious given the age and grade level of the pupils here involved.

The following language of the Commissioner is the polestar for consideration of an appropriate penalty in this case:

> . . . [T]eachers . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. . . . Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling. See, In the Matter of the Tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302, 321.

No reasonable person can dispute the salutary notion that children sent to our public schools are entitled to be protected against the untoward use of physical action against them by teachers or anyone else. Sadly, however, such incidents do occur, and when they do, as here, a consideration of many factors is necessary when determining an appropriate sanction. For example, was the incident isolated and unrelated to other conduct or was it, to the contrary, symptomatic of a regular pattern. Did the incident or incidents demonstrate a lack of self-restraint and self-control and an element of deliberate cruelty or viciousness? Was the action deliberate and premeditated or spontaneous? In addition, consideration must also be given to whether or not the attitude of the teacher can be corrected so that there will be no likelihood of any reoccurrence and a reasonable prognosis can be offered pertaining to whether the teacher can continue effectively to perform in the school system. These and other elements must be taken into account when deliberating upon the penalty portion of a tenure matter such as this.

You are viewing an archived copy from the New Jersey State Library.

A particularly instructive decision in this regard is the case of In the Matter of the Tenure Hearing of Nogaki, OAL DKT. EDU 1942-82 (August 8, 1983) rev'd by Commissioner (Sept. 26, 1983), rev'd by State Board (April 6, 1984). In Nogaki, a physical education teacher was found to have punched two ninth graders in the chest during gym classes when they refused to follow the teacher's directives. The incident was very short. Following a hearing, the administrative law judge determined that the actions alleged to have been committed by the teacher did take place and constituted unbecoming conduct. However, taking into account all of the surrounding circumstances, particularly that the teacher did not demonstrate a total lack of self-control or intend to cruelly or viciously inflict physical pain, the administrative law judge concluded that forfeiture was not appropriate and recommended that denial of a salary increment for the school year and forfeiture of one month's salary was adequate punishment. The Commissioner rejected the recommendation and ordered Nogaki's removal. However, on appeal, the State Board of Education reversed the Commissioner and reinstated the findings and conclusions of the administrative law judge. In reaching that result, the State Board recognized, at the outset, its "great obligation to protect the children of this State from corporal punishment and a concomitant obligation to remove unfit teachers from the classrooms." Nogaki at 3. Nevertheless, in view of the 13-year service to the school district by Nogaki without prior disciplinary action, it was the opinion of the State Board that his acts were not so egregious as to warrant his dismissal. In expressing that view, the State Board noted that the test in matters of this kind was set forth by the Superior Court, Appellate Division in an unreported decision in Board of Education of the City of East Orange v. Thomas Tiefenbacher, (N.J. App. Div., December 5, 1983, 594-84T6, A165-82T3) (unreported). The decision in Tiefenbacher, which also quoted from the prior case of In Re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), analyzed the unbecoming conduct in light of many of the factors which I have adverted to above and stressed that in the exercise of discretion with respect to the question of penalty, it is not appropriate to stress one factor over another. Thus, given the single, isolated nature of Nogaki's action, the State Board found dismissal to be an unreasonable and excessive exercise of the Commissioner's discretion. Essentially, the physical contact caused no serious harm, there was no showing of premeditation or specific intent, and there was no showing that the teacher had a propensity for violence.

You are viewing an archived copy from the New Jersey State Library.

Bearing in mind the principles articulated in Nogaki and other cases cited therein, I do not believe that the severest form of penalty, dismissal, is warranted in this case. The respondent has served in the school district for 16 years, and there is no indication in the record of any prior disciplinary action having been taken against him. I had a full opportunity to observe him during the course of his testimony, and while I made findings of fact which reject certain portions of his testimony on credibility grounds and concluded that he did conduct himself in an unbecoming fashion, I am convinced, nevertheless, that continuing to permit him to teach would not have a deleterious effect on the maintenance of discipline or the proper administration of the school system by the Board. The most flagrant of his acts seems to me to involve the G. J. incident, and while there was a clear overreaction and the use of excessive physical force with respect to the events of that day, Roemmelt did not act out of any preconceived plan to inflict harm and likely did have the interests of G. J. at heart when he moved quickly to pull him away from the spot where he had been standing. The particular manner in which he acted was unbecoming. Nevertheless, under all of the circumstances, it did not rise to the level of concern which, for example, was found in the Simonic case.

The incident wherein I found Roemmelt to have kicked D. W.'s desk into his side was, as I mentioned heretofor, somewhat innocuous. Teachers should not be permitted to kick or otherwise move desks into the sides of pupils, and, for that reason, I found the charge to have been proven. However, the particular nature of the incident does not require a penalty as serious as removal.

Finally, while the incident wherein Roemmelt grabbed the pencil sharpener from N. K.'s hand and threw it to the floor is distressing and in combination with the other findings does reveal a teacher who is not always able to keep his temper under control, that event, too, does not either alone or in combination justify his dismissal. Given all of the factors which I have mentioned, I am convinced that an appropriate penalty in this case need not include Roemmelt's dismissal. However, because more than one incident was involved and there was excessive force used during each of them, a substantial message must be delivered to this teacher regarding what he has done and to serve as a warning against future lapses in his conduct. To that end, I recommend to the Commissioner that the following penalty be imposed in this matter:

You are viewing an archived copy from the New Jersey State Library.

(1) That respondent shall be deemed to have forfeited the 120 days' pay withheld from him when he was suspended and charges were certified by the Board to the Commissioner; and

(2) That the salary and/or adjustment increment to which respondent otherwise would have been entitled for the 1986-87 school year be withheld; and

(3) That, in addition, respondent shall forfeit two/tenths or 20 percent of his 1986-87 salary.

You are viewing an archived copy from the New Jersey State Library.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

March 9, 1987
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

MAR 10 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 14 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

You are viewing an archived copy from the New Jersey State Library.

IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD ROEMMELT,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF	:	DECISION
WASHINGTON, WARREN COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties filed exceptions to the initial decision within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board's exceptions focus on the penalty meted to respondent. Citing a panoply of tenure cases including Redcay v. State Board of Education, 130 N.J.L. 369-371 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.&A. 1944); In the Matter of the Tenure Hearing of Thomas Molineux, School District of the Township of Medford, decided by the Commissioner on remand August 8, 1986; In the Matter of the Tenure Hearing of M. William Cowan, School District of the Borough of Bernardsville, decided by the Commissioner January 15, 1986, aff'd State Board September 3, 1986; and In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) (1967 S.L.D. 201), the Board contends strongly as follows that respondent should be dismissed from his tenured position:

> Each of the incidents of unbecoming conduct found to have been perpetrated by Respondent exhibited his predilection for violent physical outbursts when confronted with minor deviations from his instructions. He was dealing in each instance with fifth grade children. He was never physically assaulted. He was never openly and defiantly disobeyed by the students. He consistently "failed to exhibit the self-control and patience required in working among public school pupils." Cowan, supra.
>
> The setting of the incidents - a fifth grade classroom; the absence of provocation; the use of excessive force; the obvious intent to punish the students for minor transgressions, the fact that the use of excessive force was not limited to a single incident are all salient factors.
>
> (Board's Exceptions, at p. 8)

For these reasons, the Board argues that respondent should be dismissed for lack of the self-restraint necessary for interaction with primary grade children.

You are viewing an archived copy from the New Jersey State Library.

Respondent's exceptions are a verbatim recitation of his post-hearing brief, supplemented by the following points.

Relying on the transcript of the criminal proceedings conducted in Municipal Court which were based upon the same facts as those averred in Charges 1, 2, and 3 of the tenure charges herein, respondent takes strong exception to the ALJ's having found J.G. (a classmate and witness) credible concerning Charges 1, 2 and 3. In Point I of his post-hearing brief and also, in his exceptions, respondent claims that "Petitioner has failed to meet its burden of proof, necessitating dismissal of the charges." (Respondent's Exceptions, at p. 9) Ignored by the ALJ, respondent posits in his exceptions, is "the fact that at the Municipal Court hearing, barely six weeks after the alleged incident, [J.G.] testified that nothing happened in the class between Roemmelt and G.J." (Respondent's Exceptions, at p. 12) Referring to the transcript of the criminal matter at pages 73-74, respondent states, "the inescapable conclusion is that [J.G.] either perjured himself on this issue before the Municipal Judge or the A.L.J. Respondent asserts that [J.G.'s] Municipal Court testimony was true and that his testimony before the A.L.J. was created. In any event, the testimony in both hearings is mutually exclusive." (Respondent's Exceptions, at p. 14)

Further, respondent avers in exceptions that the ALJ had no evidence before him to find that respondent was guilty of unbecoming conduct on Charge 5, wherein it is averred respondent kicked a desk, injuring a child. He challenges the ALJ's use of the word "guess" in stating that "it was D.W.'s guess that the incident occurred because shortly before he had gone the wrong way down a fire escape during a fire drill." (Id., at p. 15) (emphasis in text) Respondent avers that tenure charges require "more than guesses on the part of children. There is nothing in the record that can lead to the conclusion as found by the A.L.J. that Roemmelt in anger intentionally kicked any desk." (Id., at p. 15)

Further, respondent requests that the Commissioner consider the entire testimony of J.G. Respondent avers J.G. lied with respect not only to Charges 1, 2 and 3, but also with respect to Charge 6. Since Charge 6 was dismissed by the ALJ because of "weaknesses surrounding the precise nature of the incident," respondent avers that Charge 5, the incident involving respondent's alleged kicking of a desk, must also fall because of the unreliability of J.G.'s testimony both at the tenure hearing and at the criminal hearing. Respondent reiterates that Charges 6 and 7 did not happen, and that he used reasonable physical force to protect G.J., thus compelling the dismissal of Charges 1, 2 and 3. Accordingly, respondent claims, the Board did not meet its burden of persuasion, and all charges must be dismissed.

As to Point II of respondent's post-hearing brief and exceptions, which avers that "the charges must be dismissed on the basis of the improper statement of evidence submitted by [Principal] Martin Burne" (Respondent's Post-Hearing Brief, at p. 15; Respondent's Exceptions, at p. 18), respondent adds in exceptions

You are viewing an archived copy from the New Jersey State Library.

the argument that In the Matter of the Tenure Hearing of Charles Apkarian, West New York, decided by the Commissioner September 27, 1985, aff'd State Board September 3, 1986 is distinguishable from the instant matter. Respondent avers that Burne's statement of evidence under oath contains no evidence that meets the residuum rule. Secondly, respondent avers that

> the suggestion that the burden placed upon the Board of Education in obtaining evidence, i.e., sworn statements, would have been insurmountable, is preposterous. All that was necessary was to have statements prepared submitted to the witnesses and signed under oath by the witnesses. No burden is added. If the ALJ is correct, the Commissioner of Education is approving ineptness and laziness. This the law does not permit.
> (Respondent's Exceptions, at p. 21)

Respondent claims on this basis the tenure charges are improper and should be dismissed.

Point III of respondent's post-hearing submission and his exceptions state: "Collateral estoppel bars the Board and the Commissioner from adjudicating Charges 1, 2 and 3." (Respondent's Exceptions, at p. 22) Respondent argues that the ALJ either misperceived or misunderstood his argument. He states that he did not assert, nor does he herein, that the acquittal in a Municipal Court proceeding bars a board's pursuit of tenure charges. Rather, respondent contends that "the Municipal Court's finding of fact that he used justified, reasonable physical force to protect a child who Roemmelt perceived was in danger, is binding upon the Commissioner of Education." (Respondent's Exceptions, at pp. 25-26) To reach his conclusion, the ALJ, by necessity, had to find that respondent used unjustified physical force, contends respondent.

> Since the testimony and evidence in both cases was substantially identical and the law of justification and corporal punishment have the same policy consideration, this he could not do. That is what the Municipal Court Judge found. The A.L.J. is erroneous on this issue. Charges 1, 2 and 3 must be dismissed.
> (Respondent's Exceptions, at p. 26)

Respondent urges that the tenure charges be dismissed in their entirety.

Upon his careful and independent review of the record before him, which, it is noted, does not include a transcript of the OAL tenure hearing below, the Commissioner affirms the decision of the Office of Administrative Law, with modification as to penalty, for the reasons that follow.

You are viewing an archived copy from the New Jersey State Library.

Initially, the Commissioner will address the procedural issues raised herein. The Commissioner is in accord with the ALJ that the Statement of Evidence under oath, upon which the certification of charges was predicated in this matter, represents sufficient evidence upon which the Board could have made its determination to certify the herein charges to the Commissioner. The Commissioner rejects respondent's contention that there is no residuum of reliable evidence contained herein for the same reasons that the statement of evidence in Apkarian, supra, was deemed adequate. In the instant matter, concerning Charges 1, 2 and 3, the children involved were brought before the principal within 24 hours of the alleged incident, at which time their oral and written statements were taken. Later, other allegations, which formed the basis of Charges 4-7 were brought to the principal's attention by way of signed letters from parents. Similarly, in Apkarian, the basis upon which the statement of evidence under oath was submitted by the superintendent to the board was a series of unsworn letters and accident reports. Judge Stephen Weiss, in the instant proceedings, summarized cogently the Commissioner's and the State Board's position on the sufficiency of the evidence contained in statements of evidence under oath relating to both Apkarian and the instant matter. See Initial Decision, ante. The Commissioner finds no distinguishing facts in the instant matter from those considered in Apkarian and, thus, finds no merit in respondent's exception suggesting that there was no residuum of competent evidence herein.

Concerning respondent's second procedural issue respective to a dismissal of Charges 1, 2 and 3 because they are barred by the doctrines of res judicata and estoppel, the Commissioner again agrees with and adopts as his own the ALJ's analysis as found on pages 15-16. In accord with his duty pursuant to N.J.S.A. 18A:6-10 et seq. and relying upon such case law as In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, 1978 S.L.D. 526, aff'd State Board 1979 S.L.D. 155 and In the Matter of the Tenure Hearing of Jacque Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302, the Commissioner adds to the ALJ's discussion that in no way is the "Municipal Court's finding of fact that [respondent] used justified, reasonable physical force to protect a child who Roemmelt perceived was in danger *** binding upon the Commissioner of Education." (Respondent's Exceptions, at p. 25) On the contrary, in the Commissioner's view, there are many actions, which if presented before a court -- either criminal or civil -- would not result in the imposition of a penalty under the appropriate standard of review of the trial court, were the occurrence demonstrated. However, if presented to the Commissioner for his review of the matter from the special perspective of the behavior expected of teachers, the samesaid conduct might very well constitute conduct unbecoming a teacher, if proven. While the transcript of the criminal proceedings conducted by a municipal court judge developed upon the same facts as averred in Charges 1, 2 and 3 of the tenure hearing herein and the judge's determination on those facts stand for the proposition that respondent's behavior did not rise to the level of

You are viewing an archived copy from the New Jersey State Library.

criminal conduct, it may not be interpreted to stand for the proposition that respondent's behavior could not constitute conduct unbecoming a teacher. His conclusion as to respondent's motivation in those circumstances does tend to reinforce, however, the ALJ's judgment that it was not respondent's intent to inflict pain and suffering on G.J. Therefore, the Commissioner adopts as his own the conclusion of both the Municipal Court Judge and the Administrative Law Judge that respondent demonstrated no specific intent or premeditation to inflict harm upon G.J., he having assigned the testimony adduced at each proceeding appropriate weight under his standard of review. In all other regards, he adopts the findings of fact and conclusions of Law of the ALJ regarding Charges 1, 2, and 3.

As to the remaining issues, Charges 5, 6 and 7, respondent's exceptions aver that witnesses' testimony at the tenure hearing differed from that adduced at the criminal proceeding. Thus, respondent avers, relying upon the testimony taken at the criminal proceeding, the ALJ's credibility determinations were in error, requiring the dismissal of the tenure proceedings. In the absence of specific references of the testimony from a transcript of the hearing below which specifically delineate such alleged errors, the Commissioner adopts as his own the findings as espoused by the ALJ on pages 19-20 of the initial decision. N.J.S.A. 52:14B-10

However, notwithstanding the Commissioner's adoption of the ALJ's findings of fact and conclusions of law herein, including Judge Weiss' reasoning as stated at pages 20-23, he does not agree that the penalty assigned is entirely appropriate. Rather, in light of the totality of the circumstances herein, and considering also the conclusions of the Municipal Court Judge, the Commissioner finds and directs the following penalty:

1. forfeiture of the 120 days' pay withheld from respondent when he was suspended and charges were certified by the Board to the Commissioner; and

2. forfeiture of the salary and adjustment increments which respondent would have received for the 1986-87 school year.

Accordingly, the recommended report and decision of the Office of Administrative Law is adopted with modification.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 15, 1987

Pending State Board

You are viewing an archived copy from the New Jersey State Library.

You are viewing an archived copy from the New Jersey State Library.