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SCHOOL LAW

DECISIONS

January 1, 1989 to December 31, 1989

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Saul Cooperman
Commissioner of Education

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State of New Jersey

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INITIAL DECISION
OAL DKT. NO. EDU 3120-88
AGENCY DKT. NO. 56-4/87
ON REMAND FROM
OAL DKT. NO. EDU 3015-87
AGENCY DKT. NO. 56-4/87

THEODORE R. MURNICK,
Petitioner,
v.
ASBURY PARK BOARD OF EDUCATION,
AND W. FRANK JOHNSON,
DEPARTMENT OF EDUCATION,
BUREAU OF FACILITY PLANNING SERVICES,
Respondents.

Gita F. Rothschild, Esq., for petitioner (McCarter & English, attorneys)

Peter P. Kalac, Esq., for respondent Asbury Park Board of Education (Kalac, Newman & Lavender, attorneys)

Donald Parisi, Deputy Attorney General, for respondent W. Frank Johnson (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

Record Closed: January 10, 1989 Decided: March 16, 1989

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

STATEMENT OF THE CASE

The New Jersey Superior Court, Appellate Division, remanded this case to the Commissioner of Education to determine whether a 1.8 acre parcel of land known as the Bond Street School property (or controverted property) in Asbury Park is an appropriate

site for a 700 pupil elementary school and whether it was properly approved by the Department of Education, Bureau of Facility Planning Services (Bureau) in compliance with regulations of the State Board of Education prior to the Board seeking voter approval to purchase the site. Asbury Park Bd. of Educ. v. Murnick et al., 224 N.J. Super. 504 (App. Div. 1988)

PROCEDURAL HISTORY

The litigation began on April 1, 1987 when Theodore R. Murnick (petitioner), the owner of the controverted property, filed a petition of appeal with the Commissioner of Education contesting the Bureau's decision approving the Bond Street site for an elementary school. On May 11, 1987 the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing conference was scheduled and conducted July 2, 1987 during which a plenary hearing was scheduled to commence August 27, 1987. In the meantime, however, the Board had filed a complaint in Superior Court seeking to condemn petitioner's property. On July 6, 1987 the court declined to defer to the administrative expertise of the Commissioner of Education on petitioner's challenge to the site. It held that the site was approved by the Bureau and it rejected petitioner's objections to the condemnation on the merits. A statutory stay was entered in the condemnation proceeding pending an appeal filed by petitioner on July 7, 1987.

On July 20, 1987 the Asbury Park Board of Education (Board) moved for summary decision and dismissal of the administrative proceeding based upon the refusal of Superior Court to defer to the administrative process and its rejection of petitioner's objections to the condemnation proceeding on the merits. On September 18, 1987 an initial decision was issued by the undersigned in which the recommendation was made that the petition be dismissed because the Superior Court had exercised jurisdiction over the same dispute and, therefore, the Commissioner lacked jurisdiction. The conclusion was also reached in that initial decision that summary decision on the merits must be granted the Board through the application of collateral estoppel.

After the Commissioner adopted the initial decision but before the State Board ruled on the appeal to it, the New Jersey Superior Court, Appellate Division, held on the appeal of the condemnation ruling that the condemnation case and the school site

challenge must be treated as independent issues. Accordingly, while the court affirmed the dismissal of objections to the condemnation proceedings, it remanded the issue of the propriety of the school site to the Office of Administrative Law and ordered that a plenary administrative hearing be conducted on petitioner's challenge to the school site approval process.

A plenary hearing was scheduled to be conducted in the matter during December 1988. In anticipation of that hearing, the parties engaged in extensive discovery. On the basis of that discovery petitioner moves for summary decision in his favor on the record developed thus far. Petitioner contends that this record establishes the site approval given the Board by the Bureau is invalid because of the arbitrary, capricious, and unreasonable conduct of Bureau personnel regarding the purported approval given the Board. Thus, petitioner contends that without valid prior approval of the site voter approval given at a referendum is null and void. Therefore, petitioner concludes and demands judgment in his favor that the Board's actions to condemn and take his property for school construction is unlawful. The Bureau opposes petitioner's motion for summary decision upon the grounds that material facts are in dispute and, alternatively, even if petitioner's argument for summary decision is persuasive the matter must be remanded for it to determine in the first instance whether the controverted site it approvable under regulations enacted in 1988. The Asbury Park Board joins the Department in this latter argument by seeking to have applied the time of decision rule.

Findings are reached in this initial decision that the site approval required under State Board of Education rules and regulations of 1985 and purportedly given the Board by the Bureau at that time is invalid which, in turn, renders invalid the Bureau's determination in 1986 that its site approval given the Board in 1985 remained valid for a 1986 referendum to be conducted by the Board. I **CONCLUDE**, therefore, that the referendum conducted by the Board in 1986 at which the voters granted the Board approval to acquire petitioner's land for school construction purposes is null and void, having been conducted by the Board without the requisite valid Bureau approval. Finally, the finding is reached that the time of decision rule does not apply in this case.

FACTS

For purposes of petitioner's motion for summary decision the total record in this case reveals the following relevant facts not in dispute between the parties. The Asbury Park school district is described in the Attorney General's brief filed on behalf of the Bureau. That description is repeated here in part:

> The Asbury Park School District, over the past two decades, has been faced with severe shortages of adequate facilities for its students. In 1975-76, a major attempt to address the District's facilities needs was made. An architect was engaged and plans were developed for a new elementary school. This project, however, was never implemented due to political changes in the district including a reorganization of the governing structure.
>
> Until 1978-79, the Asbury Park school system operated five schools. Of those, three were elementary schools built around the turn of the century. In 1980, the District was forced to close one of the elementary schools—the Bond Street school— due to unsafe conditions in the school building. The funds to renovate or replace the building were not available. [1] However, when the District closed the Bond Street school, many students had to be housed in rented, sub-standard facilities.

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1 The Bureau explains in a footnote that since 1978 the school district had five referenda to deal with the facilities problems. In 1978 a referendum to renovate the Bangs Avenue elementary school was defeated. In March 1980 a referendum for the renovation and addition to the Bangs Avenue and Bradley elementary schools was defeated. In August 1980, a referendum to renovate the Bangs Avenue school was successful. In October 1985, a referendum for land acquisition, including the controverted site here and the construction of two new elementary schools, was defeated. In October 1986 a referendum for land acquisition, including the controverted site here and the construction of two elementary schools, was successful.

> In February 1984 the District was advised that as a result of Level I monitoring, Asbury Park would not be certified based on unacceptable ratings in several elements including element five—facilities. [2] In order to correct the facitities deficiency, the District needed to eliminate all of the sub-standard rented facilities.
>
> In an attempt to resolve the facilities problem [identified in the Level I monitoring report of February 1984], the Board selected sites for the construction of two new elementary schools. One of the sites chosen was the Bond Street site [the controverted site here] which was sold [by the Board] to the petitioner when [the Board] closed the school in 1980***

The record shows that the Department of Education presently has the school district in Level III monitoring. In 1985 when the Board selected the Bond Street site upon which to build a school, the old Bond Street school which the Board had closed in 1980 and sold to petitioner along with the land, still existed. State board regulations, then codified at N.J.A.C. 6:22-1.11(f), provided that before a local board of education took any action to purchase or otherwise acquire land for school construction purposes, site approval had to be obtained from the Bureau. In order to receive such approval, the Board had to submit:

> a written request from the board of education for such approval***
>
> a statement from the State Department of Environmental Protection that the land can be adequately provided with the necessary water and an acceptable sewage disposal system for the proposed ultimate maximum enrollment, and that the project has no potential for a substantially adverse environmental impact,
>
> a statement from an architect or engineer indicating that the land to be acquired is suitable for the proposed use,

---

2 The referenced monitoring is a certification or approval process developed by the Department of Education to insure the provision by all local school districts of the constitutionally mandated thorough and efficient education. The Department monitors school districts and certifies those which meet certain criteria. The monitoring process has three levels. A district that fails to be certified at Level I must undergo a Level II review process which, through a self-study, results in an improvement plan. A district that fails to become certified as a result of its own Level II improvement plan then undergoes a Level III review by an external team. This monitoring and approval process may result in the eventual takeover by the Department of the local district if the local district fails to meet the stated evaluation criteria.

a complete plot plan of the land to be acquired, showing topographical and contour lines, adjacent properties (on all sides) and access roads,

a map of the school district showing the location of the land and the location of existing schools in the district,

recommendations of the county superintendent of schools,

a pupil distribution map, if available, showing places of residency,

if existing buildings are located on the land to be acquired, the intended use and/or disposition of these buildings should be indicated,

data regarding the impact of such a facility upon racial balance within the district's public schools, and

recommendations of the local planning board.

While not then set forth as a mandatory requirement, the Department of Education through a Bureau publication, School Site: Selection, Development and Utilization, recommended a site size for an elementary school to be "a minimum base site of ten acres plus one acre for each 100 students (or fraction) of projected maximum enrollment at the school***"

On or about July 23, 1985 while the foregoing regulations and written recommendations in the Department booklet were in effect the Board, through its architect, filed with the Bureau a letter request seeking approval of the 1.8 acre Bond Street site for the construction of a new elementary school with a functional capacity of 736 pupils. The letter request was sent to M.D. Macaluso, an education program specialist, in the Bureau. The manager of the Bureau, and Macaluso's supervisor, is W. Frank Johnson.

In the meantime new regulations which had been proposed March 18, 1985 were adopted by the State Board of Education on September 4, 1985, effective October 21, 1985. These regulations formalized the earlier recommendation that before any action was taken to acquire upon which to construct a school, a district board of education must first receive approval of the adequacy of the land from the Bureau before the Board sought voter approval to purchase the land. To consider the approval of any

land acquisition, the Bureau manager had to be provided with certain information including a complete plot plan of the land to be acquired with acreage and dimensions specified. With respect to site size, the regulations for the first time took land availability into account in establishing minimum acceptable size standards by allowing smaller minimum site sizes for municipalities with greater population densities such as Asbury Park. N.J.A.C. 6:22-1.2(b)(4) then provided in part:

> In the application of the following standards for minimum acceptable school site sizes, the bureau shall take into consideration the proximity and extent of non-school open land and availability of nearby athletic fields and parking areas:

Standards for Minimum Acceptable School Site Sizes

District Population Density (Persons Per Square Mile)	Required Acres, Base		
	Elementary School	Middle School	High School
Below 500	10	20	30
500-1000	8	16	24
1001-5000	6	12	18
5001-10000	4	8	12
Above 10000	2	4	6

	Examples		
Added acres Each 100 pupils	Elementary School (500)	(Building Capacity) Middle School (1000)	High School (1500)
1.0	15	30	45
0.8	12	24	36
0.6	9	18	27
0.4	6	12	18
0.2	3	6	9

Under the standards, this Board would need 3.4 acres of land upon which to build its proposed elementary school for 736 pupils.

The Bureau was also required to have received and considered recommendations of the county superintendent of schools based on criteria contained in the Department of Education's publication entitled "School Sites: Selection, Development and Utilization" and recommendations of local planning boards. No provision for variances to the site requirments specified was made in the regulations, although variances were allowable to the Department's educational facility standards.

Prior to the time of the effective date of these new regulations on October 21, 1985 but after the State Board of Education adopted the regulations on September 4, 1985, the Asbury Park electorate on October 8, 1985 defeated the Board's referendum seeking approval to acquire the controverted land for the purpose of new school construction.

During the following 1986 summer and after of course the regulations became effective the Board determined to seek voter approval for acquisition of the controverted Bond Street site in a second referendum. In response to an oral inquiry from the Board, the Bureau orally advised it that no new approval would be required and no new submissions were necessary so long as there were no significant changes in the site or in the plans submitted during 1985. However, the relevant regulations, N.J.A.C. 6:22-1.1 et seq., had then been amended to include a new section which specifically required local boards of education to apply, among other standards, the standards contained in the Bureau's publication "School Sites". This amendment resulted in the former N.J.A.C. 6:22-1.6 becoming recodified as N.J.A.C. 6:22-1.7. On or about October 2, 1985 Macaluso advised the Asbury Park superintendent that "***the acquisition of the 1.8365 acre site by the Asbury Park Board of Education for the purpose of constructing a new elementary school is hereby approved." (P-26)

Testimony given by Macaluso during depositions shows he has been employed by the Bureau for nearly 10 years and has reviewed "thousands" of requests from school districts for approval of school sites for school plans. Macaluso testified that from 1984 forward he has discussed a particular school site for school plan request for approval with Johnson relatively few times, no more than 6 separate occasions during that time period. Macaluso did not recall having gone to Johnson for any advice regarding the Asbury Park application for site acquisition approval and he, Macaluso, did not make Johnson aware of anything in particular with respect to the application because, as he explained, he did not feel there was anything of which Johnson should be made aware.

Macaluso explained that at the time of October 1, 1985 when he approved the controverted site as being appropriate for school construction he was not aware of the then adopted regulations of the State Board of Education to be effective later that very month. Nevertheless, Macaluso explained that he had used criteria the Bureau had used in the past to determine site suitability despite the then existing adoption of state board regulations governing site suitability. Macaluso explained that the criteria the Bureau had used in the past and which he used on the Asbury Park application for the proposed elementary school site was 10 acres plus 1 acre for every 100 students of maximum anticipated enrollment.

Sworn testimony given by W. Frank Johnson during depositions is that Macaluso discussed the Asbury Park application with him prior to its approval and Johnson agreed with Macaluco's judgment that the application should be approved. Furthermore, Johnson testified that the approval was, in fact, based upon Macaluso's application of the proposed new regulations which, of course, Macaluso separately testified that he was not aware of the new regulations.

Macaluso admitted during his deposition that in 1985 he misread the site plan application submitted by Asbury Park and believed he was approving the expansion of an existing elementary school site already owned by the Board to include an additional 1.8365 acres to be acquired, as opposed to a new site which encompassed a total 1.8365 acres owned entirely by others and not currently used as a school site. He explained he learned of this error after he had given the approval but is not certain whether he learned of the error prior to the 1985 referendum. Nevertheless, he did not report the error he made to Johnson or to anyone else until much later. In addition, Macaluso erroneously believed that the Asbury Park planning board had recommended the property as the best available site when the planning board had not made a recommendation by October 2, 1985. When the planning board did reach its recommendation, it recommended against renewing the Bond Street site as a school site. Macaluso never visited the Bond Street site prior to granting approval; he assumed without any data that the site was located centrally enough so students would not have to travel an inordinant distance to school; he assumed the site was on the east side of Asbury Park because, in his view, it was closer to the ocean while a map (P-10) of Asbury Park shows the Bond Street site to be in the lower left quadrant of the City in the western part of the city.

Johnson testified he believed the then existing adopted new regulations, to be effective later in October 1985, were applied with respect to the approval of the controverted site. Johnson says that while 1.8 acres is sub-standard, other factors enumerated in the regulations and an "architectural solution" permitted approval of the site. However, when questioned Johnson could not identify the other factors which permitted approval of the site in view of its minimual size. The architectural solution referred to by Johnson is his explanation that a multi-story school building would leave sufficient remaining land for recreational areas, off-loading areas, buffer zones, and setbacks. Johnson testified that the architectural solution provided a basis upon which a site size variance was granted the application in 1985. Nevertheless, Macaluso did not grant such a variance because he was not aware of and did not apply the then pending regulations. If he had, he would have realized that the minimum site size requirement for an elementary school in a city such as Asbury Park required a minimum of 3.4 acres. Johnson eventually testified at depositions that he "guessed" that a conscious variance decision was made by Macaluco in 1985 while simultaneously acknowledging that the regulations then adopted did not authorize variances from the site approval standards. Johnson acknowledged that prior to 1985, variances regarding site size standards were unnecessary because the standards were non-binding guidelines set forth in the Bureau publication School Sites: Selection, Development and Utilization.

Subsequent to the 1985 voter defeat of the Board's referendum to acquire the site, the Board resubmitted the proposition to the electorate on October 7, 1986. The site acquisition application was not resubmitted to the Bureau because it apparently took the posiiton that the approval the Board received during 1985 remained valid for the 1986 referendum. (See P-28) The referendum was approved by the voters on October 7, 1986. In the meantime, however, the regulations were amended effective July 21, 1986 which contained 3 major changes. One, a new section, N.J.A.C. 6:22-1.6, Planning Standards for Educational Adequacy, required the use of specific facility planning standards by district boards of education in architects designing school facilities. The former N.J.A.C. 6:22-1.6 then became N.J.A.C. 6:22-1.7. Two, amendments were made regarding Educational Facility Planning Standards at N.J.A.C. 6:22-2.4 which detailed requirements for the approval of mobile units or trailers, and relocatable in pre-engineered classrooms. Finally, N.J.A.C. 6:22-3.1, Substandard School Facilities, was amended to clarify definitions and uses of on-site, off-site and privately-owned facilities. No change was made July 21, 1986 regarding the suitability of proposed school sites.

When the voters approved the referendum in October 1986, petitioner requested an informal hearing pursuant to N.J.A.C. 6:22-1.7(a) before Johnson. Petitioner argued before Johnson that the prior approval granted the Board by the Bureau in October 1985 was not valid for the 1986 referendum and that the Board was required to resubmit the proposed sites for the Bureau for new approval in 1986. Petitioner also argued at the informal hearing that the Bond Street site did not comply with the requirements of N.J.A.C. 6:22-1.2 which provides in part as follows:

> (a) No district board of education may conduct a referendum for land acquisition***without prior approval of the Bureau Facility Planning Services of the Department of Education.

During his deposition, Johnson testified that the purpose of the informal hearing was to take another look at the Site and reconsider the Bureau's approval. On January 14, 1987 Johnson advised petitioner that the Board was not obligated to seek new approval in 1986 because the approval received in 1985 continued to be valid. Johnson also addressed petitioner's remaining arguments and found that those arguments insufficient to warrant a change in the determination that the Board had proper approval to seek acquisition of the Bond Street property. In the meantime, and prior to the time Johnson so advised petitioner, the planning board recommended against the Board constructing a school on the controverted site. Nevertheless, Johnson did not consider that recommendation because he says the planning board had not acted within the time provided for in the rule and he did not consider the planning board adverse recommendation because he had already written his decision reaffirming the earlier decision.

During discovery, but after Johnson's deposition, the Bureau produced for petitioner's review a memorandum prepared by Johnson three days after the informal hearing on December 18, 1986. That memorandum memorializes Johnson's perceptions, findings, and conclusions regarding the matter of this Board selecting the controverted site for new school construction purposes. The memorandum is reproduced here in full (P-35):

> Statement of the Problem
>
> The Asbury Park Board of Education is going to build a new elementary school on the "Bond Street site." Funds were authorized at a referendum held on October 6, 1986. Theodore Murnick, a developer, owns the site and the school thereon, which

he intends to develop into an apartment complex. The Board now intends to re-acquire the property through condemnation. Mr. Murnick, through his attorney, McCarter and English, contends that the referendum should be declared invalid because of procedural errors in the site approval process. He was granted an informal hearing on December 15, 1986 before the Manager, Bureau of Facility Planning Services, as provided for in N.J..A.C. 6:22-1.7. The Manager will deny his contention. At that point, we can be assured that Mr. Murnick will begin the appeals process which could cause delays in the project of up to a year. Given the facilities need documented in the Level III monitory process, such a delay cannot be allowed to occur.

Background

The Asbury Park Board of Education sold the Bond Street School and site to Mr. Murnick in 1980. The site at that time was approximately 0.93 acres and the site approved by the Bureau totals 1.84 acres. Approval was given on October 2, 1985. The site size required by the code for the school originally proposed of 350 students is 2.8 acres. However, the Board has submitted revised plans for a school of 711 students, an increase of 361, or 103 percent, on the same site. For a school of this enrollment, the required site size is 3.2 acres.

It is not uncommon for the Bureau to approve a variance in site. However, the Board's change in plans has exacerbated the problem of a limited site and it would not have been approved, and is not approvable.

Current Evaluation of the Site

The site size of 1.84 acres does not meet the 2.8 acre code requirement. The Bureau approved a site size variance for the original proposed building of 350 students at the 1.84 acres.

The increase in capacity by the Board of its most recent proposal necessitates a re-evaluation of the variance and subsequent site approval, or, a reduction in capacity of the proposed school. It is noteworthy that on the 2.1 acre site of the second school to be built, the Board will construct a school with a capacity of only 350 students.

It is also noteworthy that during the Level III monitoring process the Department of Education agreed with a district defined need of two new schools with a capacity of 550 students each, or 1100 total capacity. This plan spread the capacity on the two small sites, both of which were given a variance for approval. Now the Board plans call for 711 capacity on one site and 350 on the second site, for a total of 1061 student capacity.

Other current factors which impact on the Bond Street site are:

1. a new city master plan has been adopted and the school site is now located within a new residential zone calling for mid to high price townhouses and condominiums

2. two conditions result from 1. above

   a) the school will not likely be as close to the homes of the students as originally expected (as the new housing is developed through the years)

   b) professional planners will take the position, and testify to, that the use of the site for a school is improper land use under the new city master plan.

3. traffic patterns could be relatively heavier given the new housing patterns in the city master plan

4. allegedly, other sites of greater acreage are available on the east side of town

In retrospect, given even a hint of what is now known, a better course of action would have been to require the district to search for another site.

Other Factors

There are two other factors which impact on the future of the Bond Street School.

The first deals with questions, however untrue, which could be raised about potential impropriety of the Board selling the property to Mr. Murnick in 1980 for $31,177 and reacquiring it in 1987 for what will likely be a substantially higher price.

Actions

Two objectives must guide the immediate actions of the Department including: (1) making certain that the students in Asbury Park have appropriate facilities in which to learn, and, (2) giving directions and assistance to the district which expedites the implementation of the facilities portion of Level III Monitoring report.

To accomplish these objectives we should:

1. discuss the contents of this report and agree that a problem exists, and its dimension (Calabrese, McCaroll, Hughes, Johnson)

2. the Bureau informally evaluate any proposed alternative sites as to whether they are approvable.

3. discuss informally with the district the potential move to a site other than Bond Street, or a change in the capacity distribution between the two proposed schools (Hughes, Johnson)

NOTE: The attorney for Mr. Murnick agreed to provide locations of alleged available sites.

4. if no new sites are approvable, implement the plan for the use of the Bond Street site.

While this memorandum suggests Johnson was interested in considering alternative sites in Asbury Park other than the controverted Bond Street site, there is no evidence either in his deposition or in the documents which shows he investigated other sites. In fact, the Asbury Park Board of Education vigorously protested that this case was only about the Bond Street site and not about alternative sites.

As noted by petitioner on this motion, the evidence shows that the controverted Bond Street site was personally evaluated by Macaluso only in 1988 when Johnson asked him to visit the site to evaluate it under 1988 regulations. It is noted that on or about April 4, 1988 N.J.A.C. 6:22-1.7 was amended to allow variances from the school site approval requirements at N.J.A.C. 6:22-1.2. The 1988 amendment provided tha the Bureau manager may issue variances from school site acreage requirements "provided the spirit and intent of the standards are observed and the need for variances is satisfactorily documented." Also, on August 15, 1988 the State Board Rules and Regulations were amended to delete portions of N.J.A.C. 6:22-1.2 including the table of standards for minimum acceptable school site sizes and the requirement that the county superintendent's recommendations be based on the criteria in the "school sites" brochure. As a result, new subsection (c) was added to N.J.A.C. 6:22-1.2 which, in part, states as follows:

(c) School site sizes shall be directly related to the acreage required for the structures and activities to be situated thereon. Except where specifically noted, the acres shall be considered for single use. Only where specifically noted can the acres be designated for multiple use, for example, using the same acres for sports which occur at different times of the year. School sites shall include the following:

1. An elementary school site shall have sufficient acreage for:

i. The placement of the school building;

ii. Expansion of the school building to its maximum capacity;

iii. The placement of all other structures such as storage buildings, school bus maintenance buildings or garages and any other structure, above or below the ground, which is to be placed thereon;

iv. Basic all-purpose play and recreation field(s);

v. Walkways and roadways on which people and vehicles traverse the site;

vi. Public and service access roads onto the site including, where warranted, a one-way school bus road of 30 feet width or a two-way road to 36 feet width, a school bus drop-off area, and 18 feet wide lanes for fire apparatus;

vii. The provision for fire apparatus of a 30 feet wide access around the entire building; and

viii. The provision for the building to be set back and for buffer zones as required by local and State codes.

2. An elementary school site may include the following, for which sufficient acreage must be provided:

i. Parking for faculty, staff and the public;

ii. Landscaping and aesthetics;

iii. Community-use facilities such as tennis courts, "tot lots" and basketball courts;

iv. Other structures or activities required by the educational program; and

v. A separate kindergarten play area.

When Macaluso visited the site during 1988 he did not do an "official evaluation"; he did not consider the local planning board's recommendation rejecting the Bond Street site; he merely gave his asserted "professional opinion" whether the site would be sufficient to house a building. Macaluso testified in depositions he reached his professional opinion that the site was approvable after analyzing the site without reference to the plans already submitted.

The foregoing constitutes all relevant and material facts of the matter for purposes of petitioner's motion for summary decision and I specifically **FIND** the foregoing constitutes the facts of the matter.

ARGUMENTS OF THE PARTIES

Petitioner contends that administrative agencies and officials have a duty to enforce and comply their own regulations which, petitioner contends, was violated in the present case. Petitioner contends that the record reveals an utter failure to enforce regulations enacted by the State Board despite a private acknowledgement by the Bureau manager Johnson nearly two years ago that the Bond Street site was not approvable and should not have been approved. Moreover, petitioner contends that Macaluso's initial 1985 approval was given without regard to the then existing regulations and without any kind of objective consideration of the adequacy of the site upon which to allow a board of education to erect a school building.

The Department contends that material facts are in dispute and, accordingly, summary decision may not be entered on behalf of petitioner. Moreover, the Department contends that even if petitioner's argument on summary decision is persuasive the matter must be remanded to the Department of Education for it to determine whether the site is approvable under regulations enacted in 1988.

While the Board concurs in the objections to petitioner's motion for summary decision raised by the Department, it adds that because the Appellate Division directed the Commissioner to determine whether the controverted site is an appropriate school site and whether it was properly approved for that purpose, summary decision is not appropriate for petitioner at this juncture. Rather, the Board contends that the Commissioner must determine whether the site is in fact appropriate in order to properly address the remand by the Appellate Division. Finally, the Board contends that the time-of-decision rule requires the application of newly adopted 1988 site selection regulations to the controverted site and to arrive at an independent decision without dismissing the case through summary decision on behalf of petitioner.

DISCUSSION AND CONCLUSION

The record in this case demonstrates that the Asbury Park Board of Education comes to this dispute with clean hands. There is no evidence to suggest that the Board withheld information, engaged in deceit, fraud, or knowing misrepresentations regarding the controverted site which it believed would solve its dire facility problem. Nevertheless, the conduct engaged in by Macaluso and Johnson on behalf of the Department of Education so tainted the entire application process that the referendum of 1986 at which the Asbury Park electorate gave the Board approval to acquire the controverted site must be set aside.

Neither Macaluso nor Johnson, based on the evidence in this record, ever applied the spirit much less the intent of the relevant regulations at any time during the entire application process with respect to this controverted site. Macaluso in 1985 did not know the existence of the regulations then in effect nor did he know that the application he was assertedly considering was not an application to add 1.8 acres of land to a then existing in-use school facility already owned by the Board. In fact, Macaluso did not know that the 1.8 acres was not Board property.

Johnson acknowledges that he arrived at the private judgment the existing controverted site is not approvable and he acknowledges the Board's plan to house 711 students exacerbated the problem of a limited site and it should not have been approved. Johnson admits that had he known all relevant facts which at the time of his written admission he then did know, a better course of action would have been to require the district to search for another site. These admissions by Johnson were made during December 1986 at or near the time he was to have been affording petitioner an informal fair opportunity to be heard. In light of the private admissions made by Johnson, now made public, and Johnson's continuing position that the site was approvable under then existing regulations renders a mockery the referendum in 1986 at which the Asbury Park electorate granted the Board approval to acquire the controverted site.

A remand of this matter to the Department of Education for it now to consider whether the controverted site is approvable would be a meaningless gesture in light of the fact that the asserted approval given the Board to proceed to a referendum was given under such an arbitrary application of standards by Department personnel. The State Board regulatory scheme requires the Department of Education in the order of

things to first consider the selected site before the Board seeks voter approval to acquire the site for school construction purposes. Then, and only then, assuming valid approval being issued by the Department of Education, is the Board authorized to seek voter approval. In this case, the Department wishes apparently to have voter approval remain valid through the 1986 referendum while having the matter remanded to the Department of Education to grant the 1.8 acre controverted site approval under existing regulations retroactive to a time prior to the 1986 referendum. Such request by the Department is **REJECTED.**

So, to, the time-of-decision rule may not apply in this case. To do so, would render the participation of the Asbury Park electorate a mockery in the decision-making process whether to grant the Board approval to acquire the controverted property. The 1986 referendum was not authorized by virtue of the egregious conduct engaged in by the Department of Education and, therefore, the approval given by the electorate is invalid. The time-of-decision rule if applied would require retroactive approval to be given the controverted site under existing regulations which post-date the 1986 referendum.

Accordingly, summary decision must be entered and is entered on behalf of petitioner in that the approval given the Asbury Park Board of Education to acquire the controverted site was invalid in 1985, invalid in 1986, and continues to be invalid. Therefore, the authority granted the Board to acquire the site by the electorate during the 1986 referendum is also invalid as having been granted at a referendum not otherwise properly authorized. The Board, if it still seeks to have the controverted site approved for acquisition by the electorate, must start anew the application process under existing regulations.

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.

March 16, 1989
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

3/16/89
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 21, 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

THEODORE R. MURNICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY AND W. FRANK JOHNSON, DEPARTMENT OF EDUCATION, BUREAU OF FACILITY PLANNING SERVICES,	:	DECISION ON REMAND
RESPONDENTS.	:	

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

Relying on its Brief Filed in Opposition to Summary Disposition and the affidavit of Dr. W. Frank Johnson, Manager of the Bureau of Facility Planning Services (hereinafter "Bureau"), the Bureau takes exception to the following facts found by the ALJ:

> 1. N.J.A.C. 6:22-1.11(f) was in effect when Asbury Park sought approval of the Bond Street site on July 23, 1985. (ID, p. 6.)
>
> That is incorrect. No regulations were in effect at that time. N.J.A.C. 6:22-1.11(f) had expired on July 1, 1984. New regulations had been proposed on March 18, 1985, but were not adopted until September 4, 1985 and not effective until October 21, 1985.
>
> 2. Johnson testified that the Bureau's October 1, 1985 approval was based upon M.D. Macaluso's application of the new regulations to be effective October 21, 1985. (ID, p. 9.)
>
> That is incorrect. Johnson testified that his approval, after speaking with Macaluso, was based upon the new regulations. It was Johnson who applied the new regulations, not Macaluso. The Bureau's approval, then, came after Johnson applied the new regulations.
>
> 3. Macaluso thought he was approving the expansion of an existing school site. (ID, p. 9.)

The Bureau takes exception to this because the Initial Decision does not reveal the further fact that Macaluso testified that after his error was revealed to him it did not change his mind about the approvability of the site.

Q. What, if anything, did you do after you discovered your mistake?

A. I did nothing because I felt that it was still an approvable site.

(Macaluso deposition, 148:18-21, cited in the Bureau's Brief below at 14.)

The ALJ cannot ignore this later testimony.

4. Macaluso erroneously believed the Asbury Park Planning Board had recommended the Bond Street site. (ID, p. 9.)

This is clearly erroneous. Macaluso had in his possession a letter from the city planner which said "it appears the School Board...has chosen what may be the only viable solution..." That letter is attached to the Bureau's Brief below at 14a.

5. Macaluso never visited the site prior to approval, he assumed the site was central to students and that the site was on the east side of the City. (ID, p. 9.)

These are correct, but the Bureau takes exception to the manner in which the ALJ used these facts. The ALJ goes on to say that the Bond Street site is in the western part of the city. It is not. Using the North Jersey Coastline railroad tracks as a dividing line, the Bond Street site is clearly in the eastern part of the city. That is what Macaluso meant. Therefore, any inference the ALJ is making by referring to these above facts as meaning Macaluso was off-base in his assumptions is absolutely wrong. Macaluso was correct in these assumptions. Moreover, he was under no requirement to visit the site.

6. Johnson could not identify the other factors which permitted approval of the site in view of its minimal size. (ID, p. 10.)

This is inaccurate. Johnson's affidavit is replete with information showing why the site was approvable.

7. Macaluso did not grant a site size variance in 1985. (ID, p. 10.)

Macaluso did not expressly grant a site size variance, but clearly one was granted. Macaluso knew the site was below the regulation's site size minimum. He granted approval knowing that. That can only mean that he varied the requirement. He clearly had the power to do so. As Johnson explained in his Affidavit, the Bureau has always had the power to exercise some discretion in site size determinations. Otherwise, the regulations would be mechanistically and rigidly applied, with no breathing room for special concerns. The Appellate Division in this case recognized the Commissioner's, and therefore the Bureau's, inherent power to vary the regulations' requirements.

> It is evident to us that if a major variation from the requirement is to be allowed, it is for the Commissioner to make that essential educational determination... (Appellate Division decision remanding this matter to the Commissioner.)

This inherent power leads the Bureau to also take exception to the Initial Decision's failure to comment at page 10 that while the 1985 regulations did not authorize variances, the authority to do so has always been implied.

Additionally, the Bureau objects to the ALJ's finding that the public's approval of the expenditure through bonds for construction of the site should be voided. That issue was never briefed by the parties nor was resolution of that issue within the scope of the matter before the forum. (emphasis in text)

(Bureau's Exceptions, at pp. 2-4)

The Bureau requests that the Commissioner reject the ALJ's decision and find that the matter was not ripe for summary determination.

The Board's four exceptions are summarized, in pertinent part, below:

Exception I

THE ADMINISTRATIVE LAW JUDGE HAS IGNORED THE APPELLATE DIVISION'S DIRECTION TO DECIDE THE ISSUE OF SITE APPROPRIATENESS. HE HAS CONFUSED

THE APPROVAL PROCESS WITH THE SUBSTANTIVE ISSUE OF WHETHER THE SITE IS APPROPRIATE FOR A SCHOOL. THE ADMINISTRATIVE LAW JUD6E SHOULD BE DIRECTED TO DEVELOP A RECORD ON WHETHER THE SITE IS APPROPRIATE FOR THE CONSTRUCTION OF AN ELEMENTARY SCHOOL. (Board's Exceptions, at p. 1)

Relying on the Appellate Court demand in this matter, the Board contends that the ALJ was to decide first the appropriateness of the school site and, secondly, the issue of approval. The Board avers, however, that the ALJ elected not to take proofs or order proofs taken before the Bureau on the primary question of whether the property "is an appropriate school site***." (Id,, at p. 2, quoting Asbury Park Board of Education v. Murnick et al., 224 N.J. Super. 504, 513 (App. Div. 1988) Thus, the Board contends the record was never developed in response to the Court's directive.

Even assuming that by agreeing with the ALJ that a hearing on whether the proposed site is approvable is "meaningless" (Id., citing Initial Decision, ante) and also that any subsequent review by the Bureau would be tainted by the earlier action of Department personnel, the Board argues that "[t]his, however, does not mean that the Appellate Court's direction to the Commissioner of Education, to wit, determine the site appropriateness -- can be ignored." (Id., at pp. 2-3) It rejects the ALJ's alleged response that he is without the expertise to conduct such a review. It asks the Commissioner that the ALJ's initial decision be rejected and that he be directed to:

1. Conduct a hearing on the issue of site appropriateness;

2. Make findings of fact as to each of the subsections of N.J.A.C. 6:22-1.2(c)(1)i, ii, iii, iv, v, vi, vii and viii;

3. Make an on-site evaluation of the property in question;

4. Consider the recommendations of the Asbury Park Planning Board heretofore submitted.
(Id., at p. 4)

Exception II

THE COMMISSIONER OF EDUCATION, IN REMANDING THE MATTER TO THE ADMINISTRATIVE LAW JUDGE, SHOULD DIRECT THAT THE LATTER APPLY THE CURRENTLY EXISTING NEW JERSEY ADMINISTRATIVE CODE PROVISIONS WHEN DECIDING THE ISSUE OF SITE APPROPRIATENESS. (Id., at p. 5)

Again quoting the Appellate Division's remand the Board argues that the Commissioner should direct the ALJ in developing a record on site appropriateness to use the latest New Jersey Administrative Code provisions which govern site plan approval. The Board avers that the time-of-decision rule requires the application of the newly adopted 1988 site selection regulations.

Further, the Board contends that the ALJ erred in concluding that the 1986 referendum was not authorized because of the conduct engaged in by Department personnel, citing page 18 of the initial decision in this regard. It argues that the referendum was authorized. The Board claims:

> Thus, it would appear to follow that if the Board obtained site approval, with clean hands, as the Administrative Law Judge so aptly found [p. 17], and the electorate voted to approve the purchase of said site, as well as the necessary financing to construct a school thereon, then the Commissioner should not set aside the election, as the Administrative Law Judge proposes. The Commissioner may, should he decide that the site is not appropriate, order that a school cannot be constructed thereon. (Id., at p. 7)

The Board contends that the ALJ should be ordered to make findings of fact on the appropriateness of the site, and so apply the latest New Jersey Administrative Code provisions in doing so.

Exception III

> BY DECIDING THAT THE ELECTION WAS INVALID, THE ADMINISTRATIVE LAW JUDGE HAS DECIDED AN ISSUE THAT WAS NOT BEFORE HIM. (Id.)

Citing N.J.S.A. 18A:24-65, the Board submits that the ALJ erred in deciding the validity of the election referendum, which statute speaks to a 15 day statute of limitations within which attacks on said validity of a referendum may be made. It suggests that setting aside a referendum two years after the fact is "unheard of." (Id., at p. 8) Having successfully defended such a challenge which was filed within the appropriate time frame set forth at N.J.S.A. 18A:24-65, the Board argues that it should not be placed in the position of having the referendum invalidated now. It claims it has spent and borrowed monies based on the successful referendum. To affirm the ALJ's decision, it argues, "would raise more questions than it resolves because the Board's borrowing authority will be placed in question." (Id., at p. 9) It submits it should not be placed in such a position, and that the Commissioner should not conclude, therefore, that the referendum is invalid.

Exception IV

> THE ADMINISTRATIVE LAW JUDGE ERRED IN GRANTING SUMMARY JUDGMENT. (Id.)

The Board argues that it is entitled to "fair opportunity to be heard." (Id., at p. 10, quoting the Initial Decision, ante) It suggests that the ALJ's decision implies that the site in question is not appropriate because Dr. Johnson privately reached the conclusion that the site is not appropriate, but nonetheless publicly granted approval. It claims that if the ALJ's decision is affirmed, the Board will be deprived of an opportunity to demonstrate that the site is in fact appropriate. To accept the initial decision, the Board submits, "will place the Board's borrowing power in question and it leaves unresolved the more important question of a thorough and efficient education in the Asbury Park School District." (Id., at p. 11)

The Board submits that the initial decision should be rejected and seeks to have the Commissioner direct that the ALJ conduct an evidentiary hearing to give all parties an opportunity to be heard on the question of site appropriateness.

Petitioner's reply exceptions counter, point for point, the exceptions submitted by the Board and by the Bureau. However, preliminarily, the Commissioner notes for the record that he included in his reply exceptions to the Board's exceptions a primary exception which the Commissioner does not consider in the disposition of this matter because it was untimely filed. Such reply exceptions reiterate the arguments petitioner posited before the ALJ and in his briefs. Said arguments are incorporated herein by reference.

The Commissioner does note the reply exceptions in particular that were not as fully developed in other submissions. In response to the Bureau's first exception that no regulations were in effect when the Board sought site acquisition approval in 1985, petitioner states that "[a]lthough the Bureau is technically correct, that fact is irrelevant to Judge McKeown's analysis and conclusions." (Reply Exceptions to Bureau's Exceptions, at p. 1) Petitioner avers that regardless of whether there were regulations in effect at the time of the 1985 approval, the Bureau did process the approval application and approved the site. He further argues:

> The Initial Decision accurately reflects the record on that approval decision: Macaluso, who issued the 1985 approval, was unaware of the specifics of the pending new regulations and therefore applied the criteria previously used by the Bureau (Initial Decision, p. 9; Macaluso Dep,, T133 to 134); in contrast, Johnson testified that the 1985 approval was based on the pending new regulations (Initial Decision, p.9; Johnson Dep., T42). More importantly, the new regulations were fully in effect in 1986, yet the Bureau failed to require a new application conforming with the requirements of those regulations, even though the 1985 submission did not comply. (Id., at pp. 1-2)

In reply to the Bureau's second exception that the initial decision is inaccurate in that it finds that the 1985 approval decision made by Dr. Macaluso was based on new regulations, petitioner claims such exception relies on Dr. Johnson's deposition testimony that Dr. Macaluso discussed the site acquisition application with him prior to the 1985 approval decision which Dr. Johnson agreed to and approved pursuant to the recently adopted, but not yet effective, regulations, citing Johnson Deposition, T37 to 42. In further reply petitioner asserts:

> Aside from the fact that Johnson's testimony was contradicted by Macaluso's testimony that he did not discuss this matter with Johnson prior to issuing the 1985 approval (Initial Decision, p. 8; Macaluso Dep., T130 to 131), the Bureau apparently seeks a factual finding that Macaluso, who was unaware of the new regulations and reviewed the application based on the old regulations, discussed this matter with Johnson, who claimed to have analyzed the site under the new regulations, but notwithstanding that discussion Johnson never realized that they were analyzing the site under two different sets of regulations. It strains credibility to believe that if such a discussion took place the participants did not realize that they were analyzing the proposed school site under different sets of regulations. (Id., at p. 2)

Petitioner's third and fourth reply exceptions are brief and are thus set forth verbatim, below:

> 3. The Bureau's third exception seeks to minimize the significance of Macaluso's erroneous belief at the time of the 1985 approval that he was approving the expansion of an existing school site. Macaluso's testimony that upon learning of this significant factual error he concluded that the site was nevertheless approvable is of little consequence. Of far greater significance is the fact that the initial approval decision was based on a significant erroneous factual assumption and that upon discovering that error Macaluso did not even bring it to the attention of Johnson, his superior. (Macaluso Dep., T14B to 150 and 163).
>
> 4. The Bureau's fourth exception concerns the finding that Macaluso erroneously believed that the Asbury Park Planning Board had recommended the Bond Street site. The Bureau's exception is based upon a letter in the Bureau file from the City Planner. This exception is without merit, since at his deposition Macaluso specifically reviewed the City Planner's letter and said that it was not the letter he recalled relying upon.

> (Macaluso Dep. T13B to 142). Moreover, the City Planner prefaced his comments by "underlining the preliminary nature of the plans received by this office to date, as well as the importance of the Planning Board's official response to the informal presentation to be made by the architects." (Ex. P-12) (Id.)

Petitioner's reply to the Bureau's fifth exception admits that the ALJ incorrectly referred to the site as being in the western part of the City of Asbury Park. He claims this error is harmless and does not change the fact that the proposed school site is not centrally located, especially with respect to pupil distribution shown on the map cited as Exhibit 10.

Petitioner's reply to the Bureau's sixth exception is set forth verbatim:

> 6. The Bureau's sixth exception concerns Johnson's inability to identify factors supporting approvability of the site. In making this exception, the Bureau relies upon the self-serving affidavit prepared by Johnson subsequent to his deposition testimony, while ignoring the deposition testimony. Judge McKeown properly relied upon the deposition testimony and accurately characterized that testimony. (Johnson Dep., TS6 to 52) (Id., at p. 3)

By way of summary of its reply to the Bureau's exceptions, petitioner submits:

> The Bureau's exceptions do not indicate any basis for rejecting or materially altering either the findings or conclusions in the Initial Decision. The Bureau's strained arguments and after-the-fact rationalizations cannot change the fact that the record unmistakably establishes that: "neither Macaluso nor Johnson, based on the evidence in this record, ever applied the spirit much less the intent of the regulations at any time during the entire application process with respect to this controverted site." (Initial Decision, p. 17). Petitioner accordingly submits that the Initial Decision should be adopted and approved without material alteration as the Commissioner's final decision in this matter. (Id., at p. 4)

Upon his careful and independent review of the record of this matter, the Commissioner rejects the conclusion of the Office of Administrative Law granting summary judgment in favor of petitioner, and he demands the matter for further hearing on the issues set forth below.

As noted by the ALJ in his initial decision on demand dated March 16, 1989:

> The New Jersey Superior Court, Appellate Division, demanded this case to the Commissioner of Education to determine whether a 1.8 acre parcel of land known as the Bond Street School Property (or controverted property) in Asbury Park is an appropriate site for a 700 pupil elementary school and whether it was properly approved by the Department of Education, Bureau of Facility Planning Services (Bureau) in compliance with regulations of the State Board of Education prior to the Board seeking voter approval to purchase the site. [Citation omitted]
> (Initial Decision on Remand, at pp. 1-2)

The Commissioner finds and determines that these directives have not been carried out by the Office of Administrative Law, that is, to determine whether the controverted property in Asbury Pari is an appropriate site for a 700 pupil elementary school. Moreover, the Commissioner finds that summary disposition of the question of whether the approval in 1985 was in compliance with regulations of the State Board of Education prior to the Board seeking voter approval to purchase the site was inappropriate, inasmuch as there are material issues of fact in question.

For clarity in the record, the Commissioner sets forth verbatim the Appellate Court's directives in this case:

> ***The question of whether Murnick's property is an appropriate school site and whether it was properly approved for that purpose is one which arises under the school laws and falls within the scope of the Commissioner's special expertise. Murnick's property is considerably smaller than the size requirements contained in the regulations promulgated by the State Board of Education. We assume that the size requirements were made a part of those regulations as a result of thoughtful deliberations by the State Board and that the State Board considered site size to impact on educational quality. Indeed, while the Board provided a waiver procedure in the regulations for variations in school buildings (N.J.A.C. 6:22-1.7(b)i, it does not appear to have provided for such a waiver as to site size, thus underscoring its view of the significance of that requirement. It is evident to us that if a major variation from the requirement is to be allowed, it is for the Commissioner to made that essential educational determination in the first instance. This is especially true in view of the

> fact that inadequate and substandard facilities is one reason for the crisis situation existing in Asbury Park. The Commissioner cannot abdicate his responsibility to decide the important school law issue here involved simply because the trial judge has exercised his jurisdiction in condemnation. (224 N.J. Super. at 513)

The Court's instructions are plain. It states that one issue is to be addressed by the Commissioner, composed of two parts. The first prong pertains to whether Mr. Murnick's property is an appropriate school site. The second pertains to whether the approval of said site for the construction of an elementary school was properly approved for that purpose by the Bureau in the years 1985 and 1986.

In considering the first prong of the Court's directive, the Commissioner is mindful of the language of the Court that:

> It is evident to us that if a major variation of the requirement [for variations in school buildings pursuant to N.J.A.C. 6:22-1.7] is to be allowed, it is for the Commissioner to make that essential educational determination in the first instance. (at 513)

Having carefully perused the School Facility Planning Service regulations promulgated by the State Board, effective October 21, 1985, as amended effective April 4, 1988, the Commissioner finds and determines that the latest revision does provide support for Dr. Johnson's contention that authority did exist at the time of the original approval request for the Manager of the Bureau to grant site size variances. In so determining, the Commissioner notes Dr. Johnson's deposition testimony expressing his belief at the time he first reviewed the proposal in 1985, and again in 1986, that he was implicitly empowered to vary the site size requirements by virtue of long-standing Department practice which he believed the regulations did not alter. The Commissioner finds credence for this understanding on Dr. Johnson's part in the "summary" text accompanying the proposed regulations that were later adopted effective April 4, 1988. At 20 N.J.R. 3 (January 4, 1988) it is stated:

> Another clarification codifies the authority of the department to vary site sizes under the code. N.J.A.C. 6:22-1.7(b) is amended to also reference N.J.A.C. 6:22-1.2, Approval of land acquisition, as a code section, the requirements of which can be varied. The inclusion of N.J.A.C. 6:22-1.2 into the code clarifies long-standing variance practice wherein the Manager, Bureau of Facility Planning Services has approved variances to site sizes, given appropriate justification.

Independent of this finding, but also related to Dr. Johnson's testimony, the Commissioner would correct the ALJ in his finding of fact found in the initial decision, ante, that N.J.A.C. 6:22-1.11(f) was in effect when the Board sought approval of the Bond Street site on July 23, 1985. Such finding is inaccurate. No regulations were in effect at that time, since the old regulations had expired on July 1, 1984 pursuant to Executive Order No. 66. The new regulations, adopted September 4, 1985 became effective on October 21, 1985.

The Commissioner thus directs the ALJ in the conduct of the hearings, pursuant to this remand and in response to the clear directives of the Court, to consider the import of the absence of any regulations in effect at the time of the approval of the Bond Street site, as well the inferences that may be drawn from the language of the State Board "Summary" comments upon the occasion of its adoption of the 1988 regulations at N.J.A.C. 6:22-1 et set. Whether such flexibility in site approval existed within the authority of the Bureau is a matter which in the Commissioner's view is subject to the presentation of proofs. Furthers given the responsibility imposed on the Commissioner by the Court to made a determination relative to the approvability of the site, proofs are required in order for the Commissioner to determine whether such site is consistent with the ability of the Asbury Park Board to provide a thorough and efficient education within such site. This is particularly true in light of the demonstration of the Court that "[i]t is evident to us that if a major variation from the requirement [pertaining to site size - ed.] is to be allowed, it is for the Commissioner to made that essential educational determination in the first instance." (224 N.J. Super. at 513)

Moreover, the Commissioner finds and determines that it is necessary to remand the instant matter for a full hearing on the question of current site appropriateness because the ALJ below did not reach this inquiry. Without a plenary hearing on the issue of, whether the Bond Street site is approvable now, pursuant to the current regulations, the Commissioner would be in contravention of the Court's directives. Thus, the Commissioner rejects the ALJ's conclusion that:

> A remand of this matter to the Department of Education for it now to consider whether the controverted site is approvable would be a meaningless gesture in light of the fact that the asserted approval given the Board to proceed to a referendum was given under such an arbitrary application of standards by Department personnel. (Initial Decision, ante)

In so directing the ALJ to conduct a plenary hearing on site appropriateness pursuant to the current regulations, the Commissioner adopts as his own the argument on the time-of-decision rule made before the ALJ and set forth at Point II of the Brief in Opposition to Motion for Summary Decision submitted by the Bureau dated December 21, 1988 at pages 19 through 23. To accept the ALJ's

conclusion that to apply said rule "would render the participation of the Asbury Park electorate a mockery" would be to ignore the directives of the Appellate Division.

However, for the sake of expediting resolution of this matter, the Commissioner rejects the position of both the Board and the Bureau that the matter should be remanded to the Bureau for such determination. Rather, he directs that the Office of Administrative Law conduct such hearing on whether the site in question is now approvable, based on testimony and documentation educed relating to N.J.A.C. 6:22-1.1 et seq. He thus rejects the ALJ's conclusion as expressed in the initial decision, ante, that the time-of-decision rule does not apply to this case.

As to the second prong of the Court's directive, that is, whether the site was properly approved for the purpose of building an appropriate school site at the time that the matter arose in 1985 and again in 1986, the Commissioner finds that summary decision was inappropriate because there are material facts in question pertaining to the process that was followed and who, within the Bureau, was responsible for what steps in the approval process. The Commissioner finds and determines that the depositions taken during discovery do not provide a full opportunity for the parties to be heard, for witnesses to be questioned and cross-examined, or for admission of documentary evidence to be admitted to the record, reviewed and considered. See Slohoda v. United Parcel Service, Inc., 193 N.J. Super. 588 (App. Div. 1984).

Finally, in demanding the matter to the Office of Administrative Law, the Commissioner rejects the ALJ's conclusion that "[t]he 1986 referendum was not authorized by virtue of the egregious conduct engaged in by the Department of Education and, therefore, the approval given by the electorate is invalid." (Initial Decision, ante) The Commissioner finds and determines that the ALJ's determination to set aside the referendum is without precedent or support in law. The Commissioner concludes to the contrary that the referendum need not be set aside based solely on the ALJ's conclusion that the approval process was allegedly tainted. First, the ALJ was not asked to consider such issue. Moreover, in reaching his contrary conclusion the Commissioner is convinced that there is no basis for setting aside the sovereign will of the electorate because of a claim of an allegedly flawed approval process. In the Commissioner's view, notwithstanding any possible flaw which might have existed in the approval process, the ultimate question in this matter is whether the controverted site is an approvable site under law and regulation. Until the Commissioner, as directed by the Court, has had an opportunity to make a determination as to that question, the sanctity of the referendum may not be disturbed.

Accordingly, the initial decision on summary decision is rejected for the reasons stated herein. The matter is demanded for plenary hearing on the joint question of "whether a 1.8 acre parcel of land known as the Bond Street School property *** in Asbury Park is an appropriate site for a 700 pupil elementary school and whether

it was properly approved by the Department of Education, Bureau of Facility Planning Services***" (Initial Decision, ante) pursuant to regulation of the State Board of Education both currently and prior to the Board's seeking voter approval to purchase the site. He so orders so that he may fulfill the responsibility imposed on him by the Court.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 1, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 411-88
AGENCY DKT. NO. 7-1/88 (OAL DKT. NO. EDU 976-87 REMANDED)

DORIS C. JENNINGS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)
David B. Ruben, Esq., for respondent (Ruben, Ruben & Malgram. attorneys)

Record Closed: February 7, 1989 Decided: March 20, 1989

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

Doris C. Jennings, petitioner, alleges and the Dunellen Board of Education (Board), respondent, denies that the Board improperly compensated the petitioner for the period September 1 - October 15, 1986. The Board counterclaims it overpaid the petitioner.

To be determined is (a) whether the Board properly calculated the petitoner's compensation for September 1 - October 15, 1986, under any applicable rules of the State Board of Education and what corrective action, if any, should be taken and (b) whether the petitioner was entitled to use accumulated sick leave upon commencement of the 1986-87 school year.

This matter was transmitted by the Department of Education 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. The parties submitted a stipulation of facts and, on December 3, 1987, I issued an initial decision ordering the petition of appeal dismissed for lack of jurisdiction. The Commissioner of Education remanded the matter for further proceedings to ascertain whether the superintendent of schools could, after commencement of the 1986-87 school year and after the Board acted in April 1986 to set the petitioner's salary, modify that salary. The Board's counterlaim based on Logandro v. Cinnaminson Tp. Bd. of Ed., 1980 S.L.D. 1511 (State Bd. of Ed., June 11, 1988) is to be considered relative to whether the petitioner was entitled to use her accumulated sick leave at the commencement of the 1986-87 school year.

Plenary hearing was scheduled for January 13, 1989. On that day, the parties asked and were granted leave to submit the case on the stipulations previously filed supplemented by memorandums. In addition, this judge accepted an amendment of the petition to allege that the Board had perpetrated its error in subsequent school years, provided Jennings is successful in this appeal, by keeping her one step behind on the salary schedule. I agree with the petitioner that step increases will not be awarded to the petitioner until the 1986-87 salary dispute that is the subject of this petition is decided. The motion merely avoids more litigation.

STIPULATION OF FACTS

The parties filed the following stipulations:

1. Petitioner Doris C. Jennings ("Jennings"), is a tenured teaching staff member employed by respondent Board of Education of the Borough of Dunellen ("Board"), since 1979.

2. Respondent Board is responsible for the operation of the Dunellen Public School District in Middlesex County.

3. On or about April 29, 1986, petitioner signed a renewal contract for school year 1986-87 at a salary of $20,000 (J-1).

4. On or about June 30, 1986, petitioner filed a letter with the Board secretary:

   A. Requesting a disability leave of absence as of September 2, 1986 to September 30, 1986 (21 sick days);
   B. Requesting a maternity leave of absence as of October 1, 1986 to December 31, 1986;
   C. Enclosing a physician's statement dated April 3, 1986, that her estimated delivery date was September 1, 1986 (J-2).

5. On or about July 10, 1986, petitioner filed a letter with the secretary requesting that her maternity leave of absence be extended from December 31, 1986 to September 1987 (J-3).

6. On or about July 25, 1986, the superintendent of schools sent a letter to petitioner stating that the Board had approved her request for a maternity leave of absence without pay from September 1, 1986 to June 30, 1987 (J-4).

7. On or about September 29, 1986, petitioner filed a letter with the Board secretary:

   A. Confirming that she would receive a check for 31 sick leave days;
   b. Enclosed a copy of her accumulated sick leave report (J-6).

8. On or about October 3, 1986, the Superintendent of Schools sent a letter to Petitioner:

   A. Confirming that she would receive a check for 31 sick leave days);
   B. Enclosed a copy of her accumulated sick leave report. (J-6).

9. On or about October 15, 1986, petitioner was sent a check representing 31 sick leave days calculated on the basis of her 1985-86 school year salary.

10. Petitioner was advised by the superintendent of schools that her sick leave compensation was calculated based on her 1985-86 school year salary.

11. As of July 10, 1986, it was petitioner's intention not to work at all during the 1986-87 school year. In fact, petitioner did not work at all during the 1986-87 school year.

12. The terms and conditions of petitioner's employment are governed by the collective negotiations agreement between the Board and the Dunellen Education Association.

PETITIONER'S ARGUMENTS

The petitioner points to the Commissioner's language in the remand, specifically, that he agrees that this matter rests upon the determination of whether the superintendent could unilaterally modify the petitioner's salary, after the commencement of the 1986-87 school year and after the Board had acted in 1986 to set that salary. The remand further directed a determination of whether the superintendent's action to modify the salary "was inconsistent with the body of law previously cited by the petitioner, as well as Stockton v. Trenton Bd. of Ed. decided by the Commissioner November 19, 1984, rev'd St. Bd. April 3, 1985, rev'd/rem'd N.J. Superior Court 210 N.J. Super 150 (App. Div. 1986), Decision on Remand February 20, 1987 and Trenton Teacher's Association v. Bd. of Ed. of Trenton, decided by the Commissioner October 6, 1986. Also to be considered is

the Board's counterclaim that on the basis of the decision of the State Board in Logandro v. Bd. of Ed. of Cinnaminson, 1980 S.L.D. 1511, the petitioner was not entitled to use her accumulated sick leave at the commencement of the 1986-87 school year." Slip opinion at 10-11.

The petitioner asserts that Stockton v. Trenton Bd. of Ed., 210 N.J. Super 150 (App. Div. 1986) supports her position. Once the school year began, the Board could not reduce her salary and, obviously, the superintendent could not unilaterally modify that salary.

School law decisions dating back to Harris v. Pemberton Tp. Bd. of Ed. 1939-49 S.L.D. 164 have held that if there is a mistake in placement of a teacher on a salary guide and if the teacher is not responsible for the error, the teacher cannot be deprived of the rights he or she acquired by the original resolution of the Board fixing that teacher's salary. An entire line of cases establishes that when a board of education sets a teacher's salary for a particular school year, it cannot at a later date reduce the amount because of clerical or administrative error. The Commissioner has held in "clerical error" cases that there was not nor will there be payment of moneys under mistake of law.

This rule was more recently recognized by the Commissioner and the State Board in Bree v. Boonton Bd. of Ed. OAL DKT. NO. EDU 0737-84 (June 21, 1984), adopted Commr of Ed. (Aug. 6, 1984), mod. St. Bd. (Feb. 6, 1985). Bree alleged that the board had improperly reduced his salary for 1983-84 and frozen his 1984-85 salary. The board asserted that it was merely correcting an error that had occurred when it had improperly granted Bree's salary credit for two years' teaching experience acquired when he was an undergraduate student. The ALJ found that Bree did not misrepresent his teaching experience for salary credit. Whether the superintendent or board wished to credit him for teaching experience gained while he was a college undergraduate was a management prerogative. If an error in salary placement was in fact made, it was unilateral. The responsibility for it lay with the board and its agent, the superintendent. The ALJ ordered the moneys restored and grounded his decision on previous school law decisions. The Commissioner adopted the initial decision. On appeal, the State Board modified the decision, but not in a respect relevant to this case. The State Board agreed that it was the local board's obligation to resolve any concerns it had about the petitioner's application at the time of initial employment. In the absence of fraud or misrepresentation, a board may not later withhold increases in salary to which a teaching staff member is otherwise entitled.

In the present case, there is no allegation that the petitioner was involved in any misrepresentation. Although the petitioner asserts that no error occurred, if an error did occur, it was the Board's and not hers.

Logandro, above, denied the teacher's request to use her accumulated sick leave before an unpaid leave. Here, the Board expressly permitted the use and paid her. The petitioner here was not on an unpaid leave until October 16, 1986. For these reasons, it isclear that the superintendent's unilateral action violated the petitioner's rights. She should be moved on the salary guide pursuant to her contract.

BOARD'S ARGUMENTS

The Board contends that the Commissioner's remand restores the case to the procedural posture it was in before the first initial decision. The Board states the petitioner was entitled, at most, to have her 31 sick leave days calculated based on her salary guide step for the 1985-86 school year. This decision was based on the collective negotiations agreement between the Board and the Dunellen Education Association, specifically Article XVII (B)(4), which provided:

> 4. A teacher, secretary, custodial and/or maintenance employee returning from maternity leave shall be placed on the salary guide according to the following procedure:
>
> > If she/he has taught at least five (5) calendar months of the school year, she/he shall be given one full increment.

Because the petitioner did not work at all during the 1986-87 school year and, accordingly, fell below the 5-month threshold in the contract, she was not entitled to her increment for the 1986-87 school year. The petitioner, on the other hand, argues that this clause of the contract relates to only what her compensation would be upon her return from maternity leave in September 1987. Both parties must concede that the language of the contract is susceptible of more than one plausible interpretation.

In addition, the petitioner's claim that her right to move to the next step on the salary guide in the 1986-87 school year became fixed when she signed the statement of employment in 1986 does not withstand scrutiny. Once the petitioner announced her intention to take maternity leave, any compensation due to her during the 1986-87 school year was to be determined by contract provisions addressing maternity leave. None of the school law decisions cited by the petitioner entitles a teacher to receive compensation on a higher step of the salary guide when she/he is not performing services during the subsequent school year. The Dunellen Education Association and the Dunellen Board of Education negotiated a provision addressing that topic. This tribunal must honor that contract provision.

On its counterclaim, the Board cites N.J.S.A. 34:11-4.4 which provides that no employer may withhold or divert any portion of any employee's wages unless the amounts withheld or diverted are for payments to correct payroll errors. N.J.S.A. 34:11-4.4(b)(4). This statute shows clear legislative policy intended to permit employers to recover for "payroll errors" by adjusting the employee's wages. No case cited by the petitioner addresses this authority for the Board's position.

Finally, the Board resists the petitioner's attempt to assert additional causes of action for each successive year since 1986-87. The claim is, at least, premature. The Board believes it would be inappropriate for this tribunal to reach the merits of that additional claim.

DETERMINATION AND ORDER

A municipal corporation is a creature of the State Legislature. Its powers are derived from, and its boundaries are established by, the Legislature and such boundaries mark the limit of its jurisdiction and authority. Lauria v. Bor. of Ridgefield, 119 N.J. Super. 287 (Cty. Ct. 1972), aff'd 124 N.J. Super 126 (App. Div. 1973).

N.J.S.A. 34:11-4.1 defines "employer" as:

> any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person in this State.

However, I am provided no authority to include municipal corporations in this definition. The arrangement and titles of New Jersey statutes suggest that, although municipal corporations share many characteristics with "pure" corporations, there are nevertheless important differences. N.J.S.A. 14, Corporations, General; N.J.S.A. 15, Corporations and Associations Not for Profit; N.J.S.A. 16, Corporations and Associations, Religious; N.J.S.A. 17, Corporations and Institutions for Finance and Insurance; N.J.S.A. 18A, Education; N.J.S.A. 40, Municipalities and Counties.

The general supervision and control of public education is vested in the State Board of Education which formulates plans and adopts regulations for the unified, continuous and efficient operation and development of public education in New Jersey. N.J.S.A. 18A:4-10; N.J.S.A. 18A:4-15; N.J.S.A. 18A:4-16.

The Commissioner of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws or under the rules of the State Board of Education. N.J.S.A. 18A:6-9. A decision of the commissioner may be appealed to the State Board of Education. N.J.S.A. 18A:6-27. Beyond this, there is a prescribed system of bookkeeping and accounting for local school districts adopted pursuant to N.J.S.A. 18A:4-15 and predecessor statutes.

Exceptions to the State Board of Education's umbrella of authority over school matters are clearly stated in statute; e.g., N.J.S.A. 10:4-6 et seq., the Open Public Meeting Act and N.J.S.A. 34:13A-1 et seq., the New Jersey Employer-Employee Relations Act.

In consideration of the foregoing, I **FIND** and **CONCLUDE** that N.J.S.A. 34:11-4.4 is inapplicable to this matter.

Therefore, the petitioner's pay rate for the 31 days at the beginning of the 1986 -87 school year is to be determined under school law. For the reasons that follow, I determine that the petitioner should have been paid for those days based on the 1986-87 salary guide.

I **FIND** that the petitioner served as a teaching staff member since 1979. She signed an intention to return for the 1986-87 school year (J-1). There is no allegation that the Board did not, by resolution, approve her continued employment at the appropriate place on the 1986-87 salary guide.

I further **FIND** that the petitioner later filed a letter requesting a disability leave of absence from September 2 - September 30, 1986. She also requested a maternity leave of absence October 1 - December 31, 1986. The maternity leave later was extended to September 1987 (J-7). During the summer of 1986, the superintendent wrote to the petitioner advising that the Board had approved her request for a maternity leave of absence without pay from September 1, 1986 - June 30, 1987 (J-4).

I further **FIND** that the petitioner again wrote to the Board requesting compensation for her disability leave of absence September 1 - October 15, 1986 and enclosing a physician's statement that her estimated delivery date was September 16, 1986 (J-5).

The Board agreed to pay and did pay the petitioner for 31 sick leave days covering the period from the beginning of the academic year through October 15, 1986 (J-6). The amount of the check was calculated on the basis of the petitioner's 1985-86 school year salary.

I **FIND** to whatever extent that calculation was based on the contract language cited above, it was wrong. The contract language applies to persons returning from maternity leave. Inasmuch as there was no withholding action, coupled with the fact that the academic year had begun, there is no authority upon which the Board could calculate the sick leave pay at the lesser rate. Newark Teachers' Union et. al. v Neward Bd. of Ed., OAL DKT. EDU 9836-83 (Apr. 26, 1984), adopted Comm'r of Ed. (Jun. 13, 1984).

Having reviewed Logandro, above, I **FIND** no reason why the petitioner here could not use accrued sick leave for pregnancy disability when the disability was certified by an attending physician. Accordingly, I **CONCLUDE** that the counterclaim must be **DISMISSED.**

For the reasons set forth above, it is **ORDERED** that the 31-day sick leave payment made to the petitioner be recalculated on the basis of her 1986-87 salary guide placement and that she be paid the difference forthwith. The collective labor agreement provision cited above does control the salary guide step at which the petitioner returned to work in the 1987-88 school year. It is **ORDERED** that her 1987-88 place on guide be the same step as it was in 1986-87. Absent any lawful withholding, the petitioner should have proceeded along the salary guide from 1987-88 to the present.

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.

20 MARCH 1989
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

21 March 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 22 1989
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

DORIS C. JENNINGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on demand rendered by the Office of Administrative Law have been reviewed. Exceptions and reply exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board takes general exception to the ALJ's decision in this matter and relies on its post-hearing brief in support of this exception. It was the ALJ's determination that (1) petitioner was entitled to have her 31 days of sick leave taken during September-October 1986 calculated at the rate of compensation set by the Board in April 1986; (2) that upon return from her leave for the 1986-87 school year, her salary guide placement for 1987-88 was controlled by the collective labor agreement which in this circumstance meant the same step as she was on for the 1986-87 school year; and (3) that absent a lawful withholding, petitioner should have proceeded along the salary guide from 1987-88 to the present. Petitioner in turn relies on her post-hearing brief as her reply to the Board's exception.

Petitioner herself does not take exception to the ALJ's decision but does seek clarification of the passage of the decision touched on above, the specific wording of which reads:

> For the reasons set forth above, it is ORDERED that the 31-day sick leave payment made to the petitioner be recalculated on the basis of her 1986-87 salary guide placement and that she be paid the difference forthwith. The collective labor agreement provision cited above does control the salary guide step at which the petitioner returned to work in the 1987-88 school year. It is ORDERED that her 1987-88 place on guide be the same step as it was in 1986-87. Absent any lawful withholding, the petitioner should have proceeded along the salary guide from 1987-88 to the present.
>
> (Initial Decidion, ante)

As to this, petitioner states she believes the ALJ intended that she be paid her incremental increases pursuant to the

collective bargaining agreement for 1987-88 and 1988-89 but that the decision does not clearly state so. As such, petitioner requests that the Commissioner in his decision specifically provide for payment of increments for both years.

Upon review of the record the Commissioner agrees with and adopts as his own the ALJ's determination that pursuant to Logandro, supra, petitioner was entitled to use her accrued sick leave for pregnancy disability at the commencement of the 1986-87 school year and that the rate of pay is to be calculated at the salary level set by the Board for the 1986-87 school year. Absent lawful Board action to withhold petitioner's increment for 1986-87 prior to the commencement of that academic year, no authority existed for the superintendent to unilaterally alter her salary which had previously been set by the Board in April 1986. Stockton, supra; Trenton Education Association, supra

Moreover, the Commissioner notes here as he did on page 10 of the earlier decision in this matter that

> ***a salary increment is in the nature of a reward for meritorious service. Bernards Twp. Bd. of Ed. v. Bernards Township Ed'n. Assoc., 79 N.J. 311 (1979); North Plainfield Educ. Ass'n v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984). Since an increment may not be withheld after the commencement of the school year in which it is to take effect (Newark Tchrs. Ass'n and Edna Smith v. Bd. of Ed. of Newark, decided June 13, 1984), the award or denial of a salary increment must, therefore, be based upon consideration of a teacher's performance in the prior year not the year it is to take effect.

As to where petitioner was to be placed on the salary guide subsequent to her 1986-87 leave, the Commissioner will not pass judgment as that issue is controlled by the collective bargaining agreement and he will not interpret the language of that contract as previously determined. Therefore, the Commissioner does not accept any determination reached by the ALJ regarding petitioner's salary guide placement for any year other than 1986-87 as the issue of salary for that year arises under school law not the collective bargaining agreement.

Accordingly, the recommended decision of the ALJ is adopted by the Commissioner with the modification noted above. It is therefore ordered that petitioner be paid any difference in salary between that which was paid to her for 31 sick days used during September and October 1986 set at her 1985-86 salary level and that which her 1986-87 salary level entitled her to receive.

IT IS SO ORDERED.

May 2, 1989 COMMISSIONER OF EDUCATION

DORIS C. JENNINGS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Remanded by the Commissioner of Education, January 13, 1988

Decided by the Commissioner of Education, May 1, 1989

For the Petitioner-Respondent, Klausner, Hunter & Oxfeld
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Rubin, Rubin, Malgran & Kuhn
(David B. Rubin, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Sick leave must be made available for pregnancy disability to the same extent that it is made available for other disabilities. Logandro v. Board of Education of the Township of Cinnaminson, decided by the State Board, 1980 S.L.D. 1511. Petitioner could choose to work until her disability began and then take her accrued sick leave followed by unpaid maternity leave. Id. at 1512. The Petitioner in this case did, in fact, make such a choice, which was made clear to the Board in her written leave request.

September 6, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6948-88
AGENCY DKT. NO. 271-8/88

MICHAEL LA BELLE,

Petitioner,

v.

LIVINGSTON TOWNSHIP BOARD OF EDUCATION,

Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

James S. Rothschild, Jr., Esq., for respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: March 3, 1989 Decided: March 15, 1989

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

Michael LaBelle, a tenured teaching staff member employed by the Livingston Board of Education, alleged he is being improperly compensated for the 1988-89 school year. The Board denied the allegation and avers his 1988-89 salary is consistent with Dowling v. Middletown Board of Education, 1987 S.L.D. ____ (decided June 30, 1987).

The matter was transmitted to the Office of Administrative Law as a contested case on September 22, 1988 pursuant to N.J.S.A. 52:14F-1 et seq., and was preheard on January 18, 1989. The parties agreed to submit the matter for Summary Decision. The record closed upon receipt of final briefs on March 3, 1989.

The following stipulated facts are adopted herein as **FINDINGS OF FACT:**

1. Michael LaBelle, the petitioner, is a tenured teacher of science employed by the respondent, Livingston Board of Education.

2. During the 1986-87 school year, petitioner was in the masters column of the salary guide at step 13. For that school year his salary was $30,000. Attached hereto as Exhibit A is a copy of the 1986-87 teachers salary guide.

3. In the spring of 1987, the respondent voted to withhold the petitioner's increment for the 1987-88 school year.

4. A copy of the 1987-88 teachers salary guide is attached hereto as Exhibit B. Had the respondent not withheld the petitioner's increment for the 1987-88 school year, the petitioner would have received a salary of $35,475 at step 14 of the masters guide.

5. As a result of having his increment withheld for the 1987-88 school year, petitioner received a salary of $30,000 for that year.

6. A copy of the teachers salary guide for 1988-89 school year is attached hereto as Exhibit D. If respondent had not withheld petitioner's increment for the 1987-88 school year, petitioner would have been at step 15 of the masters salary guide during the 1988-89 school year and received a salary of $40,300.

7. On June 13, 1988, the respondent approved a resolution granting to the petitioner "partial restoration" of his salary for the 1988-89 school year and setting forth his salary for the 1988-89 school year to be $34,825 (see, Exhibit C).

8. In the collective bargaining agreement between the Livingston Board of Education and the Livingston Education Association for the school years from July 1, 1987 to June 30, 1989, the numbers of the steps on the teachers salary guides were changed. To maintain consistency for purposes of this Stipulation, each of the salary guides submitted: 1986-87 (Exhibit A), 1987-88 (Exhibit B) and 1988-89 (Exhibit C) retain the step numbering used in the agreement between the Livingston Board of Education and the Livingston Education Association for the school years from July 1, 1984 through June 30, 1987.

The above stipulated facts are as follows in tabular form:

Year	Level	Step	Guide Salary	Salary Received
1986-87	MA	13	$ 30,000	$ 30,000
1987-88	MA	13	32,375	30,000
1987-88	MA	14	35,475	30,000
1988-89	MA	14	37,000	34,825
1988-89	MA	15	40,300	34,825

Petitioner seeks a salary of $40,300 for 1988-89 due to the action of the Board in approving a partial restoration of the increment withheld for the 1987-88 school year. See, Exhibit C.

Respondent argues that petitioner's 1988-89 salary of $34,825 is proper and consistent with the Commissioner's holding in Dowling.

I reject the arguments of both parties. Their briefs are incorporated herein by reference.

DISCUSSION

A careful and thorough review of the stipulated facts and exhibits reveals that petitioner's salary increase was withheld for the 1987-88 school year, and was not contested.

The 1988-89 salary of $34,825, as computed by the Board, is less than petitioner's entitlement to be placed on step 14 as a matter of law in the absence of the exercise of the Board's discretion to withhold any salary increment(s) for 1988-89 pursuant to N.J.S.A. 18A:29-14. North Plainfield Ed. Ass'n. v. North Plainfield Bd of Ed., 96 N.J. 587 (1984).

The Board has erred in determining petitioner's 1988-89 salary due to its apparent misinterpretation and wrongful application of Dowling. Dowling is distinguished from the instant matter as petitioner herein is not at the maximum step of the salary guide. Dowling was. Dowling stands for the proposition that, in the absence of an affirmative action by a succeeding Board to restore a withheld increment, a teaching staff member who reaches the maximum step of a salary guide is not entitled to a salary greater than guide salary less the amount withheld. This determination is consistent with the Court's holding in North Plainfield that a staff member whose increment is withheld can conceivably lag behind for the balance of his career should each sucessive board refuse to act affirmatively to restore the withheld increment.

A teaching staff member is entitled to progress a salary guide step annually in the absence of a withholding action. In the absence of a restoration action, the teaching staff member will lag one step behind continuously. When maximum is reached, his salary may be determined by substracting the amount withheld from the guide salary.

Although the Board perceives its 1988-89 salary determination to be a partial restoration, it effectively must be deemed a partial withholding of $2,175 in the absence of an affirmative withholding action. If construed as a partial withholding, it would then be inconsistent with Coniglio v. Bd. of Ed. of the Twp. of Teaneck, 1973 S.L.D. 449.

Petitioner's argument is also rejected as a determination of guide placement at step 15 would effectively be a restoration of the withheld increment not intended by the Board. The discretionary authority to do so rests solely with the Board, and the Commissioner has consistently refused to substitute his judgment for that of the local board.

I **CONCLUDE** that the proper salary of petitioner for the 1988-89 school year is that indicated at step 14 at the MA level of the salary guide.

The Livingston Board of Education is hereby **ORDERED** to place Michael LaBelle at the salary guide step consistent with the determination herein, and compensate him for the 1988-89 school year at the annual salary of $37,000, retroactive to September 1, 1988.

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 Commissioner 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.

15 March 1989
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

26 March 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 20 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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MICHAEL LA BELLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX 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 were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Essentially, the Board excepts to the initial decision for the following reasons:

> ***The Respondent excepts to the determination of the Administrative Law Judge that Mr. LaBelle should be placed at step 14 of the M.A. level of the Teachers' Salary Guide for the 1988-1989 school year. It is the Respondent's contention that Mr. LaBelle should appropriately be placed at step 15 of the Teachers' Salary Guide for 1988-1989, after first subtracting the incremental salary that Mr. LaBelle lost for the 1987-1988 school year due to unsatisfactory performance.
>
> Respondent relied on the decision by the Commissioner, Dowling v. Middletown Tp. Bd. of Ed., 1987 S.L.D. ____ (Commr. 6/30/87). Dowling is the most recent case that has been decided by the Commissioner on teacher increment withholding. The Commissioner said nothing in the Dowling decision that would limit the holding to teachers that are at the maximum step of the salary guide as suggested by the Administrative Law Judge in his decision.
>
> In Mr. LaBelle's case, Respondent Board exercised its authority pursuant to N.J.S.A. 18A:29-14 and the Supreme Court decision in North Plainfield Educ. Ass'n. v. Board of Education, 96 N.J. 587 (1984) not to pay Mr. LaBelle his denied increment. Respondent calculated the

> "continuing" affect (sic) of increment withholding according to the formula set forth in Dowling. According to Dowling, the amount of salary increment that is withheld due to unsatisfactory performance is calculated. In Mr. LaBelle's case, this was $5,475. After subsequently reevaluating Mr. LaBelle's performance in May, 1988, the Board voted to "partially restore" him to step 15 of the Teachers 1988-1989 Salary Guide - $40,300. The Board then subtracted his lost increment, $5,475, from $40,300. Accordingly, Mr. LaBelle's salary for the 1988-1989 school year was to be $34,825. Based on Petitioner's performance, this is what the Board thought he deserved.***
>
> (Board's Exceptions, at pp. 1-2)

Upon review of the record, the Commissioner is not persuaded that the findings and conclusion set forth by the ALJ in the initial decision warrant reversal.

To the contrary, the Commissioner finds that the arguments presented by the Board in its exceptions are misplaced and without merit. For the 1987-88 school year, petitioner's salary remained the same as it was as of the 1986-87 school year ($30,000 - 13th step of the guide). By taking this action, the Board effectively denied petitioner one increment step on the salary guide for each of the ensuing school years, unless or until a future Board acted affirmatively to restore the incremental step to petitioner.

If the Commissioner were to accept the Board's position that petitioner should be placed at the 15th step, instead of the 14th step of the salary guide, M.A. level for the 1988-89 school year, it would then, in effect, restore the entire salary increment the Board had previously held from petitioner. However, the Board has attached a condition to such placement of petitioner by virtue of the fact that it reduced petitioner's salary entitlement by $5,475, ($34,825) which is below the salary amount ($37,000) to which he is entitled at the 14th step of the 1988-89 salary guide, M.A. level. The 14th step on the salary guide represents petitioner's salary guide placement for the 1988-89 school year taking into account that the Board did not take an affirmative action to restore said salary increment.

Consequently, the net effect of the Board's action to date is the withholding of petitioner's salary increment ($5,475) as of the 1988-89 school year and the further imposition of a penalty by partially withholding the increment to which petitioner is entitled at the 14th step for the 1988-89 school year by an additional $2,175, which is the difference between the $34,825 petitioner is receiving and the $37,000 he is entitled to receive at the 14th step, M.A. level for the 1988-89 school year.

Accordingly, the Commissioner is rejecting the Board's exceptions to the initial decision and hereby adopts as his own the findings and conclusion in the initial decision as supplemented above.

The Livingston Board of Education is hereby directed to place Michael LaBelle at the salary step consistent with this decision and compensate him at the 14th step of the 1988-89 salary guide, M.A. Degree level. The Board is further directed that such salary compensation owing and due petitioner shall be made retroactive to September 1, 1988.

IT IS SO ORDERED.

May 4, 1989

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5773-88
AGENCY DKT. NO. 250-7/88

BAS ZION D. KELSEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Karen L. Jordan, Esq., and Adam S. Henschel, Esq., for petitioner (Greenberg & Prior, attorneys)

Gregory G. Johnson, Esq., for respondent (Lemuel H. Blackburn, Jr., P.C.)

Record Closed: February 8, 1989 Decided: March 27, 1989

BEFORE JOSEPH LAVERY, ALJ:

This is an appeal by **Bas Zion D. Kelsey, petitioner,** from the withholding by the **Trenton Board of Education, respondent,** of her increment for the 1988-89 school year.

PROCEDURAL HISTORY

After timely petition filed July 26, 1988 and answer of August 3, 1988, the Commissioner of Education, pursuant to N.J.S.A. 52:14B-9 and 10, declared this matter a contested case. He filed it with the Office of Administrative Law (OAL) on August 3, 1988, and the Acting Director and Chief Administrative Law Judge then assigned the case to this administrative law judge. Prehearing convened on

September 29, 1988, and plenary hearing followed on January 6, 1989. Briefs were submitted, the last of which was received on February 8, 1989. On that date the record closed.

ISSUES

The issue in this case is whether the Board unlawfully withheld petitioner's increment for the 1988-89 school year. The subissues are as outlined in the Prehearing Order of October 3, 1988:

1. **Whether the Board was arbitrary, capricious, or unreasonable in reaching its decision.**

2. **Whether the Board's decision to deny the increment was grounded in bad faith, which included the personal animus of her supervisor, and an intent to discriminate because of age and religion.**

Burden of proof:

The burden of proof falls on petitioner to show by a preponderance of the credible evidence that the Board's action was arbitrary, capricious or in bad faith, Kopera v. West Orange Bd. of Education, 60 N.J. Super. 289, 295-297 (App. Div. 1960). As to the claims of discrimination, she must also satisfy the standard of proof which attends discrimination charges, Texas community Affairs Dept. v. Burdine, 450 U.S. 258 (1981).

Undisputed facts:

Some of the material facts are not in dispute and have been agreed upon in a Stipulation of Facts executed on January 6, 1989 (Exh. C-1). That stipulation is reprinted below, *verbatim*:

The parties agree to the following stipulations of fact:

1. Petitioner is a teaching staff member who has been employed by the respondent Trenton Board of Education for the requisite number of years required under N.J.S.A. 18A:28-5 to become a tenured teacher.

2. By letter dated April 29, 1988 respondent notified the petitioner that it had decided at its April 28, 1988 meeting that it would withhold her entire increment for the 1988-89 school year.

3. Petitioner has been employed by the respondent for a total of thirty-five years, and continuously since the 1961-62 school year.

4. Beginning with the 1982-83 school year petitioner's immediate supervisor has been Mary N. Ferri, who is the head of the English Department of Trenton High School.

5. On March 31, 1988 Ms. ferri informed petitioner that she would recommend to the respondent Trenton Board of Education that petitioner's increment be denied. Ms. Ferri personally presented the matter to the respondent at a meeting in April, 1988.

6. On March 29, 1988 the respondent granted petitioner a medical leave of absence from February 2 to February 29, 1988.

In addition to this executed stipulation, it is undisputed that the Board relies on the "pattern" of absences which are recorded as follows in Exh. R-1 absence records for the years 1985-86, 1986-87 and 1987-88:

1987-88: Total absences 45 1/2 days (3 C days, 3 N days, 22 1/2 A days, 17 P days)

1986-87: Total absences 18 1/2 days (3 C days, 2 1/2 N days, 13 A days)

1985-86: Total absences 19 days (3 C days, 3 N days, 13 A days)*

ARGUMENTS OF THE PARTIES

Board's argument:

The Board presented its case through the testimony of Mary Ann Ferri and Elizabeth L. Bates, supplemented by legal brief.

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*The code for types of days is located at the bottom of absence records in Exhibit R-1.

Mary Ann Ferri, the current head of the English department at Trenton High School, has been employed by the Board for 39 years. She began her career at Trenton High School in 1982 and is presently responsible for supervision of 31 teachers, including petitioner and 8 instructional aides. This responsibility embraces implementation of curriculum, coverage by teachers of various classes, and purchase of books from grades 7 through 12. It was Ms. Ferri who recommended initially that petitioner's increment be withheld for poor attendance. In the course of supporting that recommendation, she prepared the multi-paged exhibit R-1 for submission to the Board. She was also present at the Board meeting of April 26, 1988, when the increment was denied.

Ms. Ferri testified that she felt compelled to move because of petitioner's absence rate, which was excessive, when measured against the maximum permitted by the Board's attendance policy (Exh. R-1). This was made clear by an inquiry by Jeanne O. Pearson, the Board's Executive Director of Personnel (Exh. R-1, letter of March 17, 1987).

> TO: Mrs. Elizabeth Bates
> Principal
> Trenton Central High School
>
> FROM: Mrs. Jeanne O. Pearson
> Director - Personnel (Acting)
>
> DATE: March 17, 1987
>
> RE: Incidental Absences/Withholding of Increment/
> Non-Renewal
>
> The Trenton Board of Education has directed that all employees deserving of disciplinary action due to poor attendance be treated equitably.
>
> A review of attendance records during the past 2 or 3 years indicates that the following person(s) assigned to Trenton High School has/have an incidental absentee rate exceeding five percent (5%) each year.
>
> Please indicate in the space provided the reason you have not submitted a recommendation regarding the employee(s) listed herein:
>
> . . .
>
> Bas Zion Kelsey Teacher

...

Attachments

cc: Dr. Copeland
Mrs. Thomas

In response to this directive, Ms. Ferri attempted to question petitioner diplomatically about the reasons for her absence. In so doing, she met with hostile resistance from petitioner. Nevertheless, Ms. Ferri submitted the reasons petitioner had given for her absence to Ms. Pearson (Exh. P-8).

When monitoring all teachers' attendance, Ms. Ferri, at the end of each month, gave each teacher a notice of his or her attendance record. Complying with Board policy, she provided a slip giving the number of days in the school year, and the number of days the teacher was absent. Ms. Ferri used these records to reach her conclusion here. On March 25, 1988 (Exh. R-1), the Annual Teacher Performance Report-Evaluation was prepared, in which Ms. Ferri recommended that petitioner not receive her increment. On March 29, Ms. Ferri and Ms. Bates met with petitioner.

Ms. Ferri insisted that she made her recommendation because of the serious interruption of teaching which petitioner's extensive absence pattern caused. None of her other teachers had that substantial an absence history. Although Ms. Ferri found petitioner to be a very competent teacher, who almost always had teaching plans in place for substitutes, the record of her absence was egregious. It went so far beyond the 5% maximum permitted by Board policy as to warrant a loss of increment.

Ms. Ferri noted that she herself is 61 years old and of the Catholic faith. She denied categorically that she knew petitioner's age, or ever considered it for any reason. Further, she had not evaluated petitioner or moved to have her lose an increment by reason of her Jewish faith. Ms. Ferri's letter of August 13, 1985 (Exh. R-1), was simply an attempt to assuage a sore point between them. It was meant to be conciliatory. Ms. Ferri insisted that she had written it with no discriminatory motivation whatsoever.

Elizabeth L. Bates, Principal of Trenton High School for the last seven years, and employed by the Trenton Board of Education since 1960, stated that she was responsible for overall management of Trenton High School. As a practice, she is

involved in all discipline or increment withholding actions. She confirmed the Board policy described by Ms. Ferri, and noted that absences exceeding the 5% limit trigger a review by the Department of Personnel. Ms. Bates supported Ms. Ferri's recommendation, and had herself attended the Board meeting of April 26, 1988. She emphasized that her support was not automatic. In the past, where circumstances merited, the principal had opposed such supervisory recommendations. Ms. Bates also denied that she considered age or religion in her decision.

Ms. Bates also stressed that, in the 1986-87 school year, increment withholding was possible because petitioner had exceeded the 5% absence cut-off. Ms. Ferri opposed the loss of increment at that time. She argued that Ms. Kelsey had been subject to extenuating circumstances that year, and Ms. Bates agreed. The present dilemma arises from the pattern which has emerged over the past three years.

Through legal brief, the Board contends that reliance on "incidental" absentee rate is a fair and reasonable standard because it does not deny the petitioner entitlement to a statutory leave. Citing the New Jersey Supreme Court interpretation of N.J.S.A. 18A:29-14 in Bernards Township Bd. of Ed. v. Bernards Township Ed. Ass'n, 79 N.J. 311, 321 (1979), the Board argues that it has discretion to make a judgment concerning the quality of an educational system, and to withhold an increment as a managerial prerogative to eliminate any inefficiency. That discretion may only be reversed where it is used with patent arbitrariness, and without a rational basis or induced by improper motive. Kopera v. W. Orange, 16 N.J. Super. 288 (App. Div. 1960).

Relying on administrative case law, the Board argues that, even if based upon legitimate medical reasons, excessive absenteeism might warrant withholding of an increment. Frequent absences disrupt the continuity of instruction, the benefit of which cannot be entirely regained. Petitioner has offered no evidence to offset the Board's view of that negative affect.

The Board's policy and procedure with respect to attendance (Exh. R-1) has been lawfully applied here. First, the Board individually considered petitioner's medical illness on April 28, 1988, when considering the superintendent's recommendation to withhold her increment. The policy of reliance on incidental absentee rate is a fair and reasonable standard, and does not deny petitioner

entitlement to statutory leave. Secondly, petitioner has given no evidence of discrimination by the Board for age or for religion.

Petitioner's argument:

Petitioner presented her case through her own testimony and submission of post-hearing brief.

Petitioner, Bas Zion D. Kelsey, outlined her unhappy relationship with Ms. Ferri. As an illustration, she testified that in June 1984 she was compelled to fail a girl who had not submitted back projects. During a later meeting with the girl, her mother, Mr. Murphy and Ms. Ferri, the student lunged at petitioner. For that reason, petitioner decided to leave. As a result, Ms. Ferri, in a later locked-door office conversation, stated that it was her "punitive judgment" that petitioner should now teach only sophomores. The reasoning given to petitioner was that Ms. Ferri could no longer face senior mothers whose daughters were failed by petitioner. Principal Bates countermanded that order for the rest of the year. In 1985, Ms. Ferri was again unsuccessful in having her teach sophomores, but by 1986 Ms. Ferri had somehow removed the seniors from petitioner's assignment. Although Ms. Bates promised to rectify the problem, she did not.

In a subsequent incident during August of 1985, Ms. Ferri removed petitioner's classroom from her in order to accommodate an ROTC class. This period forced her to "float", despite her senior status. Petitioner was shocked when that assignment was presented to her in front of 30 teachers at an English Department meeting, without preliminary notice. When petitioner complained that a younger, less senior teacher should float, her objection caused a personal confrontation afterward. During the shouting match which followed, Ms. Ferri pounded on the wall and berated petitioner for questioning Ms. Ferri's judgment in front of other teachers. Ms. Ferri then wrote an apologetic letter to petitioner (Exh. P-2) in which Ms. Ferri stressed her strict Catholic upbringing, and adverted to saintly role models. Ms. Ferri was aware that Ms. Kelsey adhered to the Jewish faith (Significantly, in a meeting on another occasion with Principal Bates, Mr. Kristophis, and Ms. Ferri, Ms. Ferri inappropriately announced that she was a "good Christian."). Despite this, when petitioner sought relief from cafeteria duties and its considerable strain, there was no change.

Addressing her history of medical treatment and illness, petitioner noted that it began in October 1984. At that time she was injured in a slip-and-fall accident in school on an oily floor left by a cleaning lady. Her shoulder muscles, wrist and back were injured, and the injuries prompted considerable periods of absence. From that time forward, medical treatment has continued (Exhs. P-3, P-4, P-5, P-6 and P-8).

In another accident, during January of the 1987-88 school year, petitioner was taken in an ambulance to a hospital for four days, after passing out as a result of diabetic-related deficiencies. She went on medical leave thereafter. In April of 1988, petitioner was involved in a car accident, and again went to the hospital. She received seven stitches, and suffered knee injuries. Petitioner declared that last year was her worst year. She was forced by her various conditions to apply for medical leave from February 2, 1988 to February 26, 1988.

Petitioner insisted that her lesson plans, with rare exceptions, were always prepared when she was out. These plans, as with every teacher, were kept available in the middle drawer of her desk. In 35 years of teaching, on only three days were substitute teachers left without lesson plans.

As to evaluations by Ms. Ferri, no conferences were held with her over the last four years. Ms. Ferri, as a standard practice, would not present the complete evaluation, but noted only that she "observed", and then, petitioner stated, Ms. Ferri "compelled us to sign it." On April 12, 1987, she received an appraisal form, but was not shown the Annual Teacher Performance Report-Evaluation and its negative comments. Ms. Ferri followed a policy of obtaining the signatures without disclosing the second page with her actual evaluation comment. This was true in 1985-86 and 1986-87 as well. She first saw the evaluation of April 12, 1987, when compiling data for her present litigation, sometime in June of 1988. Petitioner testified that none of the comments are true. Her records show that she adhered to curriculum.

Ms. Ferri's reference to "poison pen" letters derived from petitioner's request for meetings with Ms. Ferri to settle their personal differences. Ms. Ferri never conferred with petitioner to determine the reasons for any of her sick days. Moreover, in her experience, petitioner never had difficulties with any other supervisor during her career.

Petitioner recalled that she first received the Board of Education policy on attendance in September of 1987. She had not heard at any time of the "five percent" rule before this. She conceded that she did not believe that the Board of Education itself withheld her increment for any reason other than absences. However, petitioner thought that the Board should have taken into account her 35 years employment, and the circumstances which were beyond her control. She recalled that, each year, she received 15 sick days, plus 3 days for illness in family, and 3 days for personal leave. In 1987-88, she had 8 days left over, plus 6 from the year before. In Exhibit P-5, petitioner sought consideration for "B days." Petitioner was aware that this was not medical leave to which she was entitled, and that she had used all her sick time.

In her brief, petitioner argues that the withholding of increments for excessive absenteeism was arbitrary, capricious and unreasonable. Further, discrimination existed as a matter of law. This is true first, because case law bars the Board from relying solely upon the number of absences accumulated over the course of one or more school years to withhold an increment. The Board must consider the particularized circumstances in each case, including the reason for the illness. Guidelines followed by the Board which ignore this requirement are themselves arbitrary. Here, petitioner outlined the extent of medical necessity which caused her absences. None of the documents in Exhibit R-1 or the Joint Exhibits J-1 and J-2 submitted by the Board reflect the Board's consideration of petitioner's particular medical problems.

Secondly, the record plainly shows discrimination against petitioner by reason of her age and religion. There is no need to prove the case for discrimination based on the "shifting burdens" standard. Preponderance of the evidence is sufficient. Removal of petitioner's classroom for ROTC use, incidents during which Ms. Ferri pronounced her status as a "good Christian" and the product of "strict Catholic upbringing" achieve that evidentiary threshold. Additional evidence is the loss of her assignment to seniors and transfer to sophomores, despite her expertise and 22 years teaching at that grade level. There is also actual placement of petitioner in danger on cafeteria duty at her advanced age to consider. When evaluated against petitioner's performance and length of service, such conduct proves inherent discrimination because of religion and age. Loss of petitioner's increment was the final actionable manifestation of the Board's discrimination.

Thirdly, the Board did not consider the particularized circumstances of petitioner's case. Case law requires it. All of petitioner's absences were justifiable. Additionally, other teachers whose increments for the 1988-89 school year were denied at the same Board meeting had records of absence far in excess of those reported for petitioner.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As to **UNDISPUTED** facts, I **FIND** those designated on pages 2 through 3 of this opinion.

As to matters which are **DISPUTED** or **CONTESTED, I FIND**:

1. Petitioner did not receive notice until 1987 of the Board policy on a "five percent" absence limitation.

2. Neither petitioner's supervisor nor any other Board official conferred with petitioner on the reasons for her absences or their implication with respect to possible loss of increment (until the Board meeting of April 28, 1988 when her increment was withheld).

3. With three exceptions over a 35-year career, petitioner's lesson plans were always in place and complete for substitute teachers.

4. Ms. Ferri recommended loss of increment because of the "five percent" policy requirement made known to her by Jeanne O. Pearson, Executive Director of Personnel for the Board.

5. There was a serious personal conflict between Ms. Ferri and petitioner.

6. Ms. Ferri was not motivated by an intent to discriminate against petitioner because of her race or age.

ANALYSIS

Analysis of this case follows the issues as outlined in the Prehearing Order:

1. **Whether the Board was arbitrary, capricious, or unreasonable in reaching its decision.**

Under the the relevant evidentiary standards, the Board was arbitrary, capricious and unreasonable in denying petitioner's increment:

The law:

The applicable law in this matter was reviewed in Smith v. Board of Education, City of Trenton, OAL Dkt. EDU 5255-88 (March 6, 1989), pending before Commissioner of Education.

> The relevant decisional law which has evolved provides a number of guidelines for use in deciding on these facts:
>
> A teacher's excessive absences may constitute good cause for a local board's withholding of a salary increment. Prior years' absences may be considered. Trautwein v. Bd. of Education, Borough of Bound Brook, 1980 S.L.D. 1539,1542. The burden of proving that teacher performance is satisfactory falls on the petitioner, not the Board. Ibid. Continued absences, notwithstanding legitimacy of excuse, does not detract from the teacher's burden of proof to show that their performance is unaffected, Angelucci v. Bd. of Education, Town of West Orange, 1980 S.L.D. 1077; Virgil v. Bd. of Education, Town of West Orange, 1981 S.L.D. 1,12. On the other hand, where a seriously ill petitioner takes statutorily accrued sick time for such illness, a Board may not obviate that entitlement by withholding an employment or adjustment increment as a penalty, without considering the particular circumstances for absence. Kuehn v. Bd. of Education, Township of Teaneck, 1983 S.L.D. 1582, 1583. Additionally, while a principal may override recommendations of those who evaluate teachers through observation, he or she must show sufficient grounds, when absences are legitimate, for a conclusion that these absences caused discontinuity of instruction. Law v. Bd. of Education, Parsippany-Troy Hills (N.J. App. Div., October 25, 1983, A-280-82T2) (unreported), at 3. Past conduct over a reasonably relevant period of time may be considered, where it establishes a pattern which has continued into the school year in which the action to withhold the increment is taken. Where conduct not warranting board action to withhold salary increments in a single year continues in subsequent years, and a cumulative effect of the pattern imposes a deleterious impact on the delivery of educational services, the board may withhold future increments because of this

continuing pattern. Borrelli v. Bd. of Education, Borough of Rutherford, State Board decision, July 3, 1985, at 5-6. Where employees go beyond accumulated sick leave, and are not denied use of statutorily entitled annual and accumulated sick leave, boards may withhold increments pursuant to lawful policies (In this case there were *uncompensated* absences amounting to one third of the school year, although for legitimate illness), Bialek, et al. v. Bd. of Education, OAL DKT. EDU 7908-84; adopted, Commr. of Ed. July 19, 1985; aff., State Board decision, Dec. 6, 1985. Where a policy guideline for purposes of evaluation results in unsatisfactory rating for use of sick leave, which cumulatively is authorized by statute, such a policy is beyond the authority of the Board. Mere mathematical assignment of a rating, unaffected by the reason for absence, is arbitrary and unreasonable within the meaning of Kopera, supra. Montville Township Education Association, et al. v. Montville Township BOE (N.J. App. Div., Dec. 6, 1985, A-1178-84T7) (unreported), at 4-6. Also, Meli v. Bd. of Education, Burlington Co. Vo-Tech (Meli I) (N.J. App. Div., Mar. 4, 1987, A-2237-85T7) (unreported), at 2; Meli v. Bd. of Education, Burlington Co. Vo-Tech (Meli II) (N.J. App. Div., May 21, 1987, A-5820-85T7) (unreported), at 4. A finding of adverse impact on performance requires that there be a discontinuity of instruction which would disrupt the educational process. Meli I, p. 5.

Under *Borrelli, supra* the Board here may evaluate all the years in contention. It may do so to determine whether there is continuity of conduct creating a pattern whose cumulative effect has a deleterious impact on delivery of educational services. If it draws that conclusion, petitioner must prove the Board's conclusion and consequent withholding of increment are unreasonable and arbitrary, in the sense of *Kopera, supra*.

The facts:

In this case, neither petitioner's excellent teaching skills nor her level of performance are not in question. Ms. Ferri acknowledged that petitioner's lesson plans were virtually always in place during her absences. Petitioner credibly testified that in her entire career there were only 3 days when these plans were not ready. Neither does anyone contest the validity of petitioner's medical excuses, for which leave was granted by the Board during the 1985-86, 1986-87 and 1987-88 school years. Only in the 1987-88 school year did petitioner use P days, for which there is no mandatory contractual or statutory entitlement. However, when the board granted that 17-day leave, it gave petitioner no warning beforehand that the cost would be loss of an increment for the 1988-89 school year. Thus, petitioner has established a *prima facie* case.

In response to this *prima facie* case, taking each year in its turn, the Board charges in its brief that for 1985-86 petitioner was absent a total of 39 1/2 days excluding 11 days absences due to an accident. Yet, item 17 and Exhibit R-1 of the record submitted by the Board shows a total of 19 days for that year, 13 A days, 3 N days and 3 C days. All of these days were permissible either under contract or statute. For the 1986-87 school year, respondent Board states in its brief that petitioner was absent 18 1/2 days. Item 17 (page 2) shows that these were composed of 13 A days, 2 1/2 N days and 3 C days. The Board does not argue that any of these days were not permitted under contract or statute. For the 1987-88 school year, the Board notes that petitioner was absent a total of 35 days, not including the 17 days leave of absence between February 2 through February 26, 1988. Yet the official absence record shows (at Exh. R-1) that petitioner was out a total of 45 and 1/2 days *including* the 17 leave days. Those days were P days, and consequently not available under contract or statute. The other days were 22 1/2 A days, 3 N days and 3 C days, all of which were authorized by statute or contract.

As in Smith, supra, id at page 8-9, petitioner's *prima facie* case has not been offset by any response from the Board which would indicate a clear consideration of petitioner's reasons for absence, the attendant disruption, if any, of student student student instruction, or of impairment, if any, of school efforts to provide a thorough and efficient education. The absences for 1985-86 and 1986-87 did not exceed those which were available to her by contract or statute. 1987-88 did include 17 P days. However, as observed above, at the time this discretionary leave was granted, petitioner was given no notice that it would result in the loss of her increment. Moreover, Ms. Ferri has stated that her interest in discipline for absenteeism began when Ms. Pearson, on March 17, 1987, addressed the need to follow up on the 5% policy in the letter to Principal Bates quoted above. Before this, she had never invoked the policy.

Weighed against the holdings in the above-cited cases, it is plain that the mechanistic application of a 5% cut-off for incidental absences, as a matter of policy, cannot be upheld when a *prima facie* case has been shown. Petitioner has believably stated that only three days in her entire career was she unprepared with lesson plans for teachers or substitutes who took her place. Her teaching performance is not in question. Petitioner was also totally credible in stating that she was not informed by Ms. Ferri's comments on her absenteeism, because they were never disclosed to her. Petitioner was equally believable in testimony that she had not been told of the Board's 5% maximum absence policy until 1987. These

facts are sufficient to render the Board's action arbitrary and capricious within the meaning of Kopera, supra.

2. **Whether the Board's decision to deny the increment was grounded in bad faith, which included the personal animus of her supervisor, and an intent to discriminate because of age and religion.**

The record does not disclose that the Board considered any of the conflicts with Ms. Ferri related by petitioner at hearing. The Board has provided a believable record of *intent* to avoid disruption of the educational process which accompanies discontinuity of teacher attendance. In withholding the increment they relied on a correctly enacted and uniformly applied policy. Though it is found here that the that policy was mechanistically applied, this finding does not validate a charge of discrimination. Further, the disparity in days taken by other teachers also denied an increment is not a persuasive argument. Their cases are not being tried here.

What is apparent is that the Board has established a five percent limit as the absence cut-off, and petitioner exceeded that limit. While the Board's decision is not acceptable for the reasons cited above, it is not grounded on discriminatory animus. Moreover, petitioner in her own testimony declared her opinion that the Board itself acted without any such intent. Since the Board is the final decider, it cannot be held to have discriminated because of Ms. Ferri's actions (absent some evidence of a distorted foundation for its decision, which is not the case. No one contests the days involved (Exh. R-1, item 17)).

As to the conduct of Ms. Ferri, there is little doubt of mutual animosity between her and petitioner. However, this does not prove bad faith on the part of the Board, even if Ms. Ferri's remarks concerning her religious background are considered. The credible testimony of Ms. Ferri reveals them to be no more than an expression of religiosity. While arguably inappropriate in a public school supervisory setting, these remarks are not in themselves proof that Ms. Ferri was motivated by unlawful discriminatory intent, wholly or partly because of petitioner's Jewish faith. Whether, in the abstract, Ms. Ferri fairly treated petitioner is not a question which falls within the scope of the present appeal to resolve. As to age bias, there has been virtually no proof of such motivation, and the test, clearly, is proof of intent. Texas Community Affairs Dept. v. Burdine, 450 U.S. 258 (1951).

CONCLUSION

I **CONCLUDE**, therefore, based on the above reasoning and after review of the entire record, including the credibility of witnesses, that:

1. Respondent Board withheld petitioner's increment because of an arbitrary, capricious application of a mechanistic 5% standard. Petitioner's excess "P" days taken in 1987-88 were previously granted by the Board. That grant did not include notice that a disciplinary penalty involving increment loss would follow. All other absences were days authorized by statute or contract.

2. The Board did not discriminate against petitioner by reason of her age or religious faith.

ORDER

I **ORDER** therefore that petitioner's increment denied by respondent Board for the year 1988-89 be reinstated.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 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 27, 1989
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 30 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

BAS ZION D. KELSEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner is in agreement with the ALJ's recommended decision ordering restoration of petitioner's 1988-89 salary increment for the reasons stated in the initial decision with a slight modification, however.

Initially, it is stressed that absences, even legitimate ones which do not exceed statutory or contractual entitlements, may be the basis for increment withholding, notwithstanding the fact that a teacher's performance may be good, or even excellent, when he or she is present in the classroom. Trautwein, supra; Angelucci, supra; Ricketts and Pierce v. Bd. of Ed. of Haddonfield, decided September 17, 1984, aff'd State Board February 6, 1985, aff'd N.J. Superior Court, Appellate Division March 10, 1986; In re Burns, School District of Newark, decided March 8, 1984, aff'd State Board October 24, 1984 What a board of education is required to show, however, is that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences (Kuehn, supra); (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and (3) that there be some warning given to the employee that his or her superiors were dissatisfied with the pattern of absences. Trans of Bd. of Ed. Trenton, decided April 19, 1989; Meli, supra In the instant matter, the Board failed in its responsibilities with respect to these elements.

However, the Commissioner wishes to correct any impression drawn by the ALJ in his conclusions found in the initial decision, ante, that if a board grants an unpaid sick leave it is obligated at that time to specifically notice the employee that an increment withholding would follow. The mere grant of such a leave request does not mean that a board must then and there determine if an increment withholding would result. The board at any and all times prior to the commencement of the next school year has the right to assess the total attendance pattern of a staff member and to make a determination to withhold an increment based on the person's total attendance pattern involving both paid and unpaid absences.

Accordingly, the Board is ordered to restore to petitioner any salary increment withheld from her during the 1988-89 school year for the reasons expressed in the initial decision as modified above.

IT IS SO ORDERED.

May 11, 1989

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ON CROSS-MOTIONS FOR PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 3846-88
AGENCY DKT. NO. 93-4/88

SOUTH PLAINFIELD EDUCATION ASSOCIATION AND SOUTH PLAINFIELD EDUCATIONAL SECRETARIES ASSOCIATION,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioners (Klausner, Hunter & Oxfeld, attorneys)

Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: March 8, 1989 Decided: March 29, 1989

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This matter involves the Board's termination of certain employees as part of a reduction in force ("RIF").

This decision relates only to petitioner Joseph Ascolese, who is certified as a physical education teacher and who, prior to the RIF, was employed by the Board as an attendance officer from 1984 to 1988. Petitioner Ascolese claims that he was a teaching staff member and that he has acquired tenure and seniority. Petitioner Ascolese also claims that his seniority exceeds that of others employed as physical education teachers. He therefore moves for an order requiring the Board to employ him as a physical education teacher instead of other non-tenured teachers who serve in that position. See, N.J.S.A. 18A:28-4, N.J.S.A. 18A:28-5, N.J.S.A. 18A:28-9, N.J.S.A. 18A:28-11, N.J.S.A. 18A:28-13 and N.J.A.C. 6:3-1.10.

The Board denies that petitioner Ascolese was a "teaching staff member" and submits that he has no tenure. The Board therefore moves for dismissal of the petition's fourth count, which describes Ascolese's claim in that regard.

The Board also moves for dismissal of the petition's fifth count, wherein petitioner Ascolese claims that the elimination of his position as attendance officer violated N.J.S.A. 18A:38-32, and demands an order of reinstatement on that basis.

The Board submits that, since it eliminated the position for reasons of economy and since it has assigned the attendance officer's duties to qualified persons, the elimination must be held to be proper and legal.

PROCEDURAL HISTORY

On January 13, 1988, the Board notified petitioners that they would be terminated effective February 15, 1988, as part of a reduction in force ("RIF").

On April 13, 1988, a petition of appeal was filed with the Department of Education. N.J.S.A. 18A:6-9. On May 23, 1988, the Board's answer and defenses were filed.

The matter was transmitted to the Office of Administrative Law ("OAL") where, on May 24, 1988, it was filed as a contested case. N.J.S.A. 52:14F-1 et seq. On October 13, 1988, a prehearing order was entered.

The parties' attorneys jointly requested adjournment of the originally scheduled hearing date so that a motion and cross-motion for summary decision could be filed and decided. On January 20, 1989, the Board's notice of motion for

partial summary judgment, certification, exhibits and brief were filed in the OAL. The Board's motion seeks dismissal of the petition's fourth and fifth counts. On February 14, 1989, the petitioners' letter/notice of cross-motion for summary decision and exhibits were filed. The petitioners seek summary decision in their favor relative to the fourth and fifth counts. On February 23, 1989, the Board's reply letter brief and an exhibit were filed. On March 1 and 8, 1989, the petitioners submitted copies of a Commissioner's decision and Board minutes.

FACTUAL DISCUSSION

Based upon the certification and exhibits submitted by the parties, I **FIND** the following **FACTS**:

Petitioner Ascolese, a certified physical education teacher, initially became employed by the Board as a high school attendance officer, for the period from September 1, 1984, to June 30, 1985. (See, B-1 and B-4.) The Board's "job description" required a "New Jersey Teaching Certification"; however, it described no teaching assignment for the position. (See, P-1 and B-4.) Petitioner Ascolese's contributions and credits in the Teachers' Pension and Annuity Fund ("TPAF"), which he had obtained in a previous teaching position, were transferred to the Public Employees' Retirement System ("PERS") and, during his service as an attendance officer for the Board, petitioner Ascolese obtained further credit in PERS.

For the period from September 1, 1985, to June 30, 1986, petitioner Ascolese was again employed by the Board as a high school attendance officer. (See, P-2.) The job description for the position remained the same. Petitioner Ascolese also served in extracurricular positions as head football coach and head girls' track coach during this period.

For the above two periods, (a) the contracts between the Board and petitioner Ascolese utilized the same form as was utilized for the professional teaching staff, although petitioner Ascolese was clearly designated as an "attendance officer" and not a teacher (see, P-2 and B-4); (b) petitioner Ascolese's salary was controlled by the Board's teacher salary guide; and (c) petitioner Ascolese received reports of evaluation of his performance on the same forms as those used for the professional teaching staff, although he was clearly designated as an "attendance officer" and not a teacher. (See, P-4.)

For the periods from July 1, 1986, to June 30, 1987, and July 1, 1987, to June 30, 1988, petitioner Ascolese was employed in the Board's newly-created position of "district" attendance officer at negotiated salaries unrelated to the Board's teacher salary guide. During these periods, petitioner Ascolese's duties were the same as before, except that they were expanded to include the Board's entire district. (See, P-1 and B-5.)

In December 1987, the Board developed a plan to reduce spending to avoid a budget deficit projected for the end of the 1987-88 school year. (See, B-1, paragraphs 2 and 3.) The plan included a reduction in force ("RIF") of teaching and non-teaching employees, including petitioner Ascolese.

On December 15, 1987, employees, including petitioner Ascolese and the presidents of the petitioner associations herein, signed an agreement waiving the usual 60-day notice of termination of employment and agreeing to a reduction in the time for the notice from 60 to 30 days. In conjunction with this agreement, petitioners intended to develop and submit to the Board an alternate plan to avoid the RIF. (See, B-1, paragraph 2, and B-2.)

On January 12, 1988, the Board determined that the RIF was required and that the positions of employees--including petitioner Ascolese, who was salaried at $48,250 per year--would be eliminated effective February 15, 1988. (See, B-1, paragraph 3, and B-2.) The attendance officer duties were then assigned to Board administrators.

Contending that he had been employed by the Board for the equivalent of more than three academic years within a period of four consecutive academic years, petitioner Ascolese submitted that he was tenured as a teaching staff member and that he was entitled to seniority and employment over non-tenured physical education teachers employed by the Board. He therefore demanded that the Board employ him as a physical education teacher. The Board, however, determined that petitioner Ascolese was not tenured, and it rejected his demand. See, N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-9 et seq.

LEGAL DISCUSSION AND CONCLUSIONS

The motion for summary disposition is an efficient means of disposing of litigation. It is available when there are no genuine issues of material fact and the decision is to be made solely on legal issues. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954); R. 4:46-1; N.J.A.C. 1:1-12.5. The petition's fourth and fifth counts are ripe for such disposition.

I. The Issues of Whether Petitioner Ascolese Was a Teaching Staff Member and Whether He Has Acquired Tenure

A tenured teaching staff member whose position had been abolished as part of a RIF would be entitled to preference over someone without tenure with the same certification who was also applying for the same position. See, N.J.S.A. 18A:28-9 et seq.; Capodilupo v. W. Orange Tp. Bd. of Ed., 218 N.J. Super. 510, 515 (App. Div. 1987); and Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 242 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988).

The tenure provisions in school laws were designed to aid in the establishment of a competent and efficient school system by affording to teaching staff members a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215, 218 (App. Div. 1949). However, in order to acquire the security of permanent employment by tenure, a teaching staff member must comply with the precise conditions set forth in the statute. Zimmerman v. Newark Bd. of Ed., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 9 L.Ed. 2d 502, 83 S.Ct. 508 (1963).

Petitioner Ascolese submits that he was a teaching staff member and that, as such, he acquired tenure. (See, Petition, Fourth Count.)

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse. [N.J.S.A. 18A:1-1; emphasis added]

The Legislature has set the requirements for tenure for a teaching staff member 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 school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years; [N.J.S.A. 18A:28-5; emphasis added]

The Legislature has distinguished attendance officers from teaching staff members and has reserved the acquisition of tenure for attendance officers in city districts. See, N.J.S.A. 18A:38-32 et seq. Petitioner Ascolese cannot obtain tenure as an attendance officer in the Borough of South Plainfield. Makulinski v. Harrison Bd. of Ed., 1977 S.L.D. 1114. See also, Quinlan v. North Bergen Tp. Bd. of Ed., 73 N.J. Super. 40 (App. Div. 1962).

The Board submits that petitioner Ascolese performed only as an attendance officer and never performed as a teacher. The Board offered the following facts in support of the conclusion that petitioner Ascolese was not a teaching staff member: (1) as an attendance officer who, e.g., has the power of arrest pursuant to N.J.S.A. 18A:38-29, petitioner Ascolese's performance was akin to that of a policeman and not a teacher; (2) petitioner Ascolese's salary for his last two contracts was negotiated without reference to the teacher's salary guide; (3) upon assuming his position as attendance officer, petitioner Ascolese's previous credits and

contributions in TPAF were transferred to the PERS. N.J.A.C. 17:3-2.1, promulgated pursuant to N.J.S.A. 18A:66-1 et seq., which established TPAF, requires that an employee in a "teaching or professional staff [position] shall be required to become a member of" TPAF, and the regulation does not include attendance officer among its 44 "eligible positions." Therefore, the Board urges that petitioner Ascolese cannot be a teaching staff member.

Relative to (1), (2) and (3) above, while individually these facts are not dispositive of petitioner Ascolese's status, they are factually consistent with the conclusion that he was not a teaching staff member.

Petitioner Ascolese also submits that the following facts require the conclusion that he was a teaching staff member: (1) petitioner Ascolese's contracts utilized the same form that was used for the professional teaching staff; (2) in his first two periods of employment as an attendance officer, petitioner Ascolese's salary was controlled by the Board's teacher's salary guide; (3) petitioner Ascolese's reports of evaluation were recorded on the same forms as those used for the professional teaching staff; (4) petitioner Ascolese served in the extracurricular positions of head football coach and head girls' track coach.

Relative to (1) and (3) above, I note that petitioner Ascolese is clearly identified as an attendance officer and not a teacher. Relative to (2) above, I note that petitioner Ascolese's salary, relative to his last two contracts, was negotiated independently from that of the teachers. Relative to (4) above, the Commissioner has previously provided that service in extracurricular positions such as a coach, without more, cannot elevate someone into the status of a teaching staff member.

Petitioner Ascolese quotes the Commissioner in Vanderhoof v. Scotch Plains-Fanwood Regional School District, OAL Dkt. 5200-86 (March 11, 1987), rev'd, Comm. of Ed. (April 15, 1987), for the proposition that "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, position, it is a tenure-eligible position under Spiewak v. Rutherford . . ." (Comm. dec. at 14). See also, N.J.A.C. 6:11-3.6(b), empowering the county superintendent to make a determination of the appropriate certification and title for a position unrecognized in N.J.A.C. 6:11-1.1 et seq.

However, Vanderhoof, and the other Commissioner's cases cited by petitioner involved persons who were teaching or, e.g., assisting students in the completion of assignments from their regular teachers.

There is no dispute that petitioner Ascolese has a teaching certificate and that he has served the equivalent of more than three academic years within four consecutive academic years. However, the Board points out that, although its own "job description" for the position of attendance officer required a "New Jersey Teaching Certification," State regulations (N.J.A.C. 6:11-6.2) do not provide for a teaching endorsement or authorization for an attendance officer. Instead, N.J.S.A. 18A:38-32 provides that a board shall appoint as an attendance officer merely a "qualified person," and does not mention certification.

A local board's policies and requirements cannot supersede statutory requirements or departmental regulations. Therefore, I **CONCLUDE** that the Board's "requirement" of a teaching certificate for an attendance officer position did not elevate the position to that of "teaching staff member," as contemplated by the Legislature when it provided for acquisition of tenure. Further, petitioner Ascolese cannot acquire a teaching staff member's tenure and seniority without "actual service" in the particular position for which he is certified, i.e., physical education teacher. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 369 (1983). He has shown no such service.

The Legislature has reserved the acquisition of tenure to limited groups of employees and on ad hoc bases. Each legislative grant is sui generis. Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83, 87 (App. Div. 1978).

I **CONCLUDE** that petitioner Ascolese, who cannot acquire tenure as a borough school attendance officer, is not a teaching staff member and therefore also did not acquire tenure pursuant to N.J.S.A. 18A:28-5.

I **CONCLUDE** that petitioner Ascolese's claim in this regard must be dismissed with prejudice.

II. The Issue of Whether the Board's Elimination of Petitioner Ascolese's Attendance Officer Position Violated N.J.S.A. 18A:38-32

N.J.S.A. 18A:38-32 provides:

> For the purpose of enforcing the provisions of this article, the board of education of each school district and the board of education of each county vocational school shall appoint a suitable number of qualified persons to be designated as attendance officers, and shall fix their compensation; except that if a county attendance officer or officers are appointed for any county, any district board of education of such county may be exempt from the appointment of a local attendance officer if such exemption is approved by the county superintendent. Each board shall make rules not inconsistent with the provisions of this article and subject to the approval of the commissioner, for the government of the attendance officers. [emphasis added]

Petitioner Ascolese submits that the Board violated the above statute by its RIF elimination of his position as district attendance officer and that the Board is obliged to reestablish the position and reinstate him in it. (See, Petition, Fifth Count.)

The Board cites Charles Arangio v. Clifton Bd. of Ed., 1978 S.L.D. 207, wherein a board, for reasons of declining student enrollment and economy, eliminated the petitioner's position as tenured attendance officer and assigned the duties of that position to other employees. The Commissioner found the Board's action to be proper and legally correct.

The Commissioner's Arangio decision is also consistent with the proposition that a board has broad discretionary authority--e.g., in the matter of employment--which is usually entitled to a presumption of correctness. See, Schinck v. Westwood Bd. of Ed., 60 N.J. Super. 448 (App. Div. 1960); Quinlan v. N. Bergen Tp. Bd. of Ed., 73 N.J. Super. at 46.

Here the Board, for reasons of economy, eliminated an attendance officer's position but, as in Arangio, assigned those duties to other qualified employees, i.e., school administrators.

I **CONCLUDE** that the Board did not violate N.J.S.A. 18A:38-32 in it elimination of petitioner Ascolese's position. Parenthetically, as a non-tenured employee, he does not necessarily have a right to continued employment in that position anyway.

I **CONCLUDE** that petitioner Ascolese's claim in this regard must be dismissed with prejudice.

ORDERS

I **ORDER** that (1) the Board's motions for partial summary judgment are granted; (2) petitioner Ascolese's motion for partial summary judgment is denied; and (3) the petition's fourth and fifth counts are dismissed with prejudice.

This order granting and denying partial summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make the final decision in this matter. However, if Saul Cooperman does not so act in forty-five 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 30, 1989
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

March 30/89
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 3 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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SOUTH PLAINFIELD EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and partial initial decision rendered by the Office of Administrative Law have been reviewed. The Education Association on behalf of its member, Joseph Ascolese, filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto. The Association's reply to the Board's reply exceptions were not considered in that there is no provision in law permitting such filings.

Petitioner Ascolese first records his interpretation of the facts. He avers, inter alia, that he was initially employed by the Board effective September 1, 1984 "as a teacher assigned as Attendance Officer (Exhibit B) under a ten month teacher contract of employment (compare Exhibit C)." (Exceptions, at p. 1) He also avers that the attendance officer job description was approved by the Board at its May 12, 1982 meeting and "presumably, in compliance with law, was submitted to the Middlesex County Superintendent of Schools for her approval pursuant to N.J.A.C. 6:11-3.6 (Exhibit D)." (Id.) He claims at the time of his severance, as a result of a RIF, he had been employed for more than three academic years and that the Board employed nontenured physical education teachers at the time of the RIF.

Citing N.J.S.A. 18A:28-5, 18A:1-1 and Shirley Vanderhoof v. Scotch Plains-Fanwood Regional School District, decided by the Commissioner April 15, 1987, aff'd State Board June 1, 1988 (appeal pending Appellate Division) among other cases, petitioner iterates his argument that as a holder of a valid teaching certificate, which was required for the position he held as attendance officer, he acquired tenure as a teaching staff member in the district. Petitioner also cites Jennings v. Highland Park Board of Education, decided by the Commissioner February 27, 1989 in support of his position that because he held the teaching certificate required, he, like Petitioner Jennings, accrued tenure in the position to which he was assigned.

Petitioner further avows that the Board has no policy or requirements that supersede statutory requirements or departmental regulations, in rebuttal to the ALJ's conclusion in the initial decision that the "Board's 'requirement' of a teaching certificate

for an attendance officer position did not elevate the position to that of 'teaching staff member,' as contemplated by the Legislature when it provided for acquisition of tenure." (Exceptions, at p. 6, citing Initial Decision, ante) "Rather, South Plainfield's Board of Education has interpreted its legislative grant of authority to 'appoint a suitable ... qualified person to be designated as attendance officer...' N.J.S.A. 18A:38-32, to mean on possessing a teaching certificate." (Exceptions, at p, 7)

The remaining arguments raised in petitioner's exceptions are a verbatim recitation of the arguments posed in his letter brief in Support of Petitioner's Cross-Motion for Partial Summary Decision and in Opposition to Respondent, Board of Education of the Borough of South Plainfield's Motion for Partial Summary Decision and are incorporated herein by reference.

By way of reply exceptions the Board contends the ALJ's analysis of the case is accurate and his "conclusion -- that Mr. Ascolese did not and could not obtain tenure by being an Attendance Officer -- is unassailable." (Reply Exceptions, at p. 2) The Board avers, however, that petitioner's exceptions raise factual assertions that are not contained in the record as follows:

> Page 1, Para. 2:
>
> Petitioner refers to Ascolese's initial employment as that of a "teacher assigned as an Attendance Officer . . ." This is not accurate. The Employment Contract of September 1, 1984*** clearly shows that Ascolese was employed "to act as an Attendance Officer . . ." The word "teacher" does not appear on the Contract.
>
> Page 1, Para. 2:
>
> The information as to the previous incumbent is not in the record and is irrelevant.
>
> Page 1, Para. 2:
>
> There is nothing in the record to substantiate Ascolese's presumption, in the last four lines of this paragraph, that the Attendance Officer position was submitted to the County Superintendent. That was not required by any regulation.
>
> Page 1, Para. 2:
>
> The assertions as to the "success" of the position and the comparison of the high school and district positions are not found in the record.

Page 2, Para. 2:

> The record does not support Ascolese's statement that he asserted a tenure claim in December, 1987, prior to his termination. (Id., at pp. 2-3)

Moreover, the Board claims that Petitioner's reliance on Jennings, supra, is misplaced in that Jennings was engaged in actual teaching in a position for which certification and a specific endorsement is obtainable. The Board claims that, in the case at bar, there is no certification or endorsement available for the attendance officer position. Further, Mr. Ascolese's position did not involve teaching related duties, unlike the position occupied by Jennings.

By way of conclusion, the Board submits that the ALJ

> correctly noted that the Legislature has specifically addressed the position of Attendance Officer and has set forth the only situation (a city district) in which an Attendance Officer may acquire tenure. He has also set forth the facts showing that Petitioner Ascolese was not functioning as a teacher for the South Plainfield Board of Education at any time. (emphasis in text) (Id., at p. 5)

The Board seeks adoption of the partial initial decision.

Upon his careful and independent review of the record, the Commissioner adopts the initial decision for the reasons stated therein as clarified below.

As to the issues of whether Petitioner Ascolese was a teaching staff member and whether he acquired tenure, the Commissioner would first correct the ALJ's recitation of the holdings of Capodilupo v. West Orange Tp. Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), cert. den. 109 N.J. 514 (1987) and Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987), cert. denied 110 N.J. 512 (1988). A correct interpretation of the court's conclusion in those cases would be that a tenured teaching staff member whose position had been abolished as a part of a RIF would be entitled to preference over someone without tenure who sought to serve or was serving under the same endorsement, not with the same certificate, as the ALJ suggests. (See Initial Decision, ante)

In resolving whether Petitioner Ascolese was a tenured teaching staff member pursuant to N.J.S.A. 18A:28-5 and 18A:1-1, the Commissioner must first consider whether the Board's requirement that he hold an instructional certificate establishes the criteria expressed by the court in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) for the acquisition of tenure:

> By the express terms of these statutes [N.J.S.A. 18A:28-5 and N.J.S.A. 18A:1-1], an employee of a board of education is entitled to tenure if

> (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time. (at 74)

The key to a determination in this matter lies in interpreting the first prong of the Spiewak test, that is, that one is entitled to tenure if he or she "***works in a position for which a teaching certificate is required". (at 74) In reviewing this language, the question arises concerning from what source the requirement to hold a teaching certificate stems. Petitioner argues that if the Board requires he hold an instructional certificate, regardless of the nature of the duties he performs, he is therefore entitled to the status of teaching staff member and, further, that the position he holds under such instructional certificate is thus tenure eligible. The Commissioner rejects this position.

In the Commissioner's view, the language "works in a position for which a teaching certificate is required" (at 74) must also be dictated by the nature of the duties to be performed by the individual who serves in a given position. For example, N.J.S.A. 18A:17-3 permits a public school janitor, unless he or she is appointed for a fixed term, to serve under tenure during good behavior and efficiency. However, were the employing board to require said janitor to hold an instructional certificate, he or she would not, by merely meeting the board's requirement, be embued with the status of teaching staff member because janitorial duties in no way are similar to those of a teaching staff member.

Similarly, the Commissioner finds and determines in reviewing the record of this matter, in particular the job description admitted into the record as Exhibit D, that the duties performed by Petitioner Ascolese as an attendance officer are not consistent with those performed by a teaching staff member. In this conclusion the Commissioner is in accord with the ALJ. (See Initial Decision, ante)

Moreover, the Commissioner finds that this conclusion is consonant with case law such as Lori Boehm v. Board of Education of the Township of Pennsauken, 1984 S.L.D. 1113. Therein the Commissioner acknowledged petitioner's status as a teaching staff member in the position in which she served. However, the Commissioner specifically cited the fact that she was not only required to hold an instructional certificate, but actually performed the duties of a teaching staff member. See Boehm, at pages 1115, 1116, 1119, 1133; see also Vanderhoof, supra, and Jennings, supra. It is clear from the record in this matter that Petitioner Ascolese performed no such duties. See Exhibit D and Initial Decision, at pages 6-7. Moreover, the Commissioner concurs with the ALJ that extracurricular duties such as coaching, without more, will not "elevate someone into the status of a teaching staff member." (Initial Decision, ante) Neither is participation in a pension plan dispositive of status as a teaching staff member.

Petitioner also argues that the Board violated N.J.S.A. 18A:38-32 by having eliminated his position pursuant to a RIF and therefore, that the Board is obliged to reestablish his position as district attendance officer and to reinstate him to it. The Commissioner rejects this argument for the reasons which follow.

N.J.S.A. 18A:38-32 permits boards of education to appoint attendance officers. N.J.S.A. 18A:38-33, which speaks to attendance officers in city districts, addresses tenure for city attendance officers. Since South Plainfield is not a city, N.J.S.A. 18A:38-33 has no application in resolving whether Mr. Ascolese is a tenured employee in the South Plainfield School District. Neither does N.J.S.A. 18A:38-32 provide any guidance in resolving the instant matter since in non-city districts, such as South Plainfield, no provision exists granting attendance officers tenure.

In this regard, the Commissioner finds the ALJ's reference to Charles Arangio v. Clifton Bd. of Ed., 1978 S.L.D. 207 inapposite to this matter. In Arangio, petitioner was tenured in his position as attendance officer by virtue of N.J.S.A. 18A:38-33 in that Clifton is a city. Thus, the city is empowered by statute to grant tenure to its attendance officers; however, that power does not extend to the granting of tenure as a teaching staff member. Moreover, even assuming arguendo that it did apply, N.J.S.A. 18A:38-33 confers tenure as an attendance officer, not as a teaching staff member. Therefore, a board's "broad discretionary authority -- e.g., in the matter of employment ***" (Initial Decision, ante) cannot extend and does not extend to embuing an employee with the benefit of being a teaching staff member merely by requiring that he hold an instructional certificate.

In any circumstances where the question of whether an employee is a teaching staff member arises, the regulations clearly provide that unrecognized titles are to be forwarded to the county superintendent for determination of the appropriate certificate, if any, for the position. See N.J.A.C. 6:11-3.6(b). While in this instance an attendance officer position is a title recognized in statute, it is not one which, pursuant to statute, accords its holder the status of teaching staff member. Consequently, had the Board believed that said status was justified, it bore the responsibility to seek the advice and consent of the county superintendent. Had the Board sought the opinion of the county superintendent the issue of the permissibility of elevating the attendance officer position to the status of teaching staff member would not have arisen.

Although petitioner accepted the position as attendance officer in good faith upon the assurances of the Board that the position was that of a teaching staff member and, thus, was tenure eligible, the Commissioner is in accord with the ALJ that Petitioner Ascolese performed no duties requiring a certificate. Thus, he concludes, as did the ALJ, that "the Board's 'requirement' of a teaching certificate for an attendance officer position did not elevate the position to that of 'teaching staff member,' as contemplated by the Legislature when it provided for acquisition of

tenure." (Initial Decision, ante) He further agrees with the ALJ that without actual service in a position for which he is certified and endorsed, Petitioner Ascolese cannot acquire a teaching staff member's tenure and seniority under that endorsement, specifically, physical education.

The Commissioner would emphasize that a board does not have authority to accord the status of teaching staff member upon its employees. Notwithstanding that the Board, strictly on legal grounds, has prevailed in this matter, the Commissioner would express his grave concern over the cavalier manner in which the Board has acted in attempting to circumvent statutes relative to tenure eligibility. In this regard, the South Plainfield Board on this case is to be chastised for having brought into its employ an attendance officer and having required he hold an instructional certificate. For whatever its reasons, the Board acknowledged and compensated him as a teaching staff member because Petitioner Ascolese did hold an instructional certificate. On the other hand, when it became necessary to eliminate petitioner's position, the Board absolved itself of any responsibility for having lulled petitioner into the belief that he was a teaching staff member. He further notes that less than a year ago, the South Plainfield Board demonstrated impermissible laxity in arguing against tenure acquisition of an employee who had served for 15 years in the district as CIE coordinator suggesting such denial of tenure was justified because petitioner's assignment as CIE coordinator was not effectuated by Board resolution. See Sam Ayoub v. Board of Education of the Borough of South Plainfield, Middlesex County, decided by the Commissioner May 24, 1988. The Board is admonished to be diligent in strictly conforming with the dictates of statute and regulation pertaining to tenure eligibility and acquisition.

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

COMMISSIONER OF EDUCATION

May 15, 1989

SOUTH PLAINFIELD EDUCATION ASSOCIATION AND SOUTH PLAINFIELD EDUCATIONAL SECRETARIES ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 15, 1989

For the Petitioners-Appellants, Klausner, Hunter and Oxfeld
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Wilentz, Goldman & Spitzer
(Robert J. Cirafesi, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. We fully concur, as emphasized by the Commissioner, that "the Board's 'requirement' of a teaching certificate for an attendance officer position did not elevate the position to that of 'teaching staff member,'" Commissioner's decision, at 20. See Rumson-Fair Haven Education Association, et al. v. Rumson-Fair Haven Regional School District Bd. of Ed., decided by the State Board of Education, August 5, 1987, aff'd, Docket #A-291-87T8, slip op. at 8 (App. Div. 1988).

However, insofar as the specific issue is not before us in this appeal, we need not address the validity of the dicta expressed by the Commissioner suggesting that the scope of the position in which a teaching staff member achieves tenure is defined by the endorsement under which the individual has served, Commissioner's decision, at 21, rather than the certificate under which he or she is employed, and in the absence of any cited authority to that effect, we make no determination as to whether that is a valid expression of the law.[1] See Capodilupo v. West Orange Bd. of Ed.,

[1] We note that Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983), cited by the Administrative Law Judge in his Initial Decision in this matter, dealt only with the seniority rights of tenured teaching staff members accruing from actual service in a particular position for which the individual is certified.

decided by the State Board of Education, September 3, 1986, slip op. at 7-8, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987); Howley v. Bd. of Ed. of the Township of Ewing, decided by the Commissioner, 1982 S.L.D. 1328, 1337, aff'd by the State Board of Education, 1983 S.L.D. 1554.

October 4, 1989

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8457-88
AGENCY DKT. NO. 312-9/88

S.M.F.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE and LAWRENCE MENDELOWITZ,

Respondents.

Robert Saul Molnar, Esq., for petitioner

Frank N. D'Ambra, Esq., for respondents
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 27, 1989 Decided: March 30, 1989

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

Petitioner, a 9-year old pupil, alleged the Wanaque Board of Education denied her a thorough and efficient education pursuant to Article VIII, Section 4, paragraph 1 of the New Jersey Constitution by its arbitrary denial of her admission into the district's cross-grading program for gifted and talented children, and seeks tuition reimbursement for her attendance at the Solomon Schecter Hebrew Day School and current enrollment as a fourth grade pupil in the Pompton Lakes public schools on a non-resident tuition paying basis, which followed her unilateral withdrawal from respondent's school district.

Respondents deny the allegation and seek dismissal of the Petition.

The Petition was initially filed with the Division of Special Education on September 19, 1988, but was forwarded by the latter to the Commissioner of Education on September 21, 1988. The Commissioner transmitted the matter to the Office of Administrative Law as a contested case on November 18, 1988, pursuant to N.J.S.A. 52:14F-1 et seq. A telephonic prehearing conference was held on January 24, 1989 at which, inter alia, the matter was set down for plenary hearing on April 19, 20, and 21, 1989.

Respondents filed a Motion for Summary Decision on March 8, 1987 with an accompanying Brief and Affidavits. Responsive papers with accompanying Affidavits were filed pursuant to N.J.A.C. 1:1-12.2 and the record on the Motion was closed on March 27, 1989.

FINDINGS OF FACT

The following factual contentions, deemed to be relevant herein, result from admissions in the pleadings, stipulations incorporated in the Prehearing Order, and careful scrutiny of briefs and affidavits:

1. S.M.F. was admitted to the first grade in respondent's school district in September 1985, as a result of a professional judgment by agents of the Board, notwithstanding that she was below age for first grade entry.

2. S.M.F. was born November 7, 1979.

3. Primary pupils have been cross-graded in respondent's school district since 1980 when deemed appropriate by properly certified teaching staff members employed by respondent.

4. The respondent school district incorporates a program in its curriculum for gifted, creative, and talented (GCT) pupils beginning with grade 3 that are deemed eligible by its certified teaching staff members by meeting in-district criteria.

5. The mother of S.M.F. expressed concern, when S.M.F. entered the second grade in 1986, for a more challenging program and requested cross-grading and early entry into GCT.

6. The principal and second grade teacher of S.M.F. determined that cross-grading was neither necessary or appropriate with concerns related to S.M.F.'s emotional and social development.

7. Admission into GCT was denied for S.M.F. as eligibility begins with a pupil's entry into the third grade.

8. S.M.F. was unilaterally withdrawn from respondent's school district upon termination of the 1986-87 school year.

ARGUMENTS OF COUNSEL

The Board's principal argument is the absence of any constitutional, statutory or regulatory requirement that a pupil be cross-graded or admitted to a GCT program. It recognizes its obligation to provide educational opportunities and an instructional program to meet the needs of pupils with exceptional talent, interests, and abilities. It adamantly argues, however, that such an obligation does not require it to admit a pupil upon request of a parent when the professional judgment of its certified teaching staff members indicates that the granting of such a request is not in the best educational, social, and/or educational development of the pupil at the time the request is made, nor is there any obligation to accede to the disputed opinion of a parent.

Petitioner argues the matter is not ripe for summary decision as there are disputed issues of material fact, and that she should have the right at trial to prove that she was misled by respondents as to the existence of cross-grading and that she was discriminated against and prejudiced by her failure to receive such cross-grading.

Petitioner's argument of disputed material facts results from conflicts incorporated in Affidavits and Certifications.

Petitioner also cites case law which incorporates the authority of the Commissioner to reimburse tuition costs upon a unilateral withdrawal of a pupil from the public school district, and refers to M.D. and R.D. v. Board of Education of the City of Rahway, 76 S.L.D. 323, and Board of Education of the Village of Ridgewood v. Hecht, 80 S.L.D. 1260.

DISCUSSION

Case law cited by petitioner is easily distinguishable from the instant matter as they both refer to classified special education pupils deemed to be handicapped (perceptually impaired and emotionally disturbed). The regulatory scheme concerning reimbursement is not applicable to S.M.F. as she is neither handicapped or classified as a special education pupil.

The Constitution of the State of New Jersey and the statutory and regulatory schemes duly promulgated and adopted does require local boards to develop programs under the thorough and efficient mandate to meet the individual educational, emotional, and social needs of its pupils. However, there is no mandate that a local board accede to parental requests to admit a particular pupil into such programs. Local boards must retain its discretionary authority to make such determinations pursuant to that authority vested by the Legislature in N.J.S.A. 18A:11-1, which states:

> The Board shall —
>
> a. Adopt an official seal;
>
> b. Enforce the rules of the state board;
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

It is well established, however, that the Commissioner shall set aside a Board determination upon a finding that its action was arbitrary, capricious or unreasonable.

I am satisfied that the determinations of certified teaching staff members Savage and Mendelowitz that cross-grading of S.M.F. in grade 2, in light of her early admission to grade 1, was not in S.M.F.'s best interest, and was neither arbitrary, capricious, or unreasonable.

I am also satisfied that the Board's denial of S.M.F.'s request to be admitted to the GCT program prior to grade 3 was consistent with its policy and neither arbitrary, capricious, or unreasonable.

It is conceded here that factual disputes are to be found in the Affidavits/Certifications. The mother of S.M.F. and Mendelowitz disagree as to whether the latter told the former there was no cross-grading. Mother denies that teacher Savage provided S.M.F. with supplemental materials. Mother and the GCT teacher dispute the substance of conversations concerning S.M.F.'s eligibility for the GCT program. Mother and the GCT teacher disagree concerning whether the latter told the former that unilateral withdrawal of S.M.F. was the right thing to do. However, I **FIND** such disputed facts to be de minimus and not related to the principal issues herein, and therefore not genuine issues of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

SUMMARY OF FINDINGS AND CONCLUSIONS OF LAW

I **FIND** the Board of Education of Wanaque has not violated the thorough and efficient education mandate of the New Jersey Constitution or the statutory and regulatory schemes related thereto. I **ALSO FIND** the Board's denial of the cross-grading of S.M.F. in grade 2 and denial of her admission to the GCT program prior to grade 3 was a proper exercise of its discretionary authority. I **FURTHER FIND** that tuition reimbursement for the attendance of S.M.F. at either Solomon Schector or at the Pompton Lakes public school as a non-resident upon the unilateral withdrawal of S.M.F. from respondent's school district is not warranted or authorized as a matter of law.

I **CONCLUDE** that Summary Decision is **GRANTED** to the Wanaque Board of Education. **IT IS THEREFORE ORDERED** that the Petition of Appeal shall be and is hereby **DISMISSED WITH PREJUDICE.**

The plenary hearing scheduled for April 19, 20 and 21, 1989 is hereby **ADJOURNED.**

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 Commissioner 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.

30 March 1989
DATE

WARD R. YOUNG ALJ

4/3/89
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

APR 4 [redacted]
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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S.M.F., through her guardian ad litem, A.F.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE AND LAWRENCE MENDELOWITZ, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

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

It is observed that petitioner's exceptions to the initial decision, as well as the Board's reply to exceptions, were filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of petitioner's exceptions to the initial decision, it is evident that primary emphasis is focused upon those alleged actions of S.M.F.'s second grade teacher and the principal of the school, who petitioner claims deprived her daughter of a thorough and efficient education by their failure to apprise her as to the existence of a cross-grading system or a gifted and talented program for pupils which commenced at the third grade level. Such failure to provide this timely information, petitioner claims, was discriminatory and prejudicial insofar as it prompted her to remove S.M.F. from respondents' school system and enroll her elsewhere in order to receive the advanced educational programs which, petitioner maintains, S.M.F. is entitled to receive.

It is petitioner's contention that those operative facts in dispute, pertaining to the conduct of S.M.F.'s second grade teacher in refusing to give her daughter supplemental classwork and homework, coupled with her lack of qualifications to evaluate and assess S.M.F.'s emotional and social development, are relevant to the final disposition of this case. Petitioner therefore argues that the ALJ's failure to consider certain issues of material fact in this case and to grant summary judgment in the Board's favor is clearly in error.

The Board, on the other hand, rejects each and every exception filed by petitioner and incorporated by reference herein. In this regard, the Board maintains that petitioner acted at her own peril when she removed S.M.F. from the Wanaque School District in the fall of 1987, at which time S.M.F. would have entered the third grade and would have been eligible for the gifted and talented

program, which commences at the third grade level. It is for this reason that the Board rejects petitioner's claim that it denied S.M.F. a thorough and efficient program of education or that its actions were in any way illegal or improper. The Board therefore urges the Commissioner to affirm the findings and conclusion of the ALJ in recommending that summary judgment in its favor be granted in this matter.

The Commissioner, upon review of the respective positions of the parties to the initial decision, is not persuaded by those exceptions to the initial decision filed by petitioner urging him to reject the initial decision on the grounds that relevant factual issues remain in dispute.

Accordingly, the Commissioner finds and determines that the ALJ correctly found and concluded that the facts relevant to the issues in this matter are susceptible to summary disposition. The Commissioner adopts as his own the findings and conclusion in the initial decision and hereby dismisses the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

May 16, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 927-88
AGENCY DKT. NO. 22-2/88

BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOLS,
Petitioner,
v.
MARLENE HERSHKOWITZ,
Respondent.

Anthony P. Sciarrillo, Assistant County Counsel, for petitioner
(H. Curtis Meanor, Acting County Counsel)

Karen L. Jordan, Esq., for **William S. Greenberg**, Esq. (oral argument), for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 21, 1989 Decided: April 3, 1989

BEFORE **WARD R. YOUNG**, ALJ

This matter was opened by the certification of charges by the Board of Education of the Essex County Vocational Schools (Board) against tenured teaching staff member Marlene Hershkowitz due to her failure to return to work after the expiration of leaves of absence amounting to two years. The charges are conduct unbecoming, incapacity, insubordination, and chronic absenteeism.

Respondent denies the truth of the charges and seeks their dismissal, or in the alternative, an Order for the Board to make application to the Teachers Pension and Annuity Fund (TPAF) for a disability pension on her behalf.

The matter was transmitted to the Office of Administrative Law as a contested case on February 9, 1988, pursuant to N.J.S.A. 52:14F-1 et seq. and was preheard on March 28, 1988, and set down for plenary hearing on May 23, 24 and 25, 1988. An Order of Inactivation was entered pursuant to N.J.A.C. 1:1-9.7 and on June 23, 1988, the hearing schedule was adjourned "to provide respondent necessary time for medical consultations related to special deterioration and instability to assist in her determination as to her application for disability retirement with T.P.A.F."

Upon the expiration of the period of inactivity on December 23, 1988, in the absence of affirmative intent by respondent, her counsel advised that the matter proceed to plenary hearing, which was then set down for March 21, 22 and 23, 1989.

The Board filed a Motion for Summary Decision prior to the scheduled hearing. Respondent filed a Cross-Motion for Summary Decision and requested oral argument in addition to the filing of briefs. Briefs were filed and oral argument was held on March 21, 1989, at the conclusion of which the record was closed upon a determination there were no relevant or material facts in dispute.

FINDING OF FACTS

The following facts are undisputed and are adopted herein as **FINDINGS OF FACT:**

1. Respondent Hershkowitz was initially employed by the Board of Education of the Essex County Vocational Schools in September 1975 as a school nurse.

2. Hershkowitz was injured in an automobile accident at some time late in the 1975-76 school year.

3. Hershkowitz underwent surgery on June 18, 1976.

4. Hershkowitz returned to work in September 1976.

5. The Board granted Hershkowitz a medical leave of absence without pay but with Board benefits from May 1, 1980 to June 30, 1980.

6. Hershkowitz did not return to work in September 1980.

7. Hershkowitz was injured in a second automobile accident in December 1980.

8. The fact that Hershkowitz had not returned to work after the expiration of her medical leave of absence was brought to her attention in a letter from the Superintendent of Schools under date of March 16, 1981, wherein she was requested to reply as to her intentions.

9. Hershkowitz advised the Superintendent in a responsive letter under date of March 24, 1981, that she was "an inpatient at the New Jersey Orthopedic Hospital" and that a consultation with her "surgeon on April 7" hopefully would determine "when I am to return to work."

10. Hershkowitz's surgeon advised the Superintendent in a letter under date of April 20, 1981, that he "would estimate that her return to work will be on or about September 1, 1981, approximately, but this is merely an estimate."

11. The Superintendent again wrote to Hershkowitz on July 23, 1981, and indicated that he "must have an immediate response as to your intention of returning to work effective September 1, 1981."

12. Hershkowitz advised the Superintendent in a letter under date of August 6, 1981, of her inability to resume her duties on September 1, 1981, and that her surgeon would contact him.

13. Hershkowitz's surgeon advised the Superintendent in a letter under date of August 24, 1981 that she "has not progressed as rapidly or as well as previously anticipated and will not be able medically to return to work as of September 1, 1981."

14. On October 23, 1981, Board Secretary Smith advised Hershkowitz in writing that "I am recommending your termination at the November 17, 1981 Board Meeting" because of "your inability to perform as school nurse through the 1981-82 school year."

15. Counsel for Hershkowitz advised secretary Smith of the statutory requirements under the tenure hearing law in a letter under date of November 3, 1981.

16. Counsel for the Board advised counsel for Hershkowitz that the matter would not be discussed at the Board's November 17, 1981 meeting.

17. The Board granted Hershkowitz a medical leave of absence for the period from September 1, 1981 to May 1, 1982.

18. The Superintendent advised Hershkowitz in a letter under date of January 18, 1982 that "you must return to work on May 3, 1982, at which time your attendance will be closely monitored. Your failure to return on May 3, 1982 will result in formal action for your permanent discharge from employment."

19. The Superintendent, in a letter under date of July 27, 1983, requested Hershkowitz to "inform this office immediately as to your intent to return to your position as school nurse effective September 1, 1983."

20. Acting Principal Southers, in a letter under date of November 5, 1987, requested Hershkowitz to "inform this office immediately as to your status in regard to Essex County Vocational/Technical Schools on or before November 15, 1987."

21. Acting Superintendent Southers filed charges "of conduct unbecoming a teacher, incapacity and other just cause" with the Board Secretary on December 14, 1987.

22. Hershkowitz was absent 33 days due to illness in 1975-76.

23. Hershkowitz was absent 27 days due to illness in 1976-77.

24. Hershkowitz was absent 9.5 days due to illness in 1977-78.

25. Hershkowitz was absent 13 days due to illness in 1978-79.

26. Hershkowitz was absent 68.5 days due to illness in 1979-80 (including unpaid medical leave May 1, 1989-June 30, 1989).

1980 1980

27. Hershkowitz has not reported to work since sometime prior to May 1, 1980.

MEDICAL DIAGNOSIS

The most recent medical reports on Hershkowitz by her own physicians are reproduced here in full. In a May 4, 1988 letter to counsel for Hershkowitz, Dr. James S. Paolino said:

> Ms. Hershkowitz had suffered spinal injuries which required initial surgery in March of 1975 with removal of an intervertebral lumbar disc and a laminectomy in 1975. More extensive surgery was again performed in this same area in 1980. As a result of another injury she required cervical spine surgery in 1977. Worsening of the condition of her lumbar spine resulted in attempt at surgical fusion of the lumbar spine in 1984.
>
> Since the time of her last surgical procedure she has undergone continuous programs of physical therapy and rehabilitation. Her functional state is impaired by pain in the upper and lower back. Neurosurgical and x-ray evaluations have revealed no specific neurological abnormalities but there is evidence of failure of the last lumbar fusion procedure.
>
> At the present time physical examination shows no specific neurological deficits except for some alteration of the tendon reflexes in the lower extremities. However, the patient continues to move with great difficulty and demonstrates recurrent severe pain and episodic numbness in her extremities.
>
> Based on the present anatomical changes that are evident on her x-rays and the present physical examination it is reasonable to anticipate the possibility of progressive improvement in the future. It is unlikely that Ms. Hershkowitz has attained her maximal improvement and it is reasonable to anticipate that with continued rehabilitiation efforts she will attain a functional status that will enable her to live independently and return to gainful employment in her usual occupation as a school nurse.

In a February 15, 1989 letter to counsel for Hershkowitz, Dr. Bernard Jacobs said:

> In reply to your recent request for information concerning the above patient. She has been under my care for many years for treatment of lumbar disc problems. She underwent prior disc surgery, as well as a fusion. Her present condition is that of a failure of the fusion to completely heal, resulting in continued

> pain. In addition, the patient has so-called impingement syndrome of her shoulders which is a condition caused by wearing of tendons. She also has tendon involvement around the wrist. These are all the result of the fact that she is unable to get out of her lying position in bed without using her arms extensively. In terms of her restriction of activity, she should avoid bending from the waist, reaching above her head, sitting on soft or low chairs, and heavy lifting. As for being able to return to her work, I would estimate that she should be able to return to work in about 6 months, depending on whether or not she undergoes a revision of her fusion of the spine.

ARGUMENTS OF COUNSEL

Respondent argues that she "has never refused to perform her duties, she has never affirmatively sought other employment, nor has she failed to respond to the requests of the Board for information," and as a result thereof, the Board has failed to carry its burden to prove abandonment. See, Rb at 10.

Concerning the charge of insubordination, respondent argues that "[t]enured school employees generally may be considered insubordinate only when they willfully disobey the orders of their employers or when they engage in obstructionist conduct." See, Rb at 11. She avers "There is no evidence in this case that Marlene Hershkowitz willfully disobeyed the orders of her superiors at any time. She has never refused to return to her position." See, Rb at 12.

Relative to the charge of incapacity, respondent argues that "[i]n order to prove a charge of incapacity a Board of Education must submit evidence that the teacher is unfit to teach, whether through physical inability or for some other reason." See, Rb at 15. She also argues that the Board never required her to submit to a physical examination pursuant to N.J.S.A. 18A:16-21, and cites In the Matter of the Tenure Hearing of Nancy Bacon, 1978 S.L.D. 776, wherein the Commissioner stated at 780: "[t]he Board's action certifying charges of incapacity based upon respondent's physical health, absent a medical diagnosis from a competent physician, is without merit."

Respondent also argues that, in the event the Board prevails on its charge of incapacity, the Board should be ordered to apply to the Teachers Pension and Annuity Fund (TPAF) for a disability pension on her behalf, and cites In the Matter of the Tenure Hearing of Thomas Healy, 1977 S.L.D. 876, aff'd and modified State Board 1978 S.L.D. 1019. The Commissioner said at 885:

> The Commissioner recognizes respondent's unblemished record of more than seventeen years with the school district and the evidence that he has sought and received medical attention. In the instant matter the overarching responsibility of the Commissioner and the local Board is to the pupils of the Paulsboro School District. Therefore, the Commissioner . . . directs the Board of Education . . . to apply on behalf of respondent, to the Teachers' Pension and Annuity Fund for a disability pension, pursuant to procedure outlined in N.J.S.A. 18A:66-39 et seq.

[It is noted that the Commissioner dismissed Healy as a teacher, and the State Board modified to the extent that Healy's termination "be for reasons of physical and mental incapacity."]

Counsel for respondent at oral argument stated that although respondent's physical injuries presently precludes her employment, such preclusion is not forever; the Board had not requested medical reports prior to the certification of charges; respondent's tenure status cannot be disturbed as a matter of law, if she may return to work at some future time; the administrative law judge (ALJ) is not bound by the State Board's determination In the Matter of the Tenure Hearing of Blanche Sheets, 1979 S.L.D. 790 rev'd State Board 1980 S.L.D. 1536; the Board should be ordered to apply to TPAF for disability retirement on behalf of respondent, and the ALJ should stay his hand until TPAF rules on the application. Counsel indicated that Hershkowitz has not yet determined whether she wishes to apply for disability retirement with TPAF.

Counsel for the Board counters with arguments that Hershkowitz has not returned to work in almost nine years; the Board is unable to fill her position with anticipated permanence because of respondent's tenure status; her physical incapacity to return to work has been deemed to be for an indeterminate period of time by her own physicians, and that her chronic absenteeism is ground for her dismissal from her tenured position.

The Board indicated clearly that it accepts the medical reports of respondent's own physicians as to her physical impairment; and notwithstanding that respondent has not made a decision to apply for disability retirement with TPAF, the Board stands ready to assist her in every possible way if she ever decides to do so.

The Board relies on the State Board decision in Sheets, and the decision of the Appellate Division in Trautwein v. Bound Brook Bd. of Ed., 1980 S.L.D. 1539 in support of its position that chronic absenteeism over a period of years may properly be considered by the Board.

DISCUSSION

Although Hershkowitz was technically insubordinate because she did not report to work following the expiration of leave on May 1, 1982, nor is there any evidence in the record of any response to the Superintendent's letter to her under date of January 18, 1982, I am satisfied that her physical impairment precluded her employment and will not belabor that issue. This also applies to the charge of unbecoming conduct.

The gravamen of this dispute is whether the Hershkowitz record of absenteeism is deemed to be chronic, and if so, may it reasonably be concluded that her record of absenteeism requires a determination of incapacity which may or may not warrant her dismissal from her tenured positions.

Sheets is on point and dispositive of the matter herein. The record of absenteeism of Sheets was deemed to be chronic. Since the record of absenteeism of Hershkowitz far exceeds that of Sheets, it cannot be deemed to be less than chronic. The medical reports from Hershkowitz's physicians are similar to the medical testimony in Sheets, that is, optimism prevailed. As was pointedly stated in Sheets: "Optimism cannot be construed as a high degree of certainty." [at 799]

It was also stated in Sheets at 798:

> The point at which absenteeism is judged to be chronic falls within the prerogative and discretionary authority of the Board subject to a determination by the Commissioner of Education in accordance with N.J.S.A. 18A:6-9.

It must be noted that respondent's arguments that no medical reports were required by the Board prior to its certification of charges as well as her argument that, although currently precluded from employment because of physical impairment, she will someday be able and willing to work, were both addressed in Sheets. The Commissioner said at 800 that:

> The Commissioner is constrained to observe that the only competent medical evidence in this regard which was available to the Board at the time it certified its charge of incapacity against respondent was that it could reasonably expect her to be able to resume her teaching duties.
>
> The record in this matter further reveals that at no time after the certification of the tenure charge against respondent did the Board obtain or produce such medical evidence on its own behalf pursuant to the provisions of N.J.S.A. 18A:16-2 et seq.
>
> In the Commissioner's judgment the action of the Board in certifying the tenure charge against respondent is fatally defective for the reason stated.

However, "The State Board reverses the Commissioner's decision for the reasons expressed in the Administrative Law Judge's decision." [Sheets at 1536]

Respondent's argument that the ALJ is not bound by the State Board's determination in Sheets must be rejected. The ALJ makes his findings of fact on the record and reaches his conclusions on what is perceived to be the applicable statutes, regulations or decisional law. Policy-making has been vested in the Commissioner and State Board by the Legislature. The fact that the State Board referred to the ALJ's Initial Decision in reversing the Commissioner in Sheets does not bestow policy-making

with an ALJ, but merely adopts the latter's reasoning as its own. The law of the case was nevertheless determined by the State Board, and clearly states that excessive absenteeism deemed to be chronic is sufficient to uphold a Board's certified charge of incapacity and warrants dismissal of the teacher.

Concerning the requested order that the Board make application to TPAF for the disability retirement of Hershkowitz, said request must be rejected. Notwithstanding that the record does not disclose respondent's age or years of membership with TPAF, I believe it to be wrong to order a Board to act on behalf of respondent when she has not indicated any desire to similarly act in her own behalf.

N.J.S.A. 18A:66-39 clearly provides for a member of TPAF to make application in his or her own behalf. If and when Hershkowitz decides to make application, I am satisfied by the representation by the Board's counsel that the Board will do everything required of it by statute to assist respondent with her application.

FINDINGS OF FACT

I **FIND** the Board's charges of chronic absenteeism and incapacity to be **TRUE**, and **CONCLUDE** that dismissal of respondent from her tenured position is warranted.

IT IS THEREFORE ORDERED that Marlene Hershkowitz shall be and is hereby **DISMISSED** from her tenured employment as a teaching staff member retroactive to the date of the Board's certification of charges.

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 Commissioner 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.

3 April 1989
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

APRIL 6, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 6 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF MARLENE HERSHKOWITZ,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY VOCATIONAL SCHOOLS,	:	DECISION
ESSEX COUNTY.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Respondent excepts to the ALJ's decision which finds tenure charges of absenteeism and incapacity to be true and that dismissal from her tenured position as school nurse is warranted. She also excepts to the ALJ's rejection of her request for an order directing the Board of Education to apply on her behalf for disability retirement.

Respondent is in agreement with the ALJ's findings of fact with the exception of Finding No. 26 which should read May 1, 1980 to June 30, 1980, not 1989. Such correction is noted for the record.

Respondent avers that the undisputed facts do not establish grounds for dismissing her, maintaining that (1) the Commissioner is not bound by Sheets, supra; (2) the tenure laws require a different standard; and (3) the Board has failed to meet that standard. More specifically, respondent argues that (1) the decision in Sheets is inconsistent with other decisions that place the burden of proving the charge of incapacity on the Board; (2) the Board must submit evidence that a teacher is unfit whether through inability or through some other reason; and (3) the physicians' reports submitted by her showing she is unable to return to work at this time are insufficient to satisfy, as a matter of law, the tenure statute.

Respondent brushes aside the Board's arguments, i.e., the length of time she has been unable to work, her inability to give a specific date of return, an unspecified impact on continuity, and the inability to offer the position to someone else. She avers, inter alia, that the tenure laws set forth no specific period of time in which an employee may be absent for medical reasons before dismissal becomes appropriate; that as a school nurse vis-a-vis a classroom teacher, the interests in continuity are not compelling; and that the assertion that it cannot offer the position on a permanent basis is not supported by any affidavit or legal authority. Further, respondent contends that under Spiewak v. Rutherford, 90 N.J. 63 (1982) it is more than possible by reason of years of service another school nurse has become eligible for tenure.

As to the ALJ's determination relative to application to TPAF for disability retirement, respondent points out that N.J.S.A. 18A:66-39 clearly provides that application may be made either by the employer or the employee or someone acting on behalf of the employee. She requests that the Commissioner modify the initial decision to direct that the Board apply for the pension and cites in support of this In re Tenure Hearing of Healy, supra, and In re Tenure Hearing of Grossman, 127 N.J. Super. 13 (App. Div. 1974), cert. den. 65 N.J. 292 (1974).

Respondent also seeks to supplement the record with an affidavit rebutting statements in the brief submitted by the Board on the day of oral argument before the ALJ and requests that the Commissioner's decision not be issued until the transcript of oral argument which has been ordered is received.

Upon review of the record and initial decision, the Commissioner is in full agreement with the findings and conclusions of the ALJ in this matter. Respondent's exceptions to the contrary are not only unpersuasive but spurious as well. To suggest that the Board's reasons for seeking her dismissal after nine years of not reporting to work were unfounded, flimsy, or for political reasons is patently absurd.

The Commissioner adopts the recommended decision of the ALJ for the reasons expressed therein including his disposition of the TPAF issue. Respondent's nine years absence alone provides more than ample support for a finding of incapacity and excessive absenteeism warranting dismissal. Accordingly, respondent is therefore dismissed from her tenured school nurse position as of the date of this decision.

Finally, respondent's request to delay disposition of this matter until receipt of the transcript of oral argument is denied. No compelling reason(s) has been advanced to support the necessity for granting such a request. The record as provided to the Commissioner overwhelmingly supports respondent's dismissal.

May 19, 1989

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE :
HEARING OF MARLENE HERSHKOWITZ, : STATE BOARD OF EDUCATION
ESSEX COUNTY VOCATIONAL SCHOOLS, : DECISION
ESSEX COUNTY. :
:

Decided by the Commissioner of Education, May 19, 1989

For the Petitioner-Respondent, Anthony P. Sciarrillo, Esq.

For the Respondent-Appellant, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Karen L. Jordan, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Respondent's motion to supplement the record pursuant to N.J.A.C. 6:2-1.9 in order to "show the unusual and extraordinary obstacles she has faced in reaching her goal of recovery" from injuries sustained in two automobile accidents, letter brief in support of motion, at 3, is denied as irrelevant to the certified charges of absenteeism and incapacity, which are the subject of this appeal to the State Board. We find that even consideration of Respondent's proposed supplemental documents, which pertain to her medical treatment history, would in no way alter the result herein dismissing Respondent from her tenured position as a result of her absence from work for a period of nine years and her present incapacity to return to that position.

October 4, 1989

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1425-87
AGENCY DKT. NO. 25-2/87

PENTA ASSOCIATES II AND COASTAL LEARNING CENTER,
Petitioners,
v.
THE STATE OF NEW JERSEY DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION,
Respondents.

Timothy B. Middleton, Esq., for petitioner (Apostolou and Middleton, attorneys)

Arlene G. Lutz, Deputy Attorney General, for respondent (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

Record Closed: January 31, 1989 Decided: March 23, 1989

BEFORE RICHARD J. MURPHY, ALJ:

STATEMENT OF THE CASE

Petitioners, Penta Associates II (Penta) and Coastal Learning Center, Inc. (Coastal), are partnerships owned by the same individuals offering a private educational facility and program to handicapped children not handled by local school districts. Penta II leases school facilities to Coastal. Both partnerships challenge the constitutionality, as applied and on its face, of a regulation adopted

by the State Board of Education to limit allowable rental reimbursement in leasehold transactions between related parties that provide instruction for handicapped or emotionally disturbed children, under N.J.S.A. 18A:46-14g. See, N.J.A.C. 6:20-4.4(a)39 (formerly sections 36-38 of N.J.A.C. 6:20-4.4). The regulation limits the allowable rental cost between related parties to a 2.5-percent return calculated on the actual cost of ownership incurred. Petitioners charge that the regulation denies them a fair rate of return and thus deprives them of their property interest without due process. They also assert that the regulation is facially invalid in that it lacks any reasonable basis in fact, that it is overly sweeping and confiscatory, and that it violates their right of equal protection. The Commissioner of Education claims that the regulation is not confiscatory and that it is reasonably intended and narrowly drawn to prevent rent-gouging and other abuses by related parties seeking excessive reimbursement for rental expenses. The question presented is whether N.J.A.C. 6:20-4.4(a)39 is unconstitutional, either as applied or on its face. Both parties have moved for summary decision on the issues and, for the reasons stated, respondents' motion for summary decision is granted and petitioners' motion is denied.

PROCEDURAL HISTORY

The petition in this matter was filed with the Commissioner of Education on February 17, 1987, and the matter was transmitted to the Office of Administrative Law on March 4, 1987, for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Petitioners had earlier sought relief by way of a complaint in lieu of prerogative writ in the Superior Court of New Jersey (L-085235-86PW), but the matter was bounced back to the Commissioner of Education pursuant to R. 1:13-4 on grounds of lack of jurisdiction. The OAL prehearing conference was conducted to settle the procedures and issues on April 23, 1987, and hearing dates were scheduled for July 1987.

On August 4, 1987, the respondent, the Department of Education, moved for partial summary decision as to the facial validity of N.J.A.C. 6:20-4.4(a)36-38 [now 39], and the petitioners replied on September 8, 1987, and also filed motions to compel discovery, the latter of which was resolved by telephone conference. Petitioners also moved for partial summary decision on the issue of facial validity. An order was entered on October 16, 1987, denying the cross-motions for partial summary decision on the grounds that it would be inappropriate for an administrative agency to determine purely legal constitutional questions of facial

validity in a context divorced from issues of fact. Petitioners took an interlocutory appeal of this order to the Commissioner, who declined interlocutory review on November 4, 1987. On December 4, 1987, the petitioners filed an appeal with the New Jersey Superior Court Appellate Division from the Commissioner's refusal to review the order denying cross-motions for summary decision on the facial validity question. Because of that appeal, this case was placed on the inactive list for a period of 90 days on December 30, 1987. The Appellate Division later denied the appeal. After the case came off the inactive list, the respondents, on May 5, 1988, filed a motion to dismiss Coastal as a party. After petitioners responded, the motion was denied. It was then determined that the case would proceed by motion for summary decision on the issue of the constitutionality of the regulation as applied to the petitioners, and Penta II and Coastal filed their motion on August 23, 1988. Subsequent to that, petitioners also moved to compel answers to supplemental interrogatories, and the Department was ordered, on September 22, to provide further information. On September 26, 1988, the respondent Department cross-moved for partial summary decision on the "as applied" issue, and extensive responses and replies were submitted. On or about December 13, 1988, I determined that the issue of facial validity should be decided in the context of the motion on the "as applied" grounds, which motion had fully developed the facts through discovery without the need for a hearing. Supplemental briefs were permitted on the facial issue, and cross-motions for summary decision on both constitutional issues were considered submitted as of January 31, 1989.[1]

FINDINGS OF FACT

There is no genuine dispute as to the material facts, leaving the question of which party is entitled to prevail as a matter of law under N.J.A.C. 1:1-12.5 et seq.

As to the facts, petitioner Penta Associates II (Penta II) is a New Jersey partnership owning property in Howell Township, New Jersey, consisting of educational facilities that have been rented to the Coastal Learning Center (Coastal), a school for the emotionally disturbed. Public school districts, unable to provide an adequate education for handicapped students, may send students to private facilities and programs, in accordance with N.J.S.A. 18A:46-14g. Coastal

[1] The record was originally closed on January 19, 1989, but further correspondence was received after that date and a period of reply was allowed. An extension was granted until March 23, 1989, to provide additional time for consideration of the complex legal issues presented.

currently enrolls approximately 110 emotionally disturbed children and operates out of the facilities leased from Penta II. Penta II and Coastal are partnerships owned by the same individuals.[2] The sole purpose for Penta II's existence is to acquire and hold title to the property rented to Coastal. The owners of Penta II have, in effect, leased the school facility to themselves and operate it through Coastal.

On August 6, 1986, subsequent to the lease between Coastal and Penta II, the State Board of Education promulgated the regulation (N.J.A.C. 6:20-4.4(a)) that limits rental charges in leasehold transactions between such related organizations to 2.5 percent above the actual cost of ownership. The regulation allows non-related lessors to charge the fair market value for rent.

N.J.A.C. 6:20-4.4(a) provides:

> A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:
>
> . . . .
>
> 39. Certain costs related to transactions between related parties in which one party to the transaction is able to control or substantially influence the actions of the other. Such transactions are defined by the relationship of the parties and include, but are not limited to, those between divisions of an institution; institutions or organizations under common control through common officers, directors, or members; and an institution and a director, trustee, officer, or key employee of the institution or his or her immediate family either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. Such costs shall include:
>
> i. Rental costs for buildings and equipment in excess of the actual allocated costs of ownership (such as straight line depreciation, mortgage interest, real estate taxes, property insurance and maintenance costs) incurred by the related property owner including a 2.5 percent return calculated on the actual costs of ownership incurred by the related party. The lease agreement shall include a list of anticipated costs to be incurred by the property owner, prepared in the format supplied by the Department of Education, signed by the property owner and notarized;

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[2] Ronald Boedart, Joseph J. Scalabrini, John Bruening, Frank Viscomi and Robert Viscomi own Penta II and Coastal.

> ii. Rental costs under a sub-lease arrangement with a related party for buildings and equipment in excess of the actual allocated costs related to the lease (such as rent, lease commission expense and maintenance costs) incurred by the sub-lessor. No profit, return on investment or windfall of any kind shall be included in the sub-rental cost. The sub-lease agreement shall include a list of anticipated costs to be incurred by the sub-lessor, signed by the sub-lessor and notarized;
>
> iii. Cost of purchasing buildings, equipment or other goods from related parties in excess of the original cost to the related party less depreciation calculated using the straight line method; [emphasis added]

The Department of Education has never expressly alleged that a private school for the handicapped engaged in rent-gouging (P-3; marked as a exhibit E with petitioners' submission on September 8, 1987). In 1978, the New Jersey Commission of Investigation (SCI) issued a report on the misuse of public funds in the operation of non-public schools for handicapped children and made the following recommendation, which the Department points to as part of the support for the 1986 amendment to N.J.A.C. 6:20-4.4(a):

> If the operating entity also owns the land and building, or is a lessee in the normal course of business, or is a lessee in a sale and leaseback arrangement, or is a lessee from a related entity, the allowable rental or carrying charges should not exceed the normal costs of ownership, such as allowable mortgage interest, depreciation, taxes, insurance and maintenance.
>
> Explanation: One of the serious questions raised by the Commission at its public hearings was the ability of certain operators to use rental costs as a means of creating an increased profit. The above recommendation will prevent profiteering through leases by allowing costs only for actual carrying charges or leases which do not exceed actual carrying charges. Additionally, in order to prevent overmortgaging or leases which are increased in anticipation of the new statute, there should be added a provision which gives the Department of Education authority and responsibility to review and approve all reimbursible mortgages or leases executed. [R-1 at 191-92; emphasis added]

The summary supporting the amendment to N.J.A.C. 6:20-4.4 echoed the SCI concern:

> As of July 1, 1985, 21 private schools for the handicapped had set up commonly owned or controlled corporations. The private schools then either transferred title to fixed assets, used by the private school for the handicapped, to the related

> corporations or had the related corporations purchase fixed assets to be used by the private school for the handicapped. The related corporations collect rentals from the private schools for use of the fixed assets. Such rentals can exceed the cost of ownership that would be allowable had title to the fixed assets vested in the private school. This procedure also allows the related corporation to sell the fixed assets without reimbursing the program for tuition funds expended for such fixed assets. Such transactions between related parties are entered at less-than-arm's length.
>
> It appears that the only purpose or activity of these corporations is renting buildings and equipment to the related private school for the handicapped. Such corporations give the appearance of being straw corporations used solely to disguise activities which would otherwise be nonallowable under N.J.A.C. 6:20-4.4, to divert funds intended for the education of handicapped pupils for other uses and to circumvent the surcharge and working capital restrictions contained in N.J.A.C. 6:20-4.5 and 6:20-4.6. [Summary of proposed amendment to N.J.A.C. 6:20-4.4, 18 N.J.R. 1237]

To prevent what it perceived as a potential for abuse, the Department of Education amended N.J.A.C. 6:20-4.4(a), in order to ensure that

> the tuition rates charged New Jersey public school district boards of education by private schools for the handicapped are based on the cost of service, and are reflective of an open competitive market by restricting transactions not-at-arm's length. A not-at-arm's length transaction would be limited to the cost of ownership incurred by the related party including a 2.5 percent return calculated on the actual costs of ownership incurred by the related party. [18 N.J.R. 1237]

There is no allegation or evidence that the petitioners have engaged in the sort of abuse anticipated by the SCI, nor has the Department presented any other evidence demonstrating abuse of rental allowances by related parties. In setting the 2.5-percent limitation on rental allowances for related parties, the Department did not rely on the services of a real estate appraiser or other financial expert.

In answers to interrogatories, the Department claimed that it had studied the difference between rent charged between unrelated parties and that charged between related parties:

> The 1985-86 private school budgets were reviewed to determine the average square footage cost for both unrelated transactions and less-than-arm's length transactions. The information was taken from the budget information requested by the Department and prepared by the private school. Budget information regarding square footage and rental charges that were incomplete were not considered.

> Information regarding unrelated transactions indicated a $3.71 average charge for square foot and less-than-arm's length indicated a $4.91 average charge per square foot. (P-12: petitioners' exhbit C submitted January 4, 1989)

This study was conducted between January 13, 1986, and April 24, 1986, although the exact date has not been determined (see, P-13-15: petitioners' exhibits E, F and G, submitted on January 4, 1989).[3] The Department also admitted in interrogatories that, prior to the adoption of the regulation, rental charges by related party landlords or otherwise were judged against the standard of acceptability of $18 rental for new and completely rehabilitated facilities and $14 for used facilities (P-16). Petitioners also offer a transcript of tape recorded proceedings before the State Board of Education on August 6, 1986, concerning tuition for private schools for the handicapped. Although the speakers are not identified, counsel for the petitioners represents that statements in the transcript made on behalf of the Department in favor of the 2.5-percent rental limitation were made by Vincent Calabrese, who was an Assistant Commissioner within the Department of Education at that time.[4] In the transcript, the representative of the Department describes the basis for the 2.5-percent cap on allowable rental expense:

> We're going to have to define in specific terms to our schools what is unreasonable or what is reasonable. We've chosen the route of what is reasonable. We think a two and a half percent profit on an investment that usually revolves around -- well, let me start this way.
>
> I don't know how any individual school was financed. I know how I would finance a school if I were an entrepreneur and going out there. I wouldn't put a dollar of -- more of my own money into that school than I had to.
>
> I would go out and get a loan. Whatever I had to put up as collateral is fine. Once having had that loan, since we permit depreciation, which in this particular instance is a return of money against the principal payments of that particular loan, that that [sic] is being paid for by the tuition rate.

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3 Respondents object to the submission of exhibits E, F and G on the grounds that they were not provided in discovery, but considering that the source of these documents was the Department of Education, that objection is overruled.

4 On the strength of that representation, this transcript has been admitted for the purposes of this motion, although it should have been made available previously through discovery.

> The full interest charges are paid by the tuition rate, so that I now have a loan in which all my payments are coming back to me in one form or another, and I'm able to get two and a half percent on that loan as net income.
>
> That's the way it's usually done in the private sector, in terms of whether -- of how do you finance your operation. Very few of us are going to go out and finance a full operation without borrowing money.
>
> It's different than the public sector, wherein depreciation is a bookkeeping entry that does two things. First, it reduces the profit you have to pay taxes on. One of the major reasons of depreciation -- in fact, all of our new laws revolve around how many years can we depreciate? How can we escalate it to reduce our taxes on our profits?
>
> And, secondly, to restrict the flow of cash in the form of dividends or other payments so that we don't have a cash flow problem. Neither one of those particular reasons for depreciation are present in this case. Depreciation is a direct charge transferred to in the form of tuition and received back.
>
> Some may argue, well, in the first year, it's all interest and very little principal is coming back; and the last year will be all principal with very little interest coming back.
>
> That's a problem for the entrepreneur. If that's true, then his first few years should be sunk into a reserve or a sinking fund concept, so that the funds are available at interest at the other end of the loan.
>
> You're still getting back over the life of that loan, through these depreciation charges to tuition, whatever principal you have to pay on the loan. And the two and a half percent is net profit on that particular investment, if it goes the way I said it would go.
>
> And this is hypothetical, as we don't have access to their records to find out exactly how it was done. And then if I'm able to take that -- those funds, those charges, including my two and a half percent profit, and move that to the operation that happens to be owned by me through either a spousal arrangement or what have you, and add that back in there and get two and a half percent more on that.
>
> Then my profits begin to approach reasonable profits, because two and a half on two and a half is 5.05 percent. (P-10) (emphasis added)

Prior to the adoption of the original regulation, the current form of N.J.A.C. 6:20-4.4(a)39 was adopted in May 1987.

Penta and Coastal entered into a lease whereby Coastal rented the property from February 1984 until July 30, 1987. As of June 1986, the yearly rental rate

equaled $26,400, by the petitioners' calculation. Yearly school districts' reimbursements to Coastal amounted to $16,634.09, which is the amount allowed by the regulation. On July 30, 1987, the lease expired; the parties continued their arrangement on a month-to-month basis.

Petitioners claim that Penta II is a State-regulated party, and that the 2.5-percent regulation, as applied to it, is unconstitutional because it deprives Penta from charging the fair market value for rent and/or prohibits Coastal from paying Penta the rental at fair market value. Therefore, petitioners contend, if the regulation is valid, there will be a shortfall of approximately $8,000. If Coastal fails to pay this amount, it will be in default on the lease. If payment is made, it will be made with Coastal's own operating funds. Such a payment would decrease Coastal's profits, thereby injuring its shareholders. Petitioners further assert that, should Coastal default on the lease payments, the lease agreement might be terminated and Coastal would be without facilities to provide its services. In essence, petitioners argue that the regulation constitutes a taking.

Petitioners rely on an expert report prepared by a real estate appraiser, Richard D. Turteltaub, M.A.I., who concludes that the fair market rent for the facilities rented by Penta II to Coastal is $24,365.50, but that the regulation only permits a charge of $16,634.09 for rent between related parties, thus leaving a shortfall of $7,731.44 that the petitioners are precluded from recouping (P-1; also listed as plaintiff's exhibit C, submitted on September 8, 1988). Turteltaub, who is qualified as an expert in the field of real estate appraisal, determined the rental value (as of March 1, 1988) of the site and facilities owned by the petitioners at 442 Squankum Road in the Township of Howell, consisting of office space, a multi-purpose room, a computer room, a vocational shop area and a gymnasium. Turteltaub concluded that the fair market rental for the gymnasium area (which is semi-finished) and the workshop area was $4.50 per square foot. Thus, the fair market rental value of this 2965-square-foot area was calculated at $13,342.50. The office space, currently occupied and used by the Coastal Learning Center, was estimated to rent at a fair market rental value of $9.00 per square foot. The office space measures 1225 square feet, and thus its fair market rental value would be $11,025. By Turteltaub's calculations, the fair market rental value for the whole facility would thus total $24,365.50. He determines that the regulation permits a charge of $16,634 for rent by adding taxes of $4,043.59, a depreciation of $4,250, interest of $7,934.80, and a 2.5-percent profit of $405.70 to these figures. Turteltaub's report reviews the site and facility, studies comparable sales in the

area, and also follows an "income approach" to estimate the economic rental value of the property's finished and semi-finished areas. In two studies of comparable rental rate, Turteltaub reaches the $4.50 per-square-foot estimate for the gymnasium and workshop areas, and the $9.00 per-square-foot figure for the office area.

Petitioners also offer an expert report from a professional economist, Douglas R. Shaller, as to the economic impact of the 2.5-percent cap on rental charges between related parties. Dr. Shaller notes that the property was purchased in 1984 for $90,000 and that it was assessed by an independent appraiser at $275,000 in December 1986 (P-2; P-7; also labeled as petitioners' exhibits E and J, filed on September 28, 1987). Shaller's report states that the effect of the new regulation will be to create ongoing economic loss from reduced cash flow to related parties who have relied on receiving fair market rents for their specialized facilities and who will eventually suffer further economic loss when they sell the facilities at less than their full value as specialized school facilities. He also predicts that schools will eventually rent only non-specialized facilities from unrelated parties, a practice which will create a shortage of specialized facilities for schools for the handicapped because the prices will be forced below the market price by the regulation.

The respondent Department of Education submits a report prepared by an economist, Elizabeth Elmore, which disputes Shaller's conclusions as to the economic loss suffered by the petitioners. Dr. Elmore's report (R-2) questions petitioners' claim of economic loss as well as their assertion that the regulation will result in general harm to the education of handicapped children. She characterizes Penta II as a unregulated party in a mixed economy having no guarantee of any minimum rate of return (R-2 at 5). She questions whether Penta's costs were actually greater than the average-square-foot rental cost for commercial office space within the region. Beyond questioning the proofs as to economic harm to petitioners, Dr. Elmore questions whether the regulation will have a negative effect on the education of handicapped students, because unrelated landlords can provide the special facilities needed if related landlords and tenants are unable to obtain an adequate return due to the 2.5-percent cap of the regulation on rental cost. The Department offered no other evidence, such as any real estate appraisal, on the issue of the fair market value of petitioners' rental property or as to the rate of return. I **FIND** as a matter of fact that the figures for rent allowed under the regulation and for fair market rent in the region are supported by a fair preponderance of believable evidence. The Department has offered no competent

or persuasive evidence on this point. There are no other facts in dispute, and I so FIND.

There is no dispute as to the above facts, and I so FIND.

ISSUE

The question presented is whether the petitioners or respondents are entitled to prevail as a matter of law on the question of the validity of N.J.A.C. 6:20-4.4(a)39, as applied to the petitioners and on its face.

DISCUSSION AND CONCLUSIONS OF LAW

(1) The regulation as applied

Private schools are not foreclosed from questioning the reasonableness and constitutionality of any regulations applied to them, including the question of whether such regulations are confiscatory as applied. See, e.g., Council of Private Schools for Children with Special Needs, Inc. v. Cooperman, 205 N.J. Super. 544 (App. Div. 1985). The petitioners argue that the regulation, as applied to them, is confiscatory and thereby violates the protection of the Fifth Amendment of the Constitution of the United States, which mandates that private property cannot be taken for public use without just compensation. For the regulation to be constitutionally valid, Penta argues, it must allow a rate which is commensurate with returns on investments in other enterprises having comparable risk. Petitioners see the issue as what they actually should be allowed to charge for rent, and they cite cases from the areas of rent control ordinances and public utility law in support of their claim that if the State wants to lease property from a private citizen it must pay fair compensation. See, F.P.C. v. Texaco, 417 U.S. 380, 41 L. Ed. 2d 141, 94 S. Ct. 2315 (1974); Hutton Park Gardens v. W. Orange Town Council, 68 N.J. 543 (1975).[5]

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[5] Petitioners also object to the admission of the expert report provided by Elizabeth Elmore, an economist, on the grounds that she has no expertise in the area of real estate appraisal or rate of return. Dr. Elmore's report responded to an expert opinion given by an economist retained by the petitioners and admitted for the purpose. Petitioners' objection to Dr. Elmore's expertise concerns the weight to be given the report.

The Department defends the regulation as constitutional in its application to Penta II in that there has been no taking of property, because Penta is free to charge whatever rent it wishes--the limitation of the regulation is merely on the amount of related-party profit for which Coastal Learning Center may be reimbursed. In particular, the State maintains that Penta is merely an unregulated party that happens to do business with a regulated entity (Coastal) and is therefore subject to free market forces. The regulation applies only to the reimbursement that Coastal may lawfully seek; it does not limit the rent that a related landlord may charge and thus, the Deputy Attorney General claims, it does not result in any taking of Penta II's property.

The Department also contends that, even under traditional constitutional analysis, there has been no taking because the landowner has not been deprived of reasonable and economically viable uses of the land. See, Hodel v. Virginia Surface Mining and Reclam. Ass'n., 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981). The Department notes that Penta is free to use its property for any purpose it wishes and is not subject to State regulation, except insofar as Coastal is limited in the extent of rental cost allowed. The fact that Coastal cannot claim more than the 2.5 percent in rent does not constitute an unconstitutional taking in the Department's view because Penta retains the right to rent the school to an unrelated or unregulated entity and cannot be compelled by the State t o continue beyond its lease. The Department also argues that the related party landlord (Penta II) is unregulated and therefore unentitled to any guaranteed reasonable rate of return as a public utility.

In response, Penta argues that its function in providing a facility for the handicapped is vested with the public interest, and that the 2.5-percent limitation of the regulation has a direct impact on the related landlord, who should be allowed to charge the fair market value for rent, for which Coastal should be reimbursed. Under the public utility case law, petitioners argue that Coastal cannot be forced to operate at a loss. The Department rejects Penta's claim that it is a regulated party or a public utility by virtue of its nexus to a regulated party (Coastal), and distinguishes cases in the area of rent control and public utility on the grounds that they pertain only to regulated entities, which are guaranteed a rate of return.

In this instance, petitioners argue that both the related landlord and the tenant are, in effect, public utilities entitled to a reasonable rate of return, and that

it is unconstitutional to arbitrarily limit rental cost to 2.5 percent merely on the basis of the relation of ownership between landlord and tenant. Public utilities are business organizations that supply the public with a commodity or service. 73B C.J.S. Public Utilities §3 (1983). In Junction Water Company v. Riddle, 108 N.J. Eq. 523 (1931), the court held that "a . . . corporation does not become a public utility unless its owns, operates, manages or controls a (utility) plant or system for public use under privileges granted by the state." Here, the State granted an operating license to Coastal; Penta II merely supplies Coastal with property. Such an activity does not confer public utility status on Penta. See, Commonwealth Public Utility Commission v. WVCH Communications, Inc., 351 A.2d 328, 23 Pa. Cmwlth 292 (1976). A public utility is formed when the product or service is available to the general public indiscriminately. Higgs v. City of Fort Pierce, 118 So. 2d 582 (1960).

Penta argues that it is regulated because it entered into a binding agreement with Coastal years before the regulation was enacted. Furthermore, Penta states that the investors spent much of their personal savings to develop Coastal. On this issue, Penta argues that providing an educational facility for handicapped students is in the public interest. Without a doubt, there is a nexus between the two entities. While this nexus may confer standing on Penta, it is much too tenuous to convey regulated status upon Penta. Consequently, Penta's argument that it is regulated must fail. It is not granted any specific privileges by the state or subject to any responsibilities beyond those applied to any partnership. Penta is not open to the general public; it is a private school that accepts a limited number of public school students. As an unregulated party, Penta is not entitled to a guaranteed rate of return for its investment.

Petitioners also assert that, should Coastal be forced to operate with the $8,000 loss, it will eventually cease operations. This, petitioners declare, is a violation of Council of Private Schools v. Cooperman, Hutton Park v. West Orange, and F.P.C. v. Texaco. Respondents disagree with petitioners' case interpretations. In Cooperman, the plaintiff challenged the facial validity of N.J.A.C. 6:20-4.1 et seq. The appellate court found the regulations facially valid and held that the "quality of education provided by private schools receiving handicapped pupils is directly related to the amount of tuition that the schools spend on approved educational costs . . . The regulations are reasonably designed to carry out that determination and the broader constitutional and statutory goal of offering children a thorough and efficient free education." 205 N.J. Super. at 547. Furthermore, the court ruled only on the facial constitutionality of the regulations. It failed to "foreclose any

private school from questioning the reasonableness of any of the regulations as applied to it." Id. at 548. Accordingly, only Coastal is entitled to question the reasonableness of the regulations because it is a "particular private school." Ibid. The Cooperman case does not authorize Penta to charge the fair market rental value, as the petitioners claim. Moreover, the court did not assert that a private school for the handicapped would be protected from financial hardship.

The petitioners rely on cases dealing with the constitutionality of a rent control ordinances. In Hutton v. West Orange, the New Jersey Supreme Court held that the apartment owners were entitled to a just and reasonable rate of return on their investment. In discussing the rate of return, the court wrote that, while a regulated party was due a just and reasonable return on its investment, the rate of return "need not be as high as prevailed in the industry prior to regulation nor as much as an investor might obtain by placing his capital elsewhere." 68 N.J. at 570. In discussing the rate of return, the court wrote:

> Determination of what level of return is "just and reasonable" involves evaluation not only of the interests of the investor but also of the interests of the consumer and of the general public sought to be advanced by the regulatory legislation.
>
> . . . .
>
> Whether a particular regulation of prices fails to permit a just and reasonable return is a mixed fact-law question. The burden of proof is heavily upon the parties alleging confiscation to demonstrate it. [Ibid.; emphasis added]

The landlords in Hutton were regulated parties in the sense that the new control ordinance fell directly upon them. Here, the regulation applies only to Coastal and has only an indirect impact on the related party landlord who remains unregulated. Coastal is regulated but does not own the property and thus is not in the same position as the landlords in Hutton.

Petitioners claim that the rule imposes an unconstitutional taking upon their property. A constitutional taking is "one where a claim for just compensation will lie, where governmental action substantially destroys the beneficial use that a landowner has made of property . . . governmental exercise of the police power which does not destroy the use and enjoyment of property is damnum absque injuria" (emphasis added). N.J. Sports Exp. Auth. v. Giants Realty Assocs., 143 N.J. Super. 338, 351 (Law Div. 1976), citing Washington Market Enterprises v. Trenton, 68 N.J. 107, 122 (1975).

The concept of taking was also applied in the context of condemnation in Schnack v. State, 160 N.J. Super. 343 (App. Div. 1978). There the plaintiff argued that her property value was diminished by condemnation for a public highway to such an extent that she should be compensated. The court held that: 1) governmental regulations that effectively deprive owners of all reasonable use of property amount to compensable taking, and 2) regulations that leave the owner free to reasonable use of his property are not compensable, even though restrictions are placed on the property by regulations and/or there is a decrease in the market value of the property. Id. at 349. The Appellate Division agreed with other courts that a virtual destruction of the beneficial use of property is a necessary prerequisite to compensation.

There has been no such destruction here. N.J.A.C. 6:20-4.4(a)(39) does not "take" petitioners' property so as to require just compensation because it does not deprive them of its reasonable use. The most the regulation does is to limit the allowable reimbursement that petitioners may receive if they choose to rent the property they own through Penta II to the school they run as Coastal; they have been deprived only of the full extent of the rent they might have charged themselves. This is not taking in the constitutional sense.

Regulations that do not prevent the reasonable use of property do not "take" that property in the constitutional sense so as to require just compensation. On that basis, I **CONCLUDE** that the regulation is not unconstitutional as applied.

(2) The regulation on its face

Petitioners' assail N.J.A.C. 6:20-4.4(a)39 as facially unconstitutional because it is not supported by any facts, is overly sweeping and confiscatory, and violates equal protection rights secured by the Fourteenth Amendment of the United States Constitution. Generally, a facial attack on a regulation must be brought in the first instance in the Appellate Division of the Superior Court and is not appropriate in an administrative proceeding. See, e.g., R. 2:2-3(a)(2); Pascucci v. Vagott, 71 N.J. 40, 53 (1976); Cicoria v. Pinelands Commission, 9 N.J.A.R. 167 (1986). For this reason, the parties previous motion for partial summary decision on the facial validity issue was denied. That legal issue was then not coupled with any factual issues. See, Order of October 16, 1987. But where a facial attack involves resolution of factual issues that can best be accomplished by the administrative agency having jurisdiction and

expertise, the issue of facial validity may be decided initially by the agency in the context of determining all of the issues in controversy. See, Abbott v. Burke, 100 N.J. 289, 300-01 (1985). Accordingly, consideration of the question of facial validity is appropriate here at this point in the proceeding and I so **CONCLUDE**.

2(a) Facial Validity: Is the rule arbitrary and capricious or overly sweeping and broad?

The petitioners argue that the rule is arbitrary and capricious because it is not based on any facts. They also claim that the regulation must be substantially related to a compelling public need in order to be upheld (petitioners' brief of September 8, 1987, at 3). The regulation must further be supported by competent evidence and have a real and substantial relation to the object sought to be obtained. The owners of Penta II and Coastal argue that the record is utterly devoid of any supporting facts establishing such a compelling government need or showing that the regulation has a real and substantial relation to that need. In particular, they note that the Department of Education has not offered any evidence that any private school for handicapped children has ever rent-gouged or engaged in any unfair rental practices (ibid). Petitioners also characterize their role in providing educational facilities as satisfying a compelling public need, and they argue that the regulation will subvert the legislative goal of providing a thorough and efficient education for the handicapped by discouraging related-party landlords from providing these facilities. Because of the absence of any evidence of rent-gouging by related-party landlords, petitioners claim that the regulation is factually baseless and overly broad and sweeping. Petitioners cite The Southland Corporation v. Edison Township, 217 N.J. Super. 158 (Law and Ch. Divs. 1986) (challenging the constitutionality of the Township ordinances requiring convenience stores and gas stations to close at night) and Bonito v. Mayor and Council of Bloomfield Township, 197 N.J. Super. 390 (Law Div. 1984) (striking down a regulation requiring a video-game operators to employ off-duty police officers as security guards at specified hours). In essence, petitioners allege that the Department has adopted a regulation "to cure a problem which it admits does not exist" (petitioners' brief of September 4 at 12). They also argue that any legitimate concern with potential rent abuse could be adequately addressed by allowing reimbursement for the fair market value of rent which is a less intrusive and restrictive means than the regulation's arbitrarily selected 2.5 percent cap on rental allowances.

Respondent first defends the regulation by raising the presumption of validity to which it is entitled and maintains that the State Board acted reasonably in limiting the amount of rent allowed in the less-than-arm's length transactions involving related parties. The Department cites the SCI report described above, which recommended limits on the allowable rent between related parties because of the potential for abuse inherent in the arrangement. The Department cites Council of Private Schools v. Cooperman, which found that the regulation was reasonably designed to carry out the State Board's determination concerning the quality of Education provided by private schools receiving handicapped pupils and therefore was facially valid. 205 N.J. Super. at 547. (The Cooperman case was remanded by the Supreme Court on June 9, 1988, to an administrative law judge for a hearing on the validity of the regulation as written and applied.) The Appellate Division observed in Cooperman that "[p]rivate schools that choose to receive handicapped public school pupils under Chapter 46 must therefore relinquish some of the privacy and control over their affairs that they otherwise would have under the general provisions of Chapter 6" (205 N.J. Super. at 547-48). Because the petitioners' activity involves public school students and public school funds, the Department defends the regulation as having a substantial relationship to the protection of the public interest in those students and State monies which are threatened by potential abuse of the rental allowance by related parties.

The Department also urges that the proper scope of review in this instance is whether the rule is unreasonable or irrational, and that petitioners have the burden of establishing that facts sufficient to justify the regulation do not exist. Specifically, the Department argues that the petitioners must prove that the regulation does not bear a substantial relationship to the public interest in ensuring that public funds are employed for the education of handicapped children and not dissipated in contracts between related parties, and they must also show that the regulation is unreasonable because there are no facts to support any of the possible rationales for adopting the regulation (see, respondent's brief of September 17, 1987, at 6-7). Given the scope of allowable review, the Department contends that the regulation is not invalid merely because no instances of actual rent-gouging between related parties have been alleged or demonstrated, and it argues that the petitioners have failed to bear their burden of showing that there is no factual basis underlying the regulation. As to the allegation that the regulation is overly sweeping, the Department argues that the regulation is narrowly tailored to the perceived need to prevent the potential for abuse in less-than-arm's length transactions, and the fact that they may be alternate methods by which that goal

can be achieved is not sufficient to invalidate the rule. It cites the Supreme Court's statement in Hutton Park concerning the validity of a rent control ordinance that "[l]egislative bodies are not obliged to shape regulations under the police power with mathematical exactitude. They may make approximations and, if need be, informed guesses." 68 N.J. at 573. The Department distinguishes the Southland Corp. case as relevant only to the "as applied" issue.

The petitioners respond to the Department's defense of the regulation by arguing that the same means could be achieved by the less intrusive means of providing that the cost of rental or mortgage cannot exceed the average square footage cost for commercial space for the region in which the private school for the handicapped is located, as previously set forth in N.J.A.C. 6:20-4.429.

The parties were permitted in January 1989 to submit supplemental briefs on the facial attack. Petitioners augment their argument by maintaining that the regulation is the sort of ratemaking engaged in by the Public Utility Commission and by municipalities regulating such diverse matters as rents and taxicab fares and thus must be supported by explicit findings of fact. It cites the case of Yellow Cab Corp. v. City Council of Passaic, 124 N.J. Super. 570 (Law Div. 1973), in which a city ordinance setting taxi fares was held invalid as an exercise of ratemaking authority because it was not supported by the facts. Because the Department of Education concedes that it has no evidence of rent-gouging by related parties, petitioners maintain that the regulation cannot withstand constitutional scrutiny.

The Department of Education responds that the principles and precedent for ratemaking have no bearing on this case of rulemaking because the 2.5-percent cap does not set a rate because it does not limit the amount of rent that the unregulated related party landlord may charge, but merely limits the reimbursement for rental allowance that the regulated entity (in this case, Coastal) may receive. Because the related party landlord is unregulated, the Department distinguishes the Yellow Cab case cited by petitioners as involving ratemaking of regulated parties, an act that requires a higher level of factual support than presumptively-valid rulemaking. The Department distinguishes cases involving rate control on the grounds that Penta II is free to charge whatever it sees fit, although Coastal is limited in what it can claim for rental allowance. Unlike the landlord in rent control cases, Penta II is not directly subject to governmental regulation as to its level of rent, which may be as high or as low as the open market will bear. The Department maintains that the State Board of Education presented an adequate

rationale for the regulation and held public hearings on the subject that satisfied the requirements of rule-making as opposed to ratemaking. Petitioners do not maintain that the State Board's actions in adopting the regulation were procedurally improper, however unreasonable or unconstitutional they may have been.

As the Department correctly notes, a presumption of reasonableness attaches to rules of the State Board of Education and other administrative agencies acting within their delegated authority, and the person attacking the rule bears the heavy (but not necessarily insurmountable) burden of overcoming this strong presumption of validity. See, Bergen Pines County Hospital v. New Jersey Department of Human Services, 96 N.J. 456 (1984); Cooper River Convalescent Center, Inc. v. Dougherty, 133 N.J. Super. 226 (App. Div. 1975). When a rulemaking record is attacked in court, if any state of facts would reasonably sustain it, their existence will be presumed. See, Consolidation Coal Co., v. Kandle, 105 N.J. Super. 104 (App. Div. 1969), aff'd, 54 N.J. 11 (1969). The agency is not required to present any evidence that its rule is reasonable; the challenger must establish that it is arbitrary, capricious, unreasonable or irrational. See, In re Medicaid Long Term Care Services Bulletin 84-2, 212 N.J. Super. 48 (App. Div. 1986), certif. denied, 107 N.J. 31 (1986); 37 N.J. Practice (Lefelt, Administrative Law and Practice) (1 ed. 1988) §72 at 70-71).

In Smith v. Ricci, 89 N.J. 514 (1982), appeal dismissed 459 U.S. 962, 74 L.Ed. 2d 272, 103 S.Ct. 286 (1982), appellant's argued the unreasonableness of the State Board of Education's rule requiring local school districts to develop and implement a family life program in the elementary and secondary curriculum. The New Jersey Supreme Court stated, "appellants have offered no evidence to meet that burden [of proving unreasonableness] but instead merely assert that there are no data that prove that the program will have any effect on the societal ills that it attacks. This bare assertion does not satisfy appellants' burden of proving that the regulation is unreasonable." 89 N.J. at 525 (emphasis added). The court went on to note that the record in the Ricci case revealed a sufficient factual basis for the Board's conclusion that the family life education program was a reasonable, desirable and necessary method of dealing with readily identifiable educational and social problems. Other State Board of Education rules have been upheld where there was a clearly discernible rational connection between the undisputed facts and the choice made by the regulation. See, e.g., Fuentes v. Cooperman (N.J. App. Div., Feb. 17, 1989, A-2565-87T1 & A-2566-87TF) (unreported). In the Fuentes case, the Appellate Division upheld a rule establishing criteria for exiting from bilingual

programs, and commented that a regulation should be found valid if a rational basis for the amended regulation appears in the rulemaking record, even though not articulated by the agency and despite the presence in the record of evidence against the rule. The Appellate Division has also made clear that there are limits to the presumption of validity where fees imposed by an agency are patently excessive and in no way reasonably related to the costs of the agency activity. See, Lower Main Street Associates v. N.J. Housing and Mortgage Finance Agency, 219 N.J. Super. 263, 277-78 (App. Div. 1987) (cert. granted).

In this case, the Department has articulated its concern with the potential for abuse inherent where related parties seek reimbursement for rental allowance. The Department does not offer any specific instances of rent-gouging or other forms of abuse, although it relies upon an SCI report issued earlier that highlights these concerns and makes recommendations to limit rental allowances in such situations, as was achieved by the regulation. Even in the absence of any specific evidence of rent-gouging by the petitioners or by any other related party or private schools, the Department and State Board's concern with the potential for rental abuse has not been shown to be irrational or whimsical. The fact that a multitude of abuses in this area may not have been detected and documented does not render the rule irrational if it is rationally connected to the purpose of preventing such abuses and the dissipation of scarce State funds for the handicapped that would result. As long as the regulation has some reasonable basis it should not be disturbed. See, e.g., Southland Corporation, 217 N.J. Super. at 178. I **CONCLUDE** that the concern with the potential for abuse in related-party lease arrangements provided such a reasonable basis for the State Board of Education's promulgation of N.J.A.C. 6:20-4.4(a)39 and that the regulation is not susceptible to attack on the grounds that it is arbitrary, capricious and unreasonable.

But, as the petitioners note, the inquiry does not end there. Rather, it goes on to the question of whether the restriction was imposed unreasonably or irrationally exceeds the public need: does the regulation "burn the house to roast the pig?" 217 N.J. Super. at 179. Are there less intrusive and restrictive means than the 2.5-percent rental cap to achieve the objective of preventing excessive or inflated claims of rent from regulated private schools that rent from related parties? The petitioners argue that, even if there is some rational basis for regulation in this area despite the absence of any evidence of rent-gouging, the 2.5-percent cap is overly sweeping and broad and the objective of the regulation could just as easily (and less restrictively) be realized by limiting reimbursable rental expenses to the fair market

value of rent for comparable space in the region. The owners of Penta II and Coastal note that reimbursement was previously limited on that basis under the former regulation, N.J.A.C. 6:20-4.4(a)29. They reason that, if the State Board's concern is rent-gouging by related parties, the regulation need only ensure that related parties are permitted to recover no more than the fair market rent available to unrelated parties. In that way, both related and unrelated parties would be placed on the same footing of fair market value rent and the public funds would be protected from pilferage by less-than-arm's length arrangements by related-party landlords and tenants seeking reimbursement for inflated rental costs. They cite Southland, where an ordinance banning convenience store and gasoline station operation between midnight and 6 a.m. was struck down because such a complete prohibition on business was found to be overbroad, unreasonable and in excess of the public need, in light of the other, less drastic measures available. 217 N.J. Super. at 182. It also cites the Bonito case, which overturned a regulation requiring video arcade operators to hire off-duty police officers to secure the area in their off-duty hours because of concern with overflow of violence and problems from the centers. The complete prohibition in Southland and the restriction in Bonito were both found to exceed the public need and thus to constitute impermissible overkill.

Does the State Board's regulation of rental costs suffer from the same defect? Petitioners contend that the 2.5-percent cap bears no relation to actual costs and is unnecessary in light of the alternate available means of limiting rental reimbursement to the fair market value. It also criticizes the 2.5-percent figure as having, essentially, been pulled out of the air, and there is some validity to this criticism in the sense that the figure was not based on any detailed study of actual cost-per-pupil, as stated in N.J.S.A. 18A:46-21, but was apparently arrived at in a somewhat "ad hoc" fashion. Nonetheless, it is apparent that the State Board, in promulgating N.J.A.C. 6:20-4.4(a)39 and its predecessors, was concerned not only with rent-gouging but also with situations where persons seeking to provide private schooling for the handicapped formed partnerships or corporations solely for the purpose of acquiring property and later renting it to themselves in the form of another partnership or corporation. This concern with such "straw" transactions is evident in the SCI Report, the regulation, and the statements provided in the New Jersey Register at the time of its promulgation. Even in the absence of evidence of rent-gouging through fraudulently-inflated claims for reimbursement (and there is no evidence of such conduct on the part of the petitioners), the State Board sought to place a limitation on the amount of rent that related parties could charge themselves, regardless of what the fair market value for rent might be. Thus,

individuals who form one partnership or corporation solely to acquire and rent property to another partnership or corporation, which then runs a private school program and seeks reimbursement for those rental costs, are limited to recovering 2.5 percent of the actual costs of ownership incurred, which figure includes straight-line depreciation, mortgage interests, real estate taxes, property insurance and maintenance costs. The regulation does not prohibit private schools from leasing from related parties, nor does it bar reimbursement for such transactions; such a draconian regulation of related-party transactions would, indeed, have "burned the house to roast the pig" and thus would have been vulnerable to a facial attack on the grounds of being overly sweeping and broad. But, as written, the regulation does not prohibit related-party rental transactions or reimbursement; it imposes what the State Board felt was a reasonable restriction on the extent to which related parties engaged in less-than-arm's length transactions could receive reimbursement for what they claimed to be their rental expenses. The fact that this limitation may be less than the fair market rental value of the property does not render the regulation facially invalid, since the State Board reasonably concluded that related parties should not receive the fair market rental value because the closeness of the connection cast doubt on whether the rent being claimed was a truly legitimate expense or a somewhat artificial cost being imposed by one related party on another. While petitioners have shown that they are not being allowed the fair market value of rent on the property, it is also true that the same individuals own both partnerships and formed Penta II for the sole purpose of acquiring property and leasing it to Coastal. This is exactly the sort of arrangement that the regulation was intended to address. For these reasons and the reasons set forth in the petitioners' briefs, I am persuaded that N.J.A.C. 6:20-4.4(a)39 is not facially invalid as overly broad and sweeping, and I so **CONCLUDE**.

I further **CONCLUDE** that the State Board of Education was engaged in rulemaking and not ratemaking in promulgating N.J.A.C. 6:20-4.4(a)39, and that it thus was not required to make the same findings of fact and provide a guaranteed rate of return, as was required in those cases involving ratemaking or public utilities cited by the petitioners.

I am also not persuaded by petitioners' argument that the regulation is unconstitutional because it does not provide landlords with an adequate mechanism for adjustments without incurring substantial hardship under Helmsley v. Borough of Fort Lee, 78 N.J. 200 (1978), appeal dismissed, 440 U.S. 978, 60 L.Ed. 2d 237, 99 S.Ct. 1782 (1979). That case is distinguishable because it involved an across-

the-board rent control ordinance and stands for the proposition that an ordinance with a reasonably foreseeable and widespread confiscatory impact upon landlords must provide an adjustment mechanism without more delay than is practically necessary. N.J.A.C. 6:20-4.4(a)39 is not a rent control ordinance in the Helmsley sense and it has not been shown to have a confiscatory impact on related landlords who are unregulated and may rent to unrelated parties. I so **CONCLUDE**.

2(b) Facial Validity: Is the regulation facially confiscatory?

Petitioners contend that N.J.A.C. 6:20-4.4(a)39 is facially defective because the 2.5-percent return on the actual cost of ownership does not, under any set of facts, allow for a just and fair rate of return and thus facially constitutes an unconstitutional taking of their property. They maintain that they are entitled to a rate of return commensurate with the rate of return on investments with comparable risks and at a rate adequate to maintain and attract capital. The owners of Penta II and Coastal also maintain that a fair rate of return on their investment would be no less than eight percent and that the 2.5-percent cap of the regulation forces them, in effect, to subsidize the school system and thereby deprives them of their property without a just and fair return. They cite, in support, cases in the area of rent control ordinances and public utility law. See, e.g., Hutton Park; F.P.C. v. Texaco.

The Department responds that the regulation is not facially confiscatory because it is reasonable in light of the circumstances, including the fact that private schools for the handicapped operate as highly-regulated entities receiving most of their funds from public monies, and that the regulation is soundly based on the need to ensure that these schools do not inflate their profit at the expense of limited public funds for the handicapped. The Department also notes that the Hutton Park rent control ordinance case recognized that the permitted rate of return need not be as high as that prevailing in the industry prior to the regulation nor as much as an investor might obtain by placing his capital elsewhere. The Department also contends that an administrative agency may pass regulations in light of current or future requirements of public interest and that there is no vested right to the continuation of any regulation. See, St. Joseph's Hospital and Medical Center v. Finley, 153 N.J. Super. 214 (App. Div. 1977).

Unlike rent control ordinances, N.J.A.C. 6:20-4.4(a)39 is not a governmental price regulation limiting the prices to be charged by businesses (such as utilities and landlords) that provide services affected with the public interest. The State Board of Regulation limits only what private schools can receive in reimbursement for rent paid to related party landlords. It does not require the landlords to continue to rent to the related-party private school. What it does do is limit the allowable costs in the form of rent that related parties are allowed to charge one another and then receive from the State. This is not a governmental price regulation in the sense of the rent-control ordinance reviewed in the Hutton Park case. Unlike the landlords in Hutton Park, who could not avoid the impact of the rent-control ordinance, Penta II is not required to continue renting to Coastal and thus can avoid the impact of the regulation if it so desires, albeit at the cost of changing its arrangement with Coastal. Under these circumstances, I **CONCLUDE** that the regulation is not facially confiscatory and invalid on that ground.

2(c) Facial Validity: Does the regulation deprive the petitioners of equal protection of the law?

Petitioners lastly argue that N.J.A.C. 6:20-4.4(a)39 is unconstitutional because it facially discriminates against Penta as a related-party landlord by allowing an unrelated third party to charge at least the fair market value for rent while limiting the rental charges for related-party landlords to 2.5 percent above the actual cost of ownership. The owners of Penta II and Coastal argue that this differential treatment of unrelated and related landlords is arbitrary and capricious, that it does not rest on any reasonable set of facts, and that it also has no fair and substantial relation to the valid objective of the regulation. Petitioners emphasize that there is no evidence that they, or any other related parties, have engaged in rent-gouging or other unlawful or unfair rental practices. Because the regulation therefore discriminates without a proper basis, petitioners maintain that it cannot be sustained as valid under the principles of Auto-Rite Supply Company v. The Mayor and Township Committee of Woodbridge Township, 41 N.J. Super. 303 (Law Div. 1956), involving an ordinance prohibiting the sale or delivery of a selected list of merchandise on the sabbath. They also object to the preferential economic treatment given unrelated landlords, and maintain that the policy of the regulation will ultimately increase rent charges, decrease the supply of available buildings, and thereby discourage persons from providing private schools for the handicapped.

The Department argues that the distinction made by the regulation between unrelated and related-party landlords has a rational basis sufficient to withstand an equal protection challenge because of the difference between unrelated landlords, who must compete on the open market, and related landlords, who are not subject to market pressures and thus may be able to control or dictate rental price to the related party. The Department also maintains that petitioners must demonstrate that the State Board could not have rationally concluded that the classification would advance a legitimate legislative end in order to successfully mount an equal protection attack.

The party challenging a classification has the burden of demonstrating that it lacks a rational basis in relation to the object of the regulation. Social or economic regulation not based on using suspect classifications or impinging on fundamental rights carries with it a presumption of rationality that can be only overcome by a clear showing of arbitrariness or irrationality. See, Hodel v. Indiana, 452 U.S. 314, 69 L.Ed. 2d 40, 101 S.Ct. 2376 (1981); Matthews v. Atlantic City, 84 N.J. 153, 165 (1980). N.J.S.A. 6:20-4.4(a)39 neither employs suspect classifications nor impinges in any way on any fundamental rights, and thus it is not subject to analysis under the sort of strict scrutiny that would require it to be necessary to promote a compelling governmental interest. Here, the differences between unrelated party landlords and related landlords (the latter of whom may be the same individuals who are acting as tenants through a distinct but commonly-owned partnership) provides a sufficient rational basis for the regulation to withstand challenge on equal protection grounds, and I so **CONCLUDE**.

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that petitioners' motion for summary decision challenging N.J.A.C. 6:20-4.4(a)39 as applied and on its face is **DENIED**, and that respondents' motion for summary decision defending the regulation is **GRANTED**.

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.

3-23-89
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

3/23/89
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 29 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ct

PENTA ASSOCIATES II AND COASTAL LEARNING CENTER, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4, as were respondent's reply exceptions.

It is noted for the record that petitioners except to the ALJ's statement in the initial decision, ante, that the sole purpose of Penta's existence is to acquire and hold the title to property rented to Coastal Learning, given that no fact-finding hearing was conducted in this matter and petitioners never stipulated and/or averred that fact.

Petitioners' exceptions essentially reiterate the legal arguments contained in the briefs and letter memoranda considered by the ALJ when rendering his determination. They emphasize several times that respondent presented no proof whatsoever that rental abuses occurred either prior or subsequent to the disputed regulation. They also point to the summary statement published with the proposed regulation which speaks to an open competitive market. Petitioners contend that if the regulation was promulgated to insure fair market rent, it is quite obvious that this is not being achieved since the rent allowed is less than fair market value as may be seen by the calculations submitted by the expert witness report of Mr. Turtletaub (Exhibit P-9) and accepted as fact by the ALJ.

Petitioners disavow that their argument in this matter was predicated on a claim that Penta is a regulated party as asserted by the ALJ in the initial decision, ante. Nonetheless they also state in their exceptions that "***clearly it is." (Exceptions, at p. 4) According to petitioners, their claim was that Penta had standing to file the suit and that the regulation had to be adjudicated under the return principles established in the Public Utility Law, Rent Control Law and Fifth Amendment. Moreover, petitioners aver that the rental transaction itself between Penta and Coastal must be analyzed in determining whether or not the regulation is constitutional. Petitioners allege that in finding Penta is not a regulated party, the ALJ has put it into a classic "Catch-22" position and is in effect saying that (1) petitioners do not have a remedy in the case and (2) respondent and State Board can enact any law or effect any property right without being answerable to even

the State or United States Constitution. As to this, they reiterate that if Penta is not allowed to charge fair market value, then both petitioners will be injured. They characterize as "unsubstantiated theory" the ALJ's and respondent's claim that if Coastal owned the school buildings, it would not be able to charge rent. They also avow that fundamental fairness dictates that if the State is using a school building, the State should have to pay fair rental value.

Petitioners vehemently except to and characterize as "objectionable" and "insensitive" the ALJ's statements of the initial decision, ante, that the most the disputed regulation does is limit the allowable reimbursement for rent paid by Coastal and that petitioners have thus been deprived only of the full extent of rent they may charge themselves, which is not "taking" in the constitutional sense. More specifically, petitioners argue that if Coastal pays the rent called for in their contract, which is approximately $25,000 a year, it will operate at a loss.

Petitioners also except to the fact that in the initial decision, ante, the ALJ cites respondent's arguments relative to the New Jersey Supreme Court's conclusion in Council of Private Schools, supra, that N.J.A.C. 6:20-4.4 was reasonably designed to carry out the State Board determination concerning the quality of education provided by schools receiving handicapped pupils. They deem this an error on the ALJ's part because the regulation under dispute herein was enacted subsequent to that ruling. Petitioners likewise except to the ALJ's conclusion that the regulation was not arbitrary and sweeping, particularly that portion which reads:

> ***The fact that a multitude of abuses in this area may not have been detected and documented does not render the rule irrational if it is rationally connected to the purpose of preventing such abuses and the dissipation of scarce State funds for the handicapped that would result. As long as the regulation has some reasonable basis it should not be disturbed. *** I CONCLUDE that the concern with the potential for abuse in related-party lease arrangements provided such a reasonable basis for the State Board of Education's promulgation of N.J.A.C. 6:20-4.4(a)39***. (Initial Decision, ante)

As to this, they argue, inter alia, that it is clearly unconstitutional to force an individual to subsidize the State and to force a private individual to provide a service and/or material to the State at below fair market value. Further, if the regulation was promulgated because of a concern for the potential for abuse, petitioners point out that under the prior regulation (N.J.A.C. 6:20-4.4(29) reimbursement was also limited, but it ensured that the charge for rent did not exceed fair market value.

Respondent's reply exceptions rebut each of the points raised by petitioners in their exceptions and are incorporated herein by reference. Respondent also submitted primary exceptions which essentially support the ALJ's decision but also request clarification on some points and the reversal of others. More specifically, respondent reiterates its protest over the transcript of the State Board meeting accepted to the record by the ALJ and quoted in part of the initial decision, ante. Respondent contends among other things that since the transcript was not provided in discovery and since the speakers are not identified, it is untrustworthy as evidence; as such, the ALJ erred in admitting it.

Respondent also seeks reversal of the ALJ's determination that Coastal has standing in the matter, contending the ALJ provided no written decision setting forth the reasons for granting standing but merely indicated via telephone he was denying respondent's motion. As to the issue of standing, respondent argues that the issue at stake is Penta's amount of profit which does not touch on Coastal who is no more than an interested bystander concerned with the profit granted to its related landlord. Moreover, Coastal failed to demonstrate that an unfavorable decision will cause it injury either in regard to Coastal's expenses for rent or its allegation of being evicted.

In addition, respondent seeks to clarify the ALJ's finding in the initial decision, ante, that petitioners' figures for the fair market rent in the region are supported by a preponderance of the evidence and that respondent offered no competent or persuasive evidence on that point. As to this, respondent respectfully submits it never challenged the fair market value of the property because it was unnecessary to reach that issue in the matter, i.e., it knew the court would not have to decide how much more rent Penta could get, so it did not waste its time or the taxpayers' money. Respondent seeks to have the finding disregarded as unnecessary.

Upon a thorough and comprehensive review of the record in this matter, the Commissioner is in full agreement with the ALJ's findings and conclusions with respect to the disputed regulation. He does agree with respondent, however, that the transcript (Exhibit P-10) to which it excepts should not have been entered into the record. A review of that document reveals that no names whatsoever are identified for the "voices" transcribed and therefore may not be deemed reliable evidence to be considered in this matter.

As to the exception regarding Coastal's standing, the Commissioner does not agree with respondent's arguments that the ALJ erred in allowing Coastal standing. If anything Coastal's status as co-petitioner with Penta serves to illustrate and emphasize its less-than-arm's length relationship to that commonly owned corporation. Further, the Commissioner does not agree that the finding regarding fair market value and respondent's not having offered any competent or persuasive evidence on that point should be

disregarded. While the explanation provided by respondent as to why it chose not to submit evidence on that point is interesting, it does not render the ALJ's finding unnecessary.

Upon a most careful review of petitioners' exceptions and prior submissions, the Commissioner finds no arguments within them which would warrant reversal of the ALJ's well-reasoned decision. The Commissioner agrees fully with the ALJ that, on its face and when applied, the regulation limiting reimbursement for rent paid by a private school for the handicapped to a related party, i.e., such as payment by Coastal to Penta whose owners are the same, to actual cost of ownership to the related party plus 2.5% profit is valid and reasonable and is not arbitrary, capricious, unconstitutional or a violation of equal protection. As recognized by the ALJ, the regulation was designed to prevent a potential abuse and the absence of evidence that such abuse exists or existed does not render the regulation irrational. The State as a whole and the State Board of Education in particular has a strong interest in assuring the quality of education to handicapped students and safeguarding against practices which increase the costs of that education through less-than-arm's length transactions by related parties. This is particularly true when those transactions obtain public monies not otherwise obtainable if, as in the instant matter, the property were owned by Coastal rather than its commonly owned corporation, Penta. As stated in 18 N.J.R. 1237, the Department of Education had determined that, as of July 1, 1985, 21 private schools for the handicapped had set up commonly owned or controlled corporations which gave the appearance of being straw corporations used solely to disguise activities which would otherwise be nonallowable under N.J.A.C. 6:20-4.4. The regulation was not intended to give the commonly owned corporation renting to the private school a rent reflective of the open competitive market, as Penta would have it believed. Rather, the State Board specifically acted to restrict such less-than-arm's length transactions as a means to ensure that the tuition rates charged the public schools of New Jersey by private schools for the handicapped were based on cost and were reflective of the open competitive market. (See 18 N.J.R. 1237.)

Further, the Commissioner fully agrees with the ALJ's conclusion and respondent's exceptions and brief in support of its motion for summary judgment that the disputed regulation is constitutional as applied to Penta in that there has been no taking of its property nor is the regulation confiscatory. As correctly recognized by the ALJ, Penta is not a regulated party notwithstanding its contention otherwise. Nor should this matter have been decided under the principles of rent control law or public utility law. Penta is free to rent to whomever it wishes and at whatever rate it wishes. Moreoever, it does not rent to the State much as Penta would like to imply otherwise. For whatever reasons, it has chosen to rent to its commonly owned related party, Coastal, which is a regulated party. The fact that Coastal is a regulated

party, however, does not accord to Penta the status of a regulated party. Nor does Penta have any legal entitlement to a guaranteed rate of return subsidized through public monies. Moreover, Coastal has provided no evidence that it has operated, or would operate, at a loss as a result of the regulation.

Accordingly, the Commissioner adopts the initial decision as the final decision in this matter for the reasons well stated within it. The Petition of Appeal is therefore dismissed.

COMMISSIONER OF EDUCATION

May 22, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5253-88
AGENCY DKT. NO. 165-6/88

JOSEPH GROSSO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,
Respondent.

Mary J. Lembo Cullen, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

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

Gregory T. Syrek, Esq., for intervenors, Margaret Leslie, Marguerite McClintock, Elaine Mele, Mary O'Connor, Dawn VanderWal and Dawn Doyle
(Bucceri and Pincus, attorneys)

Record Closed: February 27, 1989 Decided: April 5, 1989

BEFORE PHILIP B. CUMMIS, ALJ:

On June 2. 1988, Joseph Grosso, a tenured employee in the New Providence School District, filed a petition with the Commissioner of Education. Petitioner sought the intervention of the Commissioner in order to gain the position of elementary school teacher, together with back pay, full benefits and all other emoluments denied petitioner as a result of respondent's failure to properly assign petitioner. Respondent filed an answer on July 15, 1988 and the matter was transmitted to the Office of Administrative Law on July 18, 1988 for hearing and determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference scheduled for September 3, 1988 was adjourned in order to add a third-party intervenor. The Clerk then inadvertently scheduled the matter for a telephone prehearing on October 18, 1988, rather than for an in-person prehearing. Thereafter the matter was rescheduled for an in-person prehearing on November 10, 1988. The prehearing was held at that time and all issues and procedures were settled. An evidentiary hering was held on January 11, 1989 at 9:00 a.m. at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. The record closed on February 27, 1989 when the last briefs were received.

ISSUE

The issue to be decided is whether the petitioner, a tenured high school business teacher, is lawfully entitled to the position of elementary school teacher due to the fact that he holds a valid elementary certification for grades K through 8.[1]

[1]None of the teachers who are presently holding the assignments in the elementary school and who would be "bumped" by Mr. Grosso are tenured teaching staff members.

STIPULATIONS OF FACT

1. Petitioner has been an employee of the respondent Board since October 18, 1965.

2. On or about April 28, 1988, respondent acted to abolish petitioner's position as Teacher of Business effective June 30, 1988. This action was taken pursuant to a lawful reduction in force, and petitioner makes no claim of seniority entitlements with regard thereto.

3. Petitioner was not offered a contract of full-time employment for the 1988-89 school year by respondent, but was offered a position as a part-time Teacher of Business for the 1988-89 school year. Petitioner rejected same.

4. Petitioner holds the certifications attached hereto and noted as Appendixes A through H. Also attached hereto as Appendix I is a letter dated July 29, 1988 from the State Department of Education relating to his certification.

5. The petitioner's employment history with respondent is as follows:

1987-88	Teacher - Business	(10 month)
1986-87	"	"
1985-86	"	"
1984-85	Supervisor II, Business	"
1983-84	"	"
1982-83	"	"
1981-82	Department Head, Business	"
1980-81	"	"
1979-80	"	"

1978-79	Department Head, Business	(10 month)
1977-78	"	"
1976-77	Businesss Education Coordinator	(12 month)
1975-76	"	"
1974-75	"	"
1973-74	"	"
1972-73	"	"
1971-72	"	"
1970-71	"	"
1969-70	"	"
1968-69	"	"
1967-68	"	"
10/65-66	"	"

6. During the 1985-86, 1986-87 and 1987-88 school years, petitioner taught computer keyboard for two (2) periods per day to third graders at respondent district's Salt Brook and Roberts Elementary Schools.

7. For the 1988-89 school year, respondent has employed the following nontenured elementary teachers at the grade level shown:

Teacher	Grade
Margaret Leslie	3rd
Dawn Doyle	2nd
Elaine Mele	K
Mary O'Connor	K
Dawn VanderWal	1st
Marguerite McClintock	3rd

8. The certificates held by these nontenured employees are attached hereto as Appendices J through P.

9. In addition to their current assignments, the teachers listed in Stipulation #7 have been employed by respondent as follows:

Margaret Leslie	1986-87 - Grade 3 1987-88 - Grade 3
Dawn Doyle	1987-88 - Grade 2
Elaine Mele	1986-87 - Kindergarten 1987-88 - Kindergarten
Mary O'Connor	1987-88 - Grade 3
Dawn VanderWal	1987-88 - Grade 4
Marguerite McClintock	October 5, 1987 to June 30, 1988 - 1st Grade Teacher's Aide and Extended Day Kindergarten (half-day)

This stipulation does not include periods of time during which these individuals may have been employed by respondent as substitute teachers.

10. All pleadings were timely filed.

All of the above having been stipulated as true facts by both parties, I accept them as valid and I **FIND** them to be factual and adopt them as part of my findings in this case.

TESTIMONY

Robert A. Lachenauer, superintendent of schools for New Providence for the last 13 years, testified that in his opinion, since the petitioner never taught elementary school and since there has been a drastic change in curriculum over the years, petitioner's

certification is at best outdated. Petitioner has had no training in elementary education since leaving college over 25 years ago and he has not been exposed to elementary school children for a long period of time. Lachenauer further testified that the teaching of mathematics, language arts, writing, science and substance abuse is totally different now than it was 25 years ago. Although Grosso is considered to be a good teacher, others are better qualified to hold an elementary school teaching position.

Lachenaeur further testified that Grosso has taught computer science to all the third grade students in the system for three years. Twelve at a time are "pulled out of class by petitioner to be taught." Petitioner has had no difficulty teaching computer science to these third-grade students over the last three years.

FINDINGS OF FACT

In addition to the stipulations of fact, I make the following findings and incorporate them as part of this decision:

1. Petitioner has not taught as an elementary school teacher during his teaching career.

2. Over the last three years, petitioner has successfully taught computer science (keyboard training) to 12 third-grade students at a time.

3. Petitioner is an experienced, qualified, tenured teacher in the New Providence system.

4. David Henn, Patricia Baros, Margaret Leslie, Marguerite McClintock, Elaine Mele, Mary O'Connor, Dawn VanderWal and Dawn Doyle are nontenured teachers within the respondent's district and all are presently teaching in New Providence.

DISCUSSION

Petitioner was first employed by respondent in October 1965. He has served variously as a 12-month business education coordinator, a 10-month department head in the high school business department, a 10-month supervisor of business and a teacher of business in the high school. He also has taught third-grade students over the last couple of years in the area of computer sciences.

When petitioner was initially employed, he possessed a permanent secondary teacher certification which entitled him to teach grades 7 through 12 in the areas of social business studies, accounting, physical education and auto-driver education. The certificate also carried an endorsement as follows: "Elementary subjects prescribed for grades three-eight inclusive."[2] In 1968, an additional endorsement for coordinator, cooperative industrial education programs, was added. During his employment, petitioner also earned various supervisory and administrative certificates as well as a certificate as typewriting teacher.

On June 30, 1988, the Board initiated a lawful reduction in force (RIF) affecting the business department of the high school. Petitioner was offered a part-time position as business teacher for the 1988-89 school year but rejected this offer. It is undisputed that petitioner acquired tenure pursuant to N.J.S.A. 18A:28-6. The petitioner submits, therefore, that when his position as business teacher was abolished effective June 30, 1988, he became entitled to any teaching assignment covered by the endorsement on his instructional certificate. No tenured teachers held these assignments. More specifically, petitioner contends that he is entitled to the teaching positions currently held by the intervenors.

---

[2]By letter dated July 29, 1988 the State Department of Education confirmed the issuance of petitioner's July 1958 elementary school teacher endorsement. This letter provides, "This certification now covers grades K through 8 and has lifetime validity."

Respondent Board, on the other hand, submits that petitioner does not have a valid claim to an elementary position within the district. The respondent argues that the position in which one acquires tenure is defined by the certification and endorsement under which a teaching staff member actually served the requisite time to acquire status pursuant to N.J.S.A. 18A:28-5. The respondent argues that petitioner never served as an elementary teacher and therefore has not acquired a tenure claim to such position.

Respondent further argues that even assuming tenure status has been achieved in the elementary position, there are substantial educationally based reasons for retaining existing nontenured elementary staff; i.e., they are experienced and trained in the modern methods and curriculum involved in the position of elementary school teacher.

Tenure is a legislatively conferred status. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 72 (1982). It is designed to afford teachers "a measure of security in the ranks they hold after years of service." Viemeister v. Bd. of Ed. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). Accordingly, the tenure law must be "liberally construed to achieve its beneficent ends." Spiewak at 74. The standards for tenure are set forth in N.J.S.A. 18A:28-5 and 6. Generally, tenure is earned upon completion of three years of service in a district (Section 5). Upon transfer, the individual retains the prior tenure and acquires tenure rights in the new title after two years (Section 6).

In Howley v. Bd. of Ed. of Ewing Township, 1982 S.L.D. 1328, affirmed by the State Board of Education, June 1, 1983, the concept of tenure was carefully explained by the court. Therein it stated, in relevant part, as follows:

> Pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6 as amended in 1962, tenure is obtained in one of the specifically enumerated positions (teacher, vice principal, principal, etc.) or in any other officially recognized "position", e.g., guidance counselor, which requires the holder to have an appropriate certificate. Once a teaching staff member acquires tenure in such a position, he may be reassigned to other schools or other grade levels covered by his certification endorsements within that position, but he may not be transferred to another position without his consent.
>
> Howley, at 1347 (emphasis added).

> Since tenure attaches to position, and the position specified in N.J.S.A. 18A:28-5 is "teacher", a tenured teacher may be "transferred or reassigned within the scope of the endorsements on his or her instructional certificate." Tenure is not acquired in a specific assignment, and therefore the statement that a tenured teacher may be transferred within the scope of his/her "certificate" (endorsements on the instructional certificate) is accurate.
>
> Howley, at 1339-1340.

Howley makes it clear that tenure is acquired in a position (such as that of "teacher") and not in a grade or category. In this regard, a Board may assign and a teacher may properly serve in any capacity in which he is qualified to serve by virtue of his/her endorsements so long as such assignment is within the scope of the certificate required for the tenurable position.

Subsequent to the Howley case, the rights of tenured staff affected by RIFs have been addressed in two published Appellate Division decisions. In the first case, Capodilupo v. West Orange Township Bd of Ed., 218 N.J. Super. 510 (App. Div. 1987), the petitioner was a tenured secondary school physical education teacher. Upon a reduction in force, he appealed to the Commissioner, arguing that he should have been offered one of the two elementary physical education teaching positions held by nontenured staff. Although never employed at the elementary level, petitioner's certificate permitted him to teach both elementary and secondary physical education. Both of the candidates whom he sought to replace had experience in the elementary school positions and were certified but had not acquired tenure. After several levels of appeal, the Appellate Division described petitioner as "a tenured teacher seeking reinstatement to a position for which he was certified, but in which he had acquired no demonstrable experience." Capodilupo, at 513. Having evaluated petitioner's claim in light of the State Board's decision in support of his tenure rights, the Court stated:

> Our review of the record satisfies us that the State Board was within its delegated authority when it ruled that a tenured teacher seeking reinstatement within the endorsements on his or her

> certificate is entitled to preference in a RIF as against a nontenured applicant with the same certification.
>
> Capodilupo, at 515.

This decision thus paved the way for the former secondary school teacher to take over the elementary school job of an incumbent nontenured person. It is noteworthy that the difference in categories, secondary v. elementary, was of no consequence to the Capodilupo conclusion. See also, Marandi v. Bd. of Ed. of West Orange, OAL DKT. NO. EDU 47-87, August 2, 1988, adopted Commissioner of Education (Sept. 15, 1988).

In the instant matter, respondent relies on Capodilupo for the proposition that that case is authority for the Board's application of an "an educationally based reasons" test. Thereunder, respondent claims that the nontenured persons have preference due to their elementary school experience and recent training as against the tenured petitioner whose experience is only at the high school level.

Respondent's reliance on Capodilupo as authority for the use of the discretionary test in this instance is misplaced. The Appellate Division only mentioned the test and expressly stated that it was not addressing its merits. This is therefore solely dicta and is nonbinding. Capodilupo, at 516.

Soon after the Capodilupo decision, the Appellate Division repeated and reinforced its determination in Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den. 110 N.J. 512 (1988). In Bednar, the petitioner's elementary school position as tenured art teacher was reduced while at the same time the Board employed a full-time experienced nontenured art teacher at the secondary level. Petitioner contended that his tenure and seniority rights had been violated. The Appellate Division found that there was merit to petitioner's argument:

> . . .[H] is tenure as an art teacher gives him the right to avoid a RIF by claiming a secondary school job of a nontenured art teacher with experience in specific category of secondary art. Bednar at 241.

The court concluded that petitioner's tenure rights could not be "dissolved" by affording a nontenured teacher "seniority," and therefore petitioner was entitled to the secondary school position. Bednar at 243.

Where the Capodilupo court refrained from comment on the State Board's argument that educational reasons could justify the retention of a nontenured teacher over a tenured teacher in certain circumstances, the Bednar court was not so reluctant. The court there stated:

> The State Board of Education attempted to fairly resolve a tension it perceived between tenure and seniority. The State Board's solution was to rule that tenure does not permit a teacher to claim an assignment in a job category in which he has no seniority against a nontenured teacher with experience in the category. The Board cited N.J.S.A. 18A:28-10, which invokes seniority to determine job rights in a RIF, and reasoned that since Bednar had no seniority teaching art on a secondary level, his rights were not violated by reducing his hours while retaining a full-time nontenured secondary art teacher.
>
> The defect in the Board's approach is this. N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinative. But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher "seniority." The tension perceived by the State Board between tenure and seniority is one the Board created. Its only proper resolution is to rule that the rights conferred by the tenure statute may not be dissolved by implementing regulations.
>
> The State Board's approach may or may not represent sound educational policy. However, it erodes tenure rights which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the legislature.
> Bednar at 242-243.

Thus, the Appellate Division has left no doubt that tenured persons qualified for a position by certification, whether they have served in the precise category or not, must prevail over nontenured persons for appointment to that position. DeCarlo v. Bd. of Ed. of So. Plainfield, OAL DKT. NO. EDU 6111-87, June 20, 1988, adopted Commissioner of Education, August 4, 1988.

CONCLUSION

Petitioner acquired tenure as a teacher pursuant to N.J.S.A. 18A:26-6. Having acquired tenure as a teacher, he could be reassigned within the scope of his instructional certificate to any assignment covered by the endorsements on his instructional certificate. When his position as "teacher" was abolished, he became entitled to any teaching assignment covered by the endorsements on his certificate to which respondent Board had assigned nontenured teachers. Notwithstanding that the respondent Board believes it had educational reasons for not appointing petitioner to one of the elementary school positions, lack of service as an elementary school teacher cannot thwart petitioner's tenured rights over nontenured individuals. To this end, upon the abolishment of his teaching position, petitioner was entitled to the teaching positions currently held by the intervenors.

I therefore **CONCLUDE** that petitioner is entitled to an elementary school teaching position, and I therefore **ORDER** that petitioner immediately be assigned as an elementary school teacher. I further **ORDER** that the petitioner be paid retroactively from the first day of the 1988-89 school year and that he receive all other benefits he would have been entitled to had he taught the full year as an elementary school teacher.

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** this Initial Decision with **Saul Cooperman** for consideration.

4/5/89
DATE

PHILIP R. COMMIS, ALJ

Receipt Acknowledged:

4/7/89
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 10 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

par/e

JOSEPH GROSSO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
V.	:	
MARGARET LESLIE ET AL.,	:	
INTERVENORS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board's exceptions were untimely filed; however, intervenors' exceptions were timely filed and petitioner's reply exceptions to intervenors' exceptions were timely. Petitioner's reply to the Board's exceptions were not considered, however, because those exceptions were untimely.

Petitioner concurs with the ALJ's decision and cites the State Board's decision in Vincent Mirandi v. Board of Education of the Township of West Orange, decided by the Commissioner September 15, 1988, aff'd State Board April 5, 1989 for the proposition that the "educationally based reasons" test articulated in Capodilupo v. West Orange Township Board of Education, 218 N.J. Super. 510 (App. Div. 1987) no longer survives. Thus, petitioner contends, in a tenure dispute "***the issue is strictly statutory, and the teacher with tenure must prevail." (Petitioner's Exceptions, at p. 1) In this regard, petitioner concurs with the ALJ's rejection of the Board's "educationally based reasons" argument. Petitioner submits the Commissioner should affirm the ALJ's decision in its entirety.

Intervenors' exceptions contend the initial decision represents an improper broadening of existing tenure rights as found in Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), cert. den. 110 N.J. 512 (1988). Intervenors aver that the language of the Court's decision in Bednar

> represents a clear correlation by the court of a teacher's tenure status and the endorsement utilized for a teaching position. This conclusion is further supported by the court's statement that seniority for tenured teachers is based upon specific job categories "which are

> normally narrower than the subject fields which are endorsed on teachers' certificates." 221 N.J. Super. at 242. (emphasis in text)
> (Intervenors' Exceptions, at p. 3)

Intervenors claim, therefore, that in determining rights and protections under tenure, the Court's focus on Bednar was the subject field endorsement on the certificate, not the certificate itself.

Intervenors also cite Capodilupo, supra, for the proposition that the Court attaches tenure to a specific endorsement on a certificate, not on the certificate. They claim in Capodilupo, "[T]he court found that the petitioner's tenure as a physical education teacher was violated, noting that the case involved a request for reinstatement within the endorsement on the teacher's instructional certificate. 218 N.J. Super., at 515." (Id.) Intervenors also cite DeCarlo v. Board of Education of the Borough of South Plainfield, decided by the Commissioner August 4, 1988 in support of this proposition. Therein, intervenors aver, "***the Commissioner concluded that the petitioner's tenure rights were limited to a supervisor's position because this was the endorsement on the administrative certificate that was actually required and used in employment, not the principal's endorsement found on the same administrative certificate***." (Id., at p. 4) Intervenors contend that petitioner in this matter

> is demanding the same absurd result [as was sought in DeCarlo - ed.] in this case by contending that he has an automatic right to displace an experienced, albeit nontenured, elementary teacher merely because he has possessed an elementary endorsement for over thirty years. Since he has never actually used the endorsement, his tenure status should not be summarily expanded to include it. He is a tenured business teacher and nothing more.
> (Id., at p. 5)

Intervenors also claim that the Commissioner's decision in Barbara Grossman v. Board of Education of the Borough of Ramsey, decided by the Commissioner November 7, 1988, aff'd State Board March 1, 1989 is apposite to this matter. They claim in that decision the Commissioner ruled that tenure for teachers is based upon the endorsements used in employment and does not extend to all endorsements held by the teacher. Intervenors avow that the initial decision does not examine Grossman but instead reaches a conclusion contrary to the Commissioner's analysis in that case.

By way of summary of their position, intervenors state:

> In each of the cited cases, the court or Commissioner was called upon to interpret the extent of a teacher's tenure rights when vying for a position against a nontenured teacher.

> There is a single analytical thread tying together all of these cases. In each instance, tenure protections were found to be consistent with, and only as broad as, the endorsement on a certificate that was actually required to carry out teaching responsibilities. In no case has tenure been expanded to include all the endorsements that an individual might have on an instructional certificate. This absurd situation would play havoc with a school district's ability to fulfill its educational responsibilities because it would entail an obligation to maintain the employment of teachers with little or no current knowledge or experience merely because they taught long enough in another area to gain tenure. Similarly, there is nothing in these decisions to support the notion that an employee may render himself insulated against termination merely by constantly acquiring new endorsements for a certificate. (Id., at p. 6)

Thus, intervenors submit that the initial decision improperly construes the scope of petitioner's tenure rights and, as a result, should be reversed by the Commissioner of Education, and the petition dismissed.

In reply to intervenors' exceptions, petitioner first contends that Capodilupo, supra, stands for the opposite proposition than that for which intervenors cite it. Petitioner avows that Capodilupo holds "***that a teacher acquires tenure as a teacher, and that his tenure includes all endorsements upon his instructional certificate." (Petitioner's Reply Exceptions, at p. 1) He claims that State Board decision makes this point clear.

Petitioner also finds intervenors' reliance on Bednar, supra, misplaced. Petitioner claims that Bednar reiterates the principle enunciated in Capodilupo and broadens that principle in recognizing that "seniority categories are often narrower than the scope of a teacher's instructional certificate." (Id.) He further avows that:

> [T]he Bednar Court stated that Chapter 28 surely does not contemplate the use of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. Bednar in no way suggests that Bednar's tenure rights were limited to the specific endorsement of art. On the contrary, as recognized by the Commissioner and State Board in subsequent cases (for example see Mirandi v. West Orange Bd. of Ed. (State Board of Education April 5, 1989)), Bednar represents an expansion of Capodilupo, making clear that the rights obtained are statutory in nature. (emphasis in text) (Id., at p. 2)

By way of rebuttal to intervenors' reliance on DeCarlo, supra, petitioner acknowledges that that petitioner's tenure rights were limited to supervisor, but not because of the certificate required for the position. Rather, petitioner herein contends that:

> ***DeCarlo's tenure claim was limited to that of supervisor, because the position in which he acquired tenure (supervisor), was specifically set forth within the tenure statute. Since DeCarlo had served in a specific position in which tenure was acquired under the statute (supervisor), he could not claim tenure as a principal. However, here Petitioner's tenure position as set forth in the statute was that of teacher, so that his tenure is as a teacher, under his instructional certificate, not limited to a specific endorsement. (Id.)

Moreover, relying on Mirandi, supra, petitioner argues that the right at issue in this case is statutory and intervenors' "educationally based reasons" argument is invalid.

Finally, petitioner finds Grossman, supra, to be inapposite to this case. Petitioner argues, to the extent that Grossman can be read to support intervenors' position, it must yield to the decisions in Capodilupo, Bednar, and Mirandi, all of which are Appellate Court or State Board decisions. Further, petitioner relies on page 26 of the Commissioner's decision in Grossman for the proposition that:

> [A] teaching staff member may not claim tenure in positions she has never held when that teaching staff member served under an instructional certificate, and seeks an educational services position, or, that teaching staff member seeks a position requiring certification that she does not hold. Grossman cannot apply where a teacher has served under an instructional certificate and seeks a position over a nontenured teacher in an area endorsed on his instructional certificate for which he is qualified by certification to teach. [footnote omitted] (Id., at pp. 2-3)

By summary, petitioner iterates that a teacher acquires tenure under his instructional certificate and the teacher's tenure rights extend to all endorsements on his instructional certificate, citing Capodilupo, Bednar, and Mirandi. He adds that the Commissioner recently rejected an argument similar to that posed by intervenors in Bodine v. Board of Education of the Township of Burlington, decided by the Commissioner February 23, 1989. In Bodine, petitioner avows, the Commissioner rejected the argument that qualification for purposes of tenure and seniority means "recently served in the area" and that the sole test for qualification is certification. (Id.) Since petitioner is properly certified as a teacher, and he holds an endorsement in elementary education, his tenure status includes his elementary endorsement and, thus, petitioner claims, the initial decision should be affirmed.

Upon a careful and independent review of the record, the Commissioner rejects the initial decision for the reasons expressed below.

Initially, the Commissioner notes his accord with the ALJ's recitation of the nature of tenure as being a statutorily conferred status. (See Initial Decision, ante.) He also affirms the ALJ's understanding of the case law establishing that tenure is acquired in a position, not in a grade or category. (See Initial Decision, ante, relying on Philip Howley et al. v. Ewing Township Board of Education, 1982 S.L.D. 1328, aff'd State Board 1983 S.L.D. 1554. He also adopts as his own the ALJ's recitation of the facts before the Court in Carodilupo, supra. (See Initial Decision, ante, and those facts before the Court in Bednar, supra.) However, the Commissioner rejects the ALJ's conclusion made in reliance upon Capodilupo and Bednar, that petitioner in this matter is "***entitled to any teaching assignment covered by the endorsements on his certificate to which respondent Board had assigned nontenured teachers." (Initial Decision, ante)

The error in petitioner's and the ALJ's reasoning lies in the conclusion they draw from their reading of Carodilupo and Bednar that because petitioner held an elementary certificate and, in fact, taught computer keyboard to third graders, he thus acquired tenure under his elementary certificate. In fact, as suggested by intervenors, petitioner's service as a teacher of computer keyboard was under his business certificate. See Tr. 18 wherein the Superintendent of Schools stated in response to a question from the Board attorney concerning the nature of petitioner's duties teaching third graders computer keyboard:

> A. Yes, we decided that because of his background in business, that he would be the logical person***.

Thus, contrary to the contention of petitioner and the conclusion of the ALJ, petitioner never served under his elementary endorsement, and therefore acquired no seniority under that endorsement. Since he never served under that endorsement he acquired no tenure entitlement. See Spiewak v. Rutherford Board of Education, 90 N.J. 63, 14 (1982)

The Commissioner's reading of Capodilupo and Bednar supports his conclusion that one obtains tenure within an endorsement on instructional certificate and, thus, that the scope of tenure is determined by the endorsement under which one has served. The Appellate Division held in Capodilupo:

> Our review of the record satisfies us that the State Board was within its delegated authority when it ruled that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification. (emphasis supplied)
> (218 N.J. Super. at 515)

Thus, the Court's determination that Capodilupo's tenure as a physical education teacher had been violated hinged on its awareness that reinstatement was subject to the scope of the endorsements on the teacher's instructional certificate.

In Bednar, the Appellate Division stated:

> Bednar's second argument has merit. It is that his tenure as an art teacher gives him the right to avoid a RIF by claiming the secondary school job of a non-tenured art teacher with experience in the specific category of secondary art. (emphasis supplied) (221 N.J. Super. at 241)

Thus, in determining that Bednar's tenure rights had been violated, the Court looked to the endorsement under which petitioner served in evaluating his tenure status. Further, the Commissioner agrees with intervenors' elaboration on this point wherein they state in exceptions:

> This conclusion [the Court's conclusion that endorsements, in conjunction with certification, determine tenure status, not the certificate alone - ed.] is further supported by the court's statement that seniority for tenured teachers is based upon specific job categories "which are normally narrower than the subject fields which are endorsed on teachers' certificates." 221 N.J. Super. at 242.
>
> (Intervenors' Exceptions, at p. 3)

To conclude, as the ALJ did, that a tenured teacher is entitled to any teaching assignment covered by any endorsement he holds to which respondent Board had assigned nontenured teachers, without looking to whether such petitioner had served under said endorsement would be tantamount to abrogating the seniority regulations altogether. This, in the Commissioner's view, was not contemplated by the Legislature in designing N.J.S.A. 18A:28-1 et seq.

Moreover, the Commissioner finds that pursuant to the Appellate Division's decision in Bednar, the State Board has abandoned the "educationally based reasons" justification for retaining a nontenured employee with experience under a specific endorsement over a tenured employee with appropriate certification and endorsement but lacking demonstrable service under that endorsement. See Mirandi, supra, at page 9. "We concur with the Commissioner's rejection of the Board's 'educationally based reasons' argument, and, in light of the Appellate Division decision in Bednar, supra, reject the continuing viability of such a standard in assessing the rights of tenured individuals in a RIF." Thus, the Commissioner rejects the Board's application of an educationally based justification for reducing petitioner's employment and, instead, relies on Bednar in support of his determination herein that petitioner acquired tenure only within the scope of his endorsement as a business teacher, not as an elementary teacher

because his service was at all times under his business endorsement. See also Grossman, supra, at page 25 wherein it is stated:

> ***mere acquisition of an additional endorsement under which she never served does not entitle her to tenure and seniority rights in an area of later-acquired certification. To hold otherwise would entitle those with certifications and endorsements in areas wherein they have not served to assert bumping rights over those who have served under proper certification, in direct contravention to the letter and the spirit of the seniority regulations.***

Accordingly, for the reasons stated above, the Commissioner rejects the initial decision and finds that petitioner does not have tenure claim to any elementary position in the district for which he has certification. Consequently, the Commissioner dismisses the instant Petition of Appeal with prejudice.

COMMISSIONER OF EDUCATION

May 22, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5032-88
AGENCY DKT. NO. 166-6/88

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,
Petitioner,
v.
MARGARET ESTELLE,
Respondent.

Joseph F. Betley, Esq., for petitioner (Capehart and Scatchard, attorneys)

Barbara Riefberg, Esq., for respondent (Selikoff and Cohen, attorneys)

Record Closed: April 3, 1989 Decided: April 10, 1989

BEFORE **NAOMI DOWER-LABASTILLE,** ALJ:

The Board of Education of Pemberton Township (Board) filed this petition seeking reimbursement of $7,600 in salary paid to Margaret Estelle, pending a worker's compensation judge's adjudication of Temporary Disability Benefits (TDB) for a work-related accident. Estelle claims she had a right to receive sick pay pursuant to N.J.S.A. 18A:30-2.1, for one year from February 23, 1987 (the date of her injury), even though the worker's compensation court adjudicated that her TDB benefits ceased on July 19, 1987.

The Commissioner transmitted the matter to the Office of Administrative Law on July 7, 1988 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing was held on September 28, 1988. The parties stipulated certain facts and the Board filed a motion for summary judgment on November 28, 1988. After

reviewing the filings, I asked for oral argument on January 9, 1989, and filing of supplementary briefs on worker's compensation law TDB. Supplementary briefs were filed by late January. In February, I was out of the office much of the time due to serious injury to a family member. I advised the parties on February 28, 1988 that the decision on motion would be delayed. The record was closed on April 3, 1989 when it was determined that the motion disposed of all issues in the case.

The stipulated **FACTS** are these:

1. For the 1986-1987 school year, respondent, Margaret Estelle, was a nontenured custodial/maintenance employee for the Pemberton Township Board of Education ("Board"), under a 10-month contract at an annual salary of $10,760.00. Respondent commenced her employment on September 1, 1977, resigned November 15, 1978 and rehired on November 15, 1979.

2. On February 23, 1987, respondent suffered a work-related injury of an orthopedic nature in her lumbar region.

3. Respondent remained absent from work for the remainder of the 1986-1987 school year.

4. Pursuant to Chapter 15 of Title 34 of the New Jersey Workmen's Compensation Act, N.J.S.A. 34:15-1 et seq, respondent applied for and received from the Board's workmen's compensation insurance carrier (Selective Insurance Company of America) temporary disability benefits in the amount of $3,927.40, representing 20 6/7 weeks of temporary disability up to July 19, 1987.

5. Selective Insurance Company sent respondent a letter dated August 17, 1987 informing respondent of the following:

> As you know, we are the Worker's Compensation Carrier for your employer, for whom you were injured on February 23, 1987.

> I am in receipt of the examination report from Dr. Robert Brill dated July 17, 1987, stating that you have reached a plateau in your recovery program. I also note that he has released you to return to work but you informed him that you do not meet the requirements for your job, so you were informed to seek some other type of employment. Therefore, your temporary total benefits are terminated.
>
> However, Dr. Brill has given you a permanent partial disability rate of 3% of total. As this was a 1987 accident, 3% of disability evaluation will entitle you to 18 weeks of benefits at the permanent partial disability rate of $80.00, for a total payment of $1,440.00.
>
> Enclosed, please find our initial check beginning your payments up to date, and the balance of benefits due you will be paid every 4 weeks until paid out. If you have any questions concerning this matter, I know you will contact the undersigned.

The August 17, 1987 correspondence is attached to the Petition of Appeal as Exhibit "A".

6. On March 11, 1988, a Judgment was entered in the Division of Worker's Compensation (Burlington County) by Judge Francis S. Munyon which awarded respondent forty-five (45) weeks of permanent disability benefits and affirmed the 20 6/7 weeks of temporary disability benefits issued to respondent. The compensation award held that respondent was not entitled to receive any more temporary disability benefits for any period of time after July, 1987. A copy of the compensation award is attached to the Petition of Appeal as Exhibit "B".

7. Respondent has not appealed or taken any further action to challenge the March 11, 1987 compensation award or, specifically, to challenge the period of temporary disability benefits found to have been properly awarded by the compensation court.

8. Respondent was represented by counsel at all times in the worker's compensation court proceedings.

9. During the 20 6/7 week period of eligibility for temporary disability benefits, respondent received full salary from the Board pursuant to N.J.S.A. 18A:30-2.1. Further, during the same 20 6/7 week period of temporary disability in which respondent was paid full salary by the Board, respondent endorsed over to the Board the temporary disability benefit checks she received from Selective Insurance Company pursuant to N.J.S.A. 18A:30-2.1. The Board received $3,927.40 in reimbursement of the temporary disability benefits issued to respondent by Selective Insurance Company.

10. For the 1987-1988 school year, respondent's annual salary was increased to $11,730.00.

11. On the first day of the 1987-1988 school year (September 1, 1987), respondent reported to work but left after only a few hours. Respondent never returned to work for the 1987-1988 school year.

12. From September, 1987 through March 15, 1988, respondent continued to receive her full salary from the Board. These salary payments were in the amounts of $1,173.00 per month for six months (September, 1987, through February, 1988) and $586.50 for one half of March, 1988 for a total of $7,624.50.

13. During the period of time that respondent received her full 1987-1988 salary from the Board, respondent did not receive temporary disability benefits under Title 34, Chapter 15, Labor and Workmen's Compensation, of the Revised Statutes (N.J.S.A. 34:15-1 et seq).

DISCUSSION OF LAW

Respondent claims she was entitled to be paid sick leave benefits for one year from the date of her accident in February 1987, pursuant to N.J.S.A. 18A:30-2.1, even though a worker's compensation court award determined that respondent was no longer entitled to temporary disability benefits after July 19, 1987, when Dr. Brill released her to return to work. The Board continued to pay benefits until the compensation case award

was confirmed in March 1988, whereupon it ceased payment. Since the compensation court award for TDB ceased in July, the Board seeks reimbursement for the sick-leave benefits (full salary) it paid to respondent from September 1987 through the first half of March, while the compensation case was pending. Respondent argues that this matter cannot be determined on summary judgment motion because she must be given the opportunity to prove that she was disabled from performing her work for the Board during the 1987-88 school year, for which time period she had been awarded 45 weeks of permanent disability benefits by the worker's compensation court. She argues that the supplemental benefit of full salary for one year was intended to continue beyond the period she received TDB on through the period of her permanent worker's compensation benefits, until the end of one full calednar year from the date of her injury. If respondent's interpretation of N.J.S.A. 18A:30-2.1 is persuasive, material facts must be determined at plenary hearing. These facts are whether or not respondent was disabled from performing her work as a custodial/maintenance employee in 1987-88 school year and if so, whether she was thus disabled for the full calendar year from the date of her injury on February 23, 1987.

The controlling statutes are these:

18A:30-1. Definition of sick leave

Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

18A:30-2.1. Payment of sick leave for service connected disability

Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be

> made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

Several recent appellate opinions have construed portions of N.J.S.A. 18A:30-2.1. The most relevant is Williams v. Bd. of Ed. of Deptford Tp., 192 N.J. Super. 31 (App. Div. 1983), aff'd, 98 N.J. 319 (1985), in which Williams sought benefits under the statute for disjunctive, intermittent absences due to work-related injury. These absences occurred more than one calendar year from the date of the injury, but, in the aggregate, they totaled less than a year of sick-leave days. Williams received a TDB award for her days of absence during a period more than one year from the date of injury. Williams argued that, because she was awarded TDB for her absences more than one calendar year from her injury, she should receive supplemental benefits under N.J.S.A. 18A:30-2.1 for the period for which she received TDB, consistent with N.J.S.A. 34:15-1 et seq. The court held that all of N.J.S.A. 18A:30-2.1 need not be construed in pari materia with entitlements under Title 34 (worker's compensation). The court pointed out that the legislature, by a statement appended to the 1967 amendment to N.J.S.A. 18A:30-2.1, "made clear its intention that the leave of absence with pay provision for an 'accident' applied to those injuries arising from employment and subject to the Workers' Compensation Act." 192 N.J. Super. at 38.

The Williams court analysis goes on to note that N.J.S.A. 18A:30-2.1 grants benefits more liberal than those granted by the Workers' Compensation Act in that there is no waiting period, so that the Board employee receives benefits under Title 18A that exceed TDB benefits allowed under Title 34, and secures Title 18A accrued sick-leave days, which are preserved intact. Nevertheless, the court holds that a calendar year means the period of 12 full months from the date of injury, and no longer. The meaning of calendar year is understood by reference to an academic (or school) year, which is normally less than 12 full months and which does not include the summer vacation of a ten-month employee. "Calendar year" had been construed by the court in dealing with tenure statutes. In Williams, the employer Board was permitted to recoup funds erroneously paid under a mistake of law.

In Morreale v. State of N.J., 166 N.J. Super. 536 (App. Div. 1979)., certif. den., 81 N.J. 275 (1979), the appellant sought sick-leave disability benefits, pursuant to civil service rule N.J.A.C. 4:1-17.9, after receipt of a TDB award for 40 weeks. The employee had been injured during lunch hour off the employer's premises. The rule allows sick leave with pay for an employee who is disabled "because of occupational injury or disease." It was based on a statute, N.J.S.A. 11:14-2, which directed the Civil Service Commission to establish regulations extending paid leave to employees disabled either through injury or illness as a result of, or arising from, their respective employment. In Morreale, appellant argued that the sick-leave statute and regulations should be read in pari materia with the worker's compensation statute, which had been interpreted to provide benefits for off-premises accidents during a lunch hour. The court held that the two statutes have different purposes, so that similar language in each need not be interpreted as having the same meaning. Whereas the Worker's Compensation Act is to be interpreted liberally "to place the cost of worker connected injury on the employer who may readily provide for it as an operating expense," the cost of disability sick leave benefits of Title 11 employees falls on the taxpayers. The court thus gave the Title 11 language "the construction which its language readily implies, not one which strains the sense of the statute as the average reader would glean it." Id at 540.

The appellate courts have held that the worker's compensation court is the appropriate tribunal to determine whether work-related activities are the direct cause of an employee's inability to work. Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985). Forgash had received an adverse determination on this issue in an administrative proceeding initiated under N.J.S.A. 18A:30-2.1, and the respondent board argued that her claim for TDB was barred by res judicata or collateral estoppel. The Forgash court ruled that "the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period" (208 N.J. Super. at 466-67), and the statute therefore contemplates a prior determination of a compensable injury by the compensation court. The State Board subsequently held that when a claim is made under N.J.S.A. 18A:30-2.1 and the question of causation is in dispute, the claim under the cited statute should be deferred until the compensation court has made a determination. Tompkins v. Bd. of Ed. of Hamilton, OAL DKT. EDU 3274-86 (Aug. 20, 1986), aff'd, Comm. of Ed. (Oct. 3, 1986), rev'd, st. Bd. of Ed. (Dec. 4, 1987). The State Board noted that the Tompkins record did not indicate "whether the Division of Workmen's Compensation has made its determination, nor of whether any issues pertaining to

Petitioner's claim under N.J.S.A. 18A:30-2.1 remain in dispute." This language suggests that a compensation court may be able to put to rest all issues under the statute.

On February 5, 1988, the State Board reiterated its holding that a petitioner must first seek a compensation-court determination of whether or not an illness is work-related before the agency will exercise jurisdiction under N.J.S.A. 18A:30-2.1. Amos v. Bd. of Ed. of Red Bank, OAL DKT. EDU 3757-86 (Jan. 14, 1987), mod., Comm. of Ed. (Mar. 18, 1987), aff'd, St. Bd. of Ed. (Feb. 5, 1988).

The Commissioner recently addressed the issue in the instant case in Cook v. Bd. of Ed. of Brick Twp., OAL DKT. EDU 8076-86 (Dec. 11, 1987), aff'd, Comm. of Ed. 9Jan. 21, 1988). Cook was injured at work on November 26, 1984, and April 17, 1985. He continued to work throughout that time period until on May 24, 1985, he had surgery necessitated by his injuries. He was disabled for the remainder of the school year, four weeks and two days, and the Board's carrier paid TDB for that period. The Board deducted these payments from Cook's full salary. Cook was denied sick leave with pay for the 1985-86 school year, and was instead granted sick leave without pay. In that school year, on April 1, 1986, Cook was awarded a disability retirement pension which commenced on July 1, 1986, after the close of the school year. Cook's worker's compensation case was settled on January 15, 1987; he agreed that TDB had been paid in full and he was granted 105 weeks of permanent disability.

The Board's theory was that Cook was owed no benefits under N.J.S.A. 18A:30-2.1 for the 1985-86 school year, since he was awarded no TDB for that year. The Board conceded, however, that it owed Cook salary at the 1984-85 level, less permanent disability payments for the school year (40 weeks). The ALJ concluded that no setoff was permitted for permanent disability payments and that no determination of temporary disability for 1985-86 had been made under N.J.S.A. 18A:30-2.1. She treated the issue as a reopening on the issue of TDB, and she concluded that relitigation of it was barred by collateral estoppel and waiver, since Cook voluntarily settled his worker's compensation TDB claim and the Board could not receive additional TDB contributions from its carrier under the circumstances. The Commissioner adopted the OAL decision as his final decision for the reasons expressed therein. Cook did not appeal.

Estelle argues that Cook can be distinguished because the petitioner Board herein has already paid benefits and now seeks to recoup them, whereas the Cook board did not pay Cook sick-leave benefits under N.J.S.A. 18A:30-2.1 beyond the period covered by the TDB benefits accepted in settlement. Estelle claims that she is not seeking "additional benefits," as Cook was. Since the Williams court held that benefits paid under mistake of law could be recouped, I **CONCLUDE** that no distinction arises by virtue of the fact of payment. Indeed, the Board was most considerate to Estelle when it continued to pay salary throughout the pendency of the worker's compensation case. If such payment pending adjudication became a bar to recoupment, no Board would willingly continue such salary payments. Thus, on policy grounds, it would be inappropriate to base a distinction on whether or not a Board voluntarily continues to pay the salary claimed under N.J.S.A. 18A:30-2.1.

There are some factual distinctions between Cook and Estelle. Both voluntarily agreed in settlement on the length of the TDB period. Estelle could have disputed the medical opinion that her condition had "plateaued" in July, i.e., that she was "as far restored as the permanent character of the injury will permit." Harbatuk v. S & S Furniture Systems Insulation, 211 N.J. Super. 614, 621 (App. Div. 1986). Absent Estelle's appeal of the compensation court's order (and it was not appealed), Estelle is in the same status as Cook in that the Board can no longer look to the carrier for TDB contribution. What Cook and Estelle did was to trade-off benefits in the settlement. By securing longer periods of permanent disability benefits they also secured more pension credit, for which the employer was required to pay. N.J.S.A. 18A:66-32.1. The receipt of TDB must be set off from salary, in any event, but if a shorter TDB period is traded off for a longer permanent award period, the claimant still has the possibility of a successful argument that he or she can subsequently seek full salary for a calendar year under N.J.S.A. 18A:30-2.1, with no TDB set off.

There is an additional fact in the Cook case: since he was awarded an ordinary disability retirement, it can be assumed that (a) he was eligible for it by virtue of having ten years of work credit in TPAF, and (b) he was physically incapacitated for the performance of duty. N.J.S.A. 18A:66-39. He did not seek the disability retirement immediately because N.J.S.A. 18A:66-32.1 required that the Board keep him on the payroll and pay his pension contribution for the period of the worker's compensation permanent disability award (or until he retired). If Cook had succeeded in his N.J.S.A.

18A:30-2.1 claim for one calendar year of salary, in 1985-86 (when he was not working) he would have received full salary, without any set offs for TDB or for permanent worker's compensation benefits, in addition to employer payments into his pension fund for pension credit for 105 weeks — the length of the permanent award — a period that was more than the length of a school year (40 weeks). The interaction between Title 18A, including the pension provisions, and worker's compensation law, in my view, contribute to an understanding and interpretation of N.J.S.A. 18A:30-2.1 that does not, per se, relate to the in pari materia arguments considered in the leading appellate cases discussed above.

Respondent here claims that one supplemental aspect of benefits bestowed by N.J.S.A. 18A:30-2.1 is that the worker shall receive full salary for one calendar year when she is permanently disabled from performing the specific duties of her position (the pension standard), whereas the worker's compensation standard would grant benefits only for disability from performing any work at all. She cites Tamecki v. Johns Manville, 125 N.J. Super. 355 (App. Div. 1973), and argues that the TDB standard is "unemployable in any capacity." Respondent also cites a similar case on the subject, Monaco v. Albert Maund, Inc., 17 N.J. Super. 425 (App. Div. 1952), which holds that TDB ends not only when the employee is able to resume work (and continue permanently) but, in certain cases, until he or she is as far restored as the permanent character of the injuries will permit. The court cites as applicable an earlier holding that the disability should be "deemed to be temporary until after a course of treatment and observation it is discovered to be permanent, and that fact is duly established." Id at 431. In Tamecki, the court notes that although the worker is no longer eligible for TDB under the standard, he is not necessarily totally disabled. "His ability to work may have been diminished and the areas of his employability narrowed, but he was compensated for these losses by the award for partial permanent disability." 125 N.J.Super. at 359.

Since lack of prior payment under N.J.S.A. 18A:30-2.1 does not distinguish Cook from the instant case, I could, without more, conclude that the Board should be permitted to recoup the monies it paid before TDB for Estelle was determined by the worker's compensation court. The Cook decision did not specifically discuss the difference between disability standards under the two statutes, however: Cook had been awarded a disability pension pursuant to N.J.S.A. 18A:66-39, so it must be inferred that he was incapacitated from performing the duties of his teaching position. It appears from the stipulated facts that, with the 45 weeks of partial permanent disability awarded and

her years of work, Estelle may fall short of the ten years of work credit needed to apply for a disability pension. An interpretation of N.J.S.A. 18A:30-2.1 should not be influenced by whether or not a particular individual does or does not qualify for a disability pension, however, since one interpretation of the statute must apply to all.

The scheme of sick-leave benefits within Title 18A itself is clear. All Boards must grant at least ten days of sick leave a year which employees may accumulate. N.J.S.A. 18A:30-2 and 3. After a work-related injury, an employee who is absent from his or her post of duty due to personal disability receives supplemental benefits under N.J.S.A. 18A:30-2.1 for up to one calendar year. The supplemental benefits include: retention and reservation of all accumulated sick days, since they need not be used up while an employee is disabled by a work-related injury; payment of full salary for the waiting period before eligibility for TDB; and full salary, less TDB benefits. If TDB is awarded for a longer period than one calendar year from the date of injury, the statutory supplement does not apply for the excess.

If the worker is awarded "periodic benefits payable under the workmens' compensation law" and he or she cannot work ("in lieu of his normal compensation," N.J.S.A. 18A:66-32.1), a Board is required to pay into the pension system the employee's regular salary deductions for pension based on his salary prior to the receipt of worker's compensation benefits, in addition to the employer contributions. Payment must be continued for the entire period during which worker's compensation benefits are paid, or until retirement. Absent retirement, the pension contribution payments "will terminate" when worker's compensation benefits terminate, but until that time, the employee is in active service. He can apply for a disability pension while periodic benefits are being paid but his pension will be reduced. The next step in the benefit scheme is ordinary or accidental disability retirement under N.J.S.A. 18A:66-39 and, at that point, the statutory standard for eligibility becomes physical or mental incapacity for the performance of duty, as well as TPAF membership "for each of the 10 years next preceding his retirement."

It thus appears to me that N.J.S.A. 18A:30-2.1 must be interpreted to intermesh as consistently as possible with the statutory scheme of benefits. A different form of benefit commences after TDB ceases, when a permanent periodic worker's compensation award is payable. Full salary is not payable at that time; the periodic

payment is in lieu of normal compensation as long as the worker does not return to work because of his disability. The supplemental benefit under N.J.S.A. 18A:66-32.1 for the time period when worker's compensation has been determined is payment of the employee's pension contribution and retention of the employee on the payroll, which extends work credit toward eligibility for a disability pension. No mention is made of standards of disability in N.J.S.A. 18A:66-32.1. As long as an employee receives periodic benefits and does not work, his or her pension contributions must be paid. It is not until the question of a disability retirement pension under N.J.S.A. 18A:66-39 is raised that the statutory standard of incapacity for the performance of duty arises.

I **CONCLUDE** that N.J.S.A. 18A:30-2.1 provides for full salary for absence from a post of duty due to a work-related injury for up to one calendar year only as long as the employee receives (or is eligible to receive) TDB benefits, as determined by the worker's compensation court. I **CONCLUDE** that the pension standard of incapacity to perform the individual employee's duties was not intended to be applicable to extend full salary over the period when permanent periodic payments are payable. I believe it is because of the different Title 18A supplemental benefits during this period, not because of an in pari materia interpretation with worker's compensation law, that the legislature, in both of the last two sentences of N.J.S.A. 18A:30-2.1, tied the supplemental benefits to TDB. The adjudication of the time at which partial or total permanent disability payments begin is essential to demarcate the time at which the Board must commence benefits under N.J.S.A. 18A:66-32.1. I **CONCLUDE** that the legislature did not intend to have full salary continued after periodic permanent benefits commenced, for such an interpretation would be at odds with the clear meaning of N.J.S.A. 18A:66-32.1. This interpretation also explains why the legislature requires the employee to pay back TDB while receiving full salary but does not mention a set off for permanent periodic benefits received. If the employee goes back to work, he or she receives "normal compensation" and keeps permanent periodic worker's compensation benefits. If the employee does not return to work, he or she receives the periodic benefits in lieu of normal compensation and the benefit of payment of pension contributions. For Estelle, the permanent disability benefits run for 45 weeks from July 19, 1987. The Board must pay pension contributions based on the 1986-87 salary as they would have been payable by Estelle from her paychecks until the end of the 45 week period. Furthermore, there is no suggestion in these statutes that a more liberal standard of disability is applicable prior to service for ten years and application for TPAF disability benefits. In fact, TDB can be

awarded for 400 weeks, yet the legislature has limited the full salary grant to one calendar year. I **CONCLUDE** that the issue of whether or not Estelle could meet the pension standard of disability is therefore not a material fact in issue, and I also **CONCLUDE** that no other factual issue exists. The case is therefore amenable to summary decision.

It is therefore **ORDERED** that the petitioner's summary decision motion must be granted and that Estelle must reimburse the Board for full salary paid for the 1986-87 school year less her pension contribution for the period mandated by N.J.S.A. 18A:66-32.1.

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.

April 10, 1989
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

4-10-89
DATE

Lenora Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 12 1989
DATE

Jayne A Venetus/KS
OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MARGARET ESTELLE,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions and reply exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioning Board requests that the Commissioner affirm the grant of summary decision in its favor but excepts to the initial decision insofar as it seeks pre- and post-judgment interest and reversal of that portion of the decision which determines it is required to pay pension contributions on behalf of respondent commensurate with the 45-week permanent disability award she received. As to this latter point, the Board argues that the Commissioner does not have jurisdiction to decide whether a board of education is obligated to make pension contributions during the period of permanent disability benefits. Rather, under the Compensation Act, that question of law rests with the Division of Pensions.

The Board further argues that even if the Commissioner had jurisdiction, the ALJ's construction of the term "periodic benefits *** in lieu of his normal compensation***" pursuant to N.J.S.A. 18A:66-32.1 and N.J.S.A. 43:15A-25.1 as including a permanent disability award under the Compensation Act presents a misunderstanding of the difference between a temporary worker's compensation benefits and a permanent worker's compensation award paid by means of weekly payments over a period of time. It is the Board's contention that pension contributions paid by the employer are only due during the period of temporary disability benefits since it is only that type of benefit which constitutes "periodic benefits *** in lieu of his normal compensation***." A permanent disability award, on the other hand, is not "in lieu of *** compensation," but a damage award to compensate the employee for his permanent injuries.

In support of this argument, the Board cites an unreported matter entitled County of Mercer v. State of New Jersey, Division of Pensions (Chan. Div. (sic), Docket No. L-14998-84) and a memorandum from the Director of the Division of Pensions relative to that decision.

Respondent excepts to the initial decision averring that the ALJ incorrectly concluded that she must reimburse the Board the full salary paid and that it ignores the Commissioner's decision in

Sirianni v. Howell Township Board of Education, Monmouth County, decided by the Commissioner February 5, 1986. Respondent believes the Sirianni matter to be on point because it ruled that even when Workers' Compensation benefits have been terminated, additional benefits may be paid under education statute.

Respondent also argues that the ALJ erred in relying on Cook, supra, because in that matter the petitioner was seeking additional benefits after his Workers' Compensation claim had been voluntarily settled. The doctrine of collateral estoppel was found to bar his claim.

Respondent further rebuts the Board's assertion and the ALJ's conclusion that she was unjustly enriched as a result of payment of extended benefits under N.J.S.A. 18A:30-2.1. She argues that that statute does not bar the continued payment to an employee where Workers' Compensation Court has determined that the injury is a service-connected disability. Moreover, respondent avers that the benefits cannot be rescinded unilaterally when the underlying motivation is not the preservation of the integrity of the benefit system but is the erroneous belief that benefits were not to continue as in the instant matter.

Respondent also argues that (1) the definition of temporary disability contained within N.J.S.A. 18A:30-2.1 simply requires that a school employee be "absent from his post of duty" and (2) this constitutes a different standard of disability which may, in turn, allow for both different and additional compensation.

Upon review of the record and initial decision rendered in the form of summary judgment, the Commissioner fully agrees with the ALJ's findings and conclusions and adopts them as the final decision in this matter. Notwithstanding respondent's arguments to the contrary, Sirianni, supra, is not on point in this matter as that case involved temporary disability not permanent disability as herein. The board's culpability in that matter was its failure to conduct its own investigation as to whether the continued temporary absence from her post was service-related as opposed to the mere acceptance of its Workers' Compensation Carrier's determination that the service-related illness extended only to November 30, 1984 rather than March 5, 1985.

In the instant matter, Cook, supra, is applicable as found by the ALJ. That matter was concerned with an individual seeking entitlement to benefits under N.J.S.A. 18A:30-2.1 for a period of time when receiving permanent disability benefits. Cook was estopped from reopening the issue of temporary disability since he had settled his claim for temporary disability benefits. He was not entitled to benefits for the period of permanent disability since N.J.S.A. 18A:30-2.1 expressly speaks to benefits during the period of temporary disability, which for respondent herein ended on July 19, 1987 whereupon permanent disability benefits commenced for a 45-week period.

Further, the Commissioner rejects the Board's argument that he lacks jurisdiction on the issue of employer contribution within

the context of this matter which is not strictly a pension issue but, rather, is intertwined with how pension relates to benefits under education statute. On this point, he agrees with respondent that:

> ***reliance on the Board of Trustees of Teachers' Pension v. LaTronica, 81 N.J. Super. 461 (App. Div. 1963), cert. den. 41 N.J. 587 (1964) is misplaced. In the present matter, there is no issue regarding reversal of a decision by the Board of Trustees of a pension plan nor does this issue regard an actual retirement allowance but merely an appropriate crediting of pension benefits. Furthermore, since the issues of pension benefits and extended benefits under the Education Statute are so intertwined in the instant matter, the Commissioner should retain the jurisdiction of this issue since it does not involve an appeal of a decision by any pension Board of Trustees. Therefore, the Commissioner is not invading the province of the pension Board of Trustees and has jurisdiction with regard to this limited issue.
>
> (Respondent's Reply Exceptions, at p. 6)

The Commissioner likewise does not agree that the ALJ erred in her order that the monies to be paid by respondent are to be mitigated by the amount of the Board's contribution to her pension. The memorandum provided by the Board in support of its position, (Exhibit G of Petitioner's Exceptions) which relies on the unreported decision in Mercer County, supra, addresses total permanent disability, not partial as awarded to respondent. The Commissioner finds no error in the ALJ's analysis of this issue.

Lastly, the Commissioner determines that pre-judgment interest is not to be awarded in this matter as there has been no demonstration that respondent acted in bad faith and/or in violation of statute or rule. N.J.A.C. 6:24-1.18(c)1 The issue of post-judgment interest is not ripe at this time. If respondent fails to meet the 60-day criteria in N.J.A.C. 6:24-1.18(c)2, the Board may seek interest once the cause of action accrues.

Accordingly, the initial decision granting summary decision in favor of the Board is adopted by the Commissioner together with the order that respondent must reimburse the Board for full salary paid for the 1987-88* school year less her pension contribution by the Board for the 45-week period in dispute.

May 24, 1989 COMMISSIONER OF EDUCATION

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* The school year cited on page 13 of the initial decision is in error as the 45-week period of permanent disability benefits was until February 1988.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5965-88
AGENCY DKT. NO. 235-7/88

PASSAIC TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

PAUL GORDON,

Respondent.

Glenn D. Curving, Esq, for petitioner
(Riker, Danzig, Scherer & Hyland, attorneys)

Paul Gordon, pro se

Record Closed: March 29, 1989 Decided: April 7, 1989

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

The Passaic Township Board of Education certified nine charges of inefficiency and four charges of unbecoming conduct against Paul Gordon, a tenured music teacher. Gordon emphatically denies the truth of each and every charge, which he avers resulted from personal animus and a conspiracy by pupils, teachers, administrators, parents, the Board, and other adults in the community.

The matter was transmitted to the Office of Administrative Law as a contested case by the Commissioner of Education on August 9, 1988, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 14, 1988, at which this matter was consolidated with a 1988-89 increment-withholding matter between the same parties (EDU 5352-88, AGY. 199-6/88); six issues were framed; and the procedures determined.

The issues incorporated in the Prehearing Order entered on October 14, 1988, are as follows:

1. Was the action of the Passaic Township Board of Education in withholding the employment increment of Paul Gordon for the 1988-89 school year arbitrary or capricious?

2. Shall the Gordon Petition of Appeal be dismissed due to the alleged untimely filing pursuant to N.J.A.C. 6:24-1.2?

3. Shall the Board's withholding action be deemed null and void due to alleged procedural defects pursuant to N.J.S.A. 18A:29-14?

4. Are any of the charges certified by the Passaic Township Board of Education against tenured teaching staff member Paul Gordon true, and if so, is dismissal or a salary reduction warranted?

5. Shall the certified charges be dismissed because of the alleged failure of the Board to comply with the requirements of N.J.S.A. 18A:6-11?

6. Shall the certified charges be dismissed because of bad faith and/or "unclean hands" of the Board and/or its agents, which includes retaliation due to alleged personal animus?

The parties agreed to submit issues 2, 3, and 5 for summary decision. An Initial Decision and Order was entered on December 9, 1988, wherein the Board prevailed on issues 2, 3, and 5; issue 1 became moot; the Order of Consolidation was vacated; and EDU 5352-88 (AGY. 199-6/88) was returned to the Commissioner for final decision.

Issues 4 and 5 proceeded to plenary hearing on February 6, 7, 8, 9, 14, 15, 16, 21 and 23, during which 119 exhibits were admitted into evidence (13 R exhibits marked for identification were not submitted as evidentiary documents), and 11 witnesses testified. Joint requests for posthearing submissions were granted, and the record closed upon final receipt on March 29, 1989.

It is noted that counsel for respondent made application to be relieved as legal representative after three and one-half days of hearing due to the insistence by respondent that he conduct the cross-examination of the Board's witnesses. The application was granted and respondent proceeded pro se from that point forward.

The testimonial record incorporates the history of Gordon's employment in Passaic Township and the litigation between these same parties. It is briefly stated here as background for appellate review. Gordon was employed as a teacher of instrumental music with band responsibilities in 1968. The record is void of any difficulties until 1976, when the Board reduced Gordon's position to half-time because of a decrease in pupil participation in instrumental music and band, and terminated Gordon in 1979 through the total abolishment of the position pursuant to N.J.S.A. 18A:28-9. The Board reinstituted the program in 1983 and employed a nontenured teacher in the recreated position. Gordon appealed on a claim of violation of his seniority rights. He was reinstated in September 1986, having prevailed in his appeal. The Board withheld Gordon's employment increment for the 1987-88 school year. Gordon appealed. The Board prevailed in the matter, docketed in the Office of Administrative Law as EDU 5022-87, and decided by the Commissioner on September 7, 1988.

The following charges of inefficiency and conduct unbecoming were certified by the Board on July 14, 1988 (at which time Gordon was also suspended without pay):

INEFFICIENCY

1. Consistently poor and/or substandard instruction of students, including poor classroom management techniques, lack of creativity or flexibility in program selection and delivery, inability to develop good student-teacher relationships and inability to adjust teaching methods to the needs of individual students, together with the repeated failure, refusal or inability to remedy the deficiencies set forth in observations and evaluations and to otherwise adhere to and follow administrative and supervisory suggestions, recommendations and directives designed to address and remedy said deficiencies;

2. Failure to exercise effective control over students, to exercise appropriate discipline and to maintain an appropriate classroom environment conducive to learning;

3. Inability and/or failure to coordinate and conduct a music program which stimulates and maintains student interest and participation in such program, and related cocurricular and extracurricular activities, as evidenced by consistent dissatisfaction and complaints from students and parents and excessive attrition in such program and activities which has resulted in the inability of the district to continue various aspects of the program;

4. Failure to teach the prescribed curriculum as determined by the Board of Education;

5. Improper use of classroom and instructional time for non-instructional purposes, i.e., sketching of student portraits;

6. Failure to prepare and follow appropriate daily and weekly lesson plans and to submit same for review in a timely fashion as directed by the administration;

7. Failure to properly and adequately discharge duties related to scheduling matters, meeting deadlines and following timelines, together with a repeated failure to follow administrative directives concerning scheduling practices, failure to notify staff and students as to scheduling changes and failure to seek administrative approval prior to making scheduling changes;

8. Failure to assume and carry out assigned duties as required, i.e., bus duty, study hall supervision, cafeteria supervision;

9. Harassment of individual students, resulting in the need for administrative action removing students permanently from the instructional program, and/or physically relocating students within the school building so as to avoid instructor/student meetings and/or confrontations.

UNBECOMING CONDUCT

1. He has exhibited an unprofessional and hostile attitude toward students during school and classroom hours, including loud and otherwise improper verbal attacks on students in the presence of fellow students. This is not in the best interest of, or welfare of, the students or the proper operation of the schools and has created an atmosphere in his classes and among his students which is not conducive to learning or the delivery of a thorough and efficient education.

2. He has, despite instructions to the contrary, repeatedly and continuously criticized and discussed the abilities and conduct of individual students and discussed such students in unfavorable terms in the presence of their classmates, other parents and persons other than appropriate school personnel and/or the parents or guardians of the subject children.

3. He has touched or had physical contact with students which has resulted in such students being fearful of remaining in his presence or continuing in his classes. He has caused such students to take actions to have themselves removed from his classes, which conduct has demonstrated a failure on Mr. Gordon's part to exercise that high degree of discretion and controlled behavior which is required of members of the teaching profession.

4. He has habitually and repeatedly made unfounded and improper disparaging remarks and accusations concerning students, parents, co-workers, administrators and Board of Education members during classroom time, school hours and during school-related functions, which actions have impacted adversely on the proper functioning of the district's schools and constitute a failure on Mr. Gordon's part to comport himself in a manner consistent with his position as a teaching staff member.

Inefficiency charge 3 will now be addressed.

Relevant Testimonial and Documentary Evidence

Principal D'Alconzo testified that this charge resulted from extraordinary pupil withdrawals from the instrumental music and band programs. He stated that pupil participation in these programs numbered 125 in 1983-84, 115 to 120 in 1984-85 and 113 in

1985-86. Over 100 pupils were registered for participation during the 1986-87 school year prior to Gordon's reinstatement on September 24, 1986. He sent a notice to parents under date of September 24, 1986, informing them of Gordon's replacement of the teacher employed by the Board upon the reinstitution of the program which was abolished in 1980. See, P-24.

D'Alconzo further testified that pupil withdrawals during 1986-87 resulted in a total of 16 pupil participants in instrumental music in June 1987, nine of which were in the band. He also stated that there were 20 withdrawals shortly after P-24 was received by parents.

Further testimony adduced from D'Alconzo concerning 1987-88 pupil participation in the elective music program indicated that 24 pupils were registered in September 1987; 12 pupils were still participating in February 1988; and but nine pupils remained in the program in June 1988.

The deterioration of the elective music program resulted in an investigation in March 1987 to determine the cause, and was conducted through conferences and questionnaires sent to parents. See, P-25.

D'Alconzo stated that he conferred with Gordon after 20-30 pupil withdrawals early in the 1986-87 school year and indicated to him that he was responsible for improving pupil participation and to recruit a return of those who withdrew, and further requested Gordon to submit a music program analysis and to advise as to what could be done to bring about improvement. Gordon submitted his analysis of the instrumental music program for the school years 1986-87 and 1987-March 1, 1988 under date of March 30, 1988, but according to D'Alconzo, Gordon never advised him of any suggested plan for stimulating increased pupil participation, and which Gordon was requested to submit by March 1 in accordance with his revised Professional Improvement Plan. See, P-11 and P-27.

The principal indicated that 17 communications were also received from parents in 1986-87 concerning the music program, copies of which he gave to Gordon for his edification and consideration. See, P-26.

D'Alconzo further testified that the music program prior to Gordon's reinstatement had a beginning band of 5th graders; a brass ensemble; an advanced band; and experienced no parental complaints or difficulties with the Christmas and Spring concerts. Under Gordon's supervision after reinstatement, concerts were disorganized and there were no 5th graders in any band, notwithstanding that pupils participating received the same amount of instrumental instruction time that students received prior to Gordon's reinstatement. D'Alconzo further testified that 24 pupils registered for the instrumental program for 1988-89; the program has grown to over 50 pupils with no organizational changes or parental complaints; the program has been revived by Gordon's replacement; 5th graders are participating in band; the Christmas concert was commendable; and the band is performing out-of-school, which had never occurred under Gordon. Administrative efforts to assist Gordon were to no avail as they were resisted by the respondent.

Dr. Victor Schumacher, the Superintendent of Schools during 1987-88, testified he was made aware of the administratively-determined need for Gordon to improve his performance, and was requested to provide guidance in the development of Gordon's Professional Improvement Plan (P.I.P.) for the 1987-88 school year. He did this prior to the effective date of his appointment (July 1, 1987). See, P-7.

Schumacher stated that he had observed and conferred with Gordon during the 1987-88 school year in order to assist him in his efforts to improve his performance, but that Gordon showed no evidence of improvement from those efforts. He testified that Gordon expressed appreciation and understanding but showed no positive results.

Schumacher further testified that a revised P.I.P. was developed through his efforts with D'Alconzo and Gordon; he conferred with Gordon to make sure that the latter understood the revision and that "it will serve as a basis for assessing the degree to which your performance improves during the correction period". See, P-11.

Administrative efforts to assist Gordon in the improvement of performance continued during the 90-day "cure period" with complete objectivity, he said, but those efforts failed to achieve the improved performance sought in the clearly identified deficiencies. Schumacher emphatically stated that it was his considered professional judgment that Gordon did not cure his deficiencies and continued to be an ineffective teacher.

Mothers also testified as to their dissatisfaction with the music program under Gordon's supervision after his reinstatement as compared to their complete satisfaction with the program from 1983 up to the reinstatement of Gordon. The childen of Mrs. S. and Mrs. M. and Mrs. McK. withdrew from the program. Mrs. B. kept her child in the program against the latter's will. See, P-18, P-22, P-25 and P-26.

Charles A. Hansen III, a stipulated expert in music education, was requested by the Board to assess the music program and recommend means to improve it. He testified that the Board's major concern was the lack of pupil participation in the instrumental and band program. He stated emphatically that he was not employed to evaluate Gordon, but to assess the program.

Hansen testified he found strong administrative support for the program; thorough courses of study with sufficient guidance for any music teacher; acceptable pupil schedule policies for instrumental music; a good band room well equipped with adequate storage; and more than adequate materials. He also stated the student-teacher relationships he observed were not good and that a recruitment deficiency was obvious. The band program he observed was almost nonexistent as only 11 pupils participated.

Mary Louise Malyska, Assistant Superintendent in 1987-88 and currently Acting Superintendent, testified that she knew D'Alconzo had no personal animosity toward Gordon, and that D'Alconzo worked particularly hard in attempting to assist Gordon in the improvement of his performance. She also stated that her personal observations of the music program and Gordon caused her to conclude that Passaic Township would never have a successful music program as long as Gordon was responsible for it.

Robert J. Mosey, a principal employed by the Board since 1973, testified that pupil participation in the elective music program declined in the late 1970's which causes for the decline he then investigated. His analysis resulted in his conclusion that pupils were unhappy with Gordon. Mosey worked with Gordon to assist him, but Gordon rejected the thought that he was at fault and persisted with his conspiracy theory. See, P-73 and P-74.

Paul Gordon was the only witness to testify on his own behalf. He stated that he had good relations with his pupils and referred to their appreciation as expressed in R-19 and R-20.

R-19 is a 14-page document entitled "The Band Experience" voluntarily prepared by two pupils and presented to Gordon, and submitted as evidence by him in support of his good pupil relationships testimony. A careful review of the documents results in inferences that one can easily conclude that are considerably less positive than he believes. R-20 is a school newspaper article written by one of the authors of "The Band Experience." It refers to the Spring Concert of May 28, 1987, and quotes Gordon as follows: "Mr. Gordon remarked how good it would sound if all 55 members he started out with had stayed in the band."

Gordon testified as to the quality of his June 20, 1988 concert as compared to the May 29, 1985 concert held prior to his reinstatement to thwart the considerable testimony of petitioner's witnesses concerning the deterioration of the band program under Gordon. He highlighted the quality of the 20 numbers performed. A careful analysis of his program reveals that 12 numbers were performed by a total of four pupils and were either solos, duets, or trios. The remaining eight numbers were performed by the "Whole Group". See, R-36 and R-37. On cross-examination, Gordon testified that the "Whole Group" referred to in R-37 numbered nine pupils.

Gordon further testified that any pupil disciplinary problems be experienced as well as pupil withdrawals from the instrumental and band program were caused by the manipulation of pupils by parents and other adults. He defined other adults as teachers, administrators and other citizens.

Gordon persistently emphasized that the band program deterioration resulted from a conspiracy of pupils, teachers, parents, administrators and other adults to undermine his program and "get him."

Gordon insisted that the conspiracy movement was initiated upon his reinstatement when D'Alconzo conferred with him and advised Gordon that his performance would be under a magnifying glass. He further stated that the forces involved in the conspiracy were also at work during the 1976-80 period.

Gordon argues in his brief that the "lack of student participation is largely a result of the ridiculing of the respondent from the presentation of the videotape and the manipulation of students. Such a ridiculing . . . resulted in the withdrawal from the band or music class." See, R-6 at 20.

This argument must be rejected. The videotape of the Junior Achievement Program referred to, which indeed ridiculed Gordon, was presented on May 28, 1987. The attrition of pupil-participants occurred prior to the program presentation as only 58 of the initial 105 pupils remained in the program in February 1987, which was further reduced by the end of the year to approximately 20 pupils. Reference is also made to R-20, the school newspaper article quoting Gordon's comment, which coincidentally is about the concert held the same date as the Junior Achievement Program.

DISCUSSION

It was not disputed that princial D'Alconzo advised Gordon upon his reinstatement that his performance would be under a magnifying glass. It is noted that the deterioration of the elective music program under Gordon caused the Board to reduce the position to half-time in 1976 and to abolish the program entirely in 1980. It is not difficult to believe that the Board reinstituted the elective program in 1983 because it deemed the program desirable as an integral part of the total school program, and violated Gordon's seniority rights when it employed a nontenured teacher because of its apprehension that the program would not succeed under Gordon. Under these circumstances, the remark by D'Alconzo was advisory to alert Gordon to his responsibilities to maintain the revived program, and indeed not conspiratorial.

The testimonial and documentary evidence in this matter is abundant, some of which is hearsay. It is a common practice for administrative agencies to receive hearsay evidence in the record. In re Toth, 175 N.J. Super. 254 (App. Div. 1980). N.J.A.C. 1:1-15.5. Nevertheless, the New Jersey Supreme Court said at 51 in Weston v. State, 60 N.J. 36 (1972):

> Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

I deem the testimony of petitioner's witnesses to be credible. I firmly believe the administrative staff put forth good faith efforts to assist Gordon in the improvement of his performance. I further believe the failure of those efforts to achieve the desired objective resulted in frustration and triggered D'Alconzo's filing of charges in the absence of a reasonable alternative and the ultimate certification of those charges by the Board.

Gordon's testimony is suspect. I believe that Gordon believes there was a conspiracy to undermine him and the elective music program. His belief, however, does not make it so. The record is void of competent evidence to sustain his contention.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A careful and thorough review of all legally competent testimonial and documentary evidence results in the adoption of the following **FINDINGS OF FACT:**

1. Paul Gordon failed to fulfill his professional responsibility to coordinate and conduct a music program which stimulates and maintains student interest and participation particularly in the elective instrumental music and band program.

2. The Passaic Township Board of Education has met its burden of proof by a preponderance of the credible evidence, as well as by clear and convincing evidence beyond a reasonable doubt, that Efficiency Charge No. 3 is **TRUE.**

I **FURTHER FIND** the seriousness of Efficiency Charge No. 3 and the adverse affect of respondent's employment on the elective music program establishes sufficient good cause to warrant his dismissal.

I **CONCLUDE**, therefore, that Paul Gordon has forfeited the protection of his tenure which the statutes otherwise afford, and **ORDER** his dismissal as a tenured teaching staff member as of the date of the Board's certification of tenure charges against him.

The findings and conclusion herein provide no compelling reason to address the remaining 12 charges.

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 Commissioner 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.

7 April 1989
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

April 10, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 11 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g/e

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL GORDON, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF PASSAIC TOWNSHIP,	:	DECISION
MORRIS 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 respondent's 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. 1:1-18.4. It is further noted, however, that although there were nine days of hearing conducted in this matter, neither of the parties has filed copies of the written stenographic transcripts in this matter with the Commissioner in support of their respective positions.

Respondent by way of his exceptions to the initial decision argues that the ALJ's findings and conclusions are fatally flawed with respect to the Board's tenure charges against him and must therefore be reversed by the Commissioner for the following reasons:

1. The ALJ ignored the important facts presented in testimony and evidential documents at the hearing which support respondent's contention that he did, in fact, fulfill his professional responsibilities as a tenured music teacher.

2. The facts contained in the record of this matter reveal that Principal D'Alconzo abused his authority and manipulated students, parents and staff members in a relentless effort to undermine respondent's professional authority for the purpose of dissuading pupils from participating in the instrumental music program.

3. The ALJ ignored the fact that practically every witness who testified against him on the Board's behalf was an employee of the Passaic Township School System.

4. The ALJ erred in minimizing the Junior Achievement Program incident. This incident revealed the apathy and unresponsiveness of Principal D'Alconzo under circumstances which depicted respondent in an unfavorable light and caused the loss of his professional authority and caused him to be left open to ridicule by eighth grade pupils in the Junior Achievement Program. This program which took place on May 28, 1987 was supervised, directed and assisted by Principal D'Alconzo, staff members and a person from a neighboring business organization.

5. The ALJ ignored the fact that the DYFS investigation to which respondent was subjected was unjustified, unwarranted and further served to diminish his professional authority.

6. The ALJ ignored document R-31 which proved that lies, rumors and bizarre stories were being spread about respondent in order to dissuade the remaining students in his instrumental music class from attending class.

Finally, respondent urges the Commissioner to either reverse the ALJ's findings and recommendations regarding the tenure charges against him or, in the alternative, remand this matter for further proceedings directing the ALJ to afford him an opportunity to substitute counsel in order that the record be appropriately developed for the Commissioner's review. In this regard, respondent claims that when his attorney withdrew from this case during the hearing proceedings, the ALJ required respondent to immediately proceed with his case pro se. Respondent argues that this action by the ALJ was unfair and severely prejudiced his case.

The Board in its reply to respondent's exceptions maintains that respondent continues to engage in the same factually unsubstantiated claims against the Board, the school administration, respondent's co-workers and the parents who presented evidence against him at the hearing in this matter. The Board contends that the ALJ correctly found and concluded that it met its burden of proving the tenure charges of inefficiency against respondent to be true by a preponderance of credible evidence.

Therefore, the Board maintains that the record as found by the ALJ is completely void of any competent evidence to sustain respondent's fantasy of conspiracy and manipulation by his principal which would establish that he made a concerted effort to undermine respondent or the music program.

Moreover, the Board categorically rejects respondent's claim that the ALJ prejudiced his case by having him immediately proceed pro se upon the withdrawal of respondent's counsel from this case.

To the contrary, the Board in its reply avers the following in pertinent part:

> Gordon's assertion that he was immediately required to proceed pro se upon the withdrawal of his counsel is patently untrue. Such an allegation is a disservice to Judge Young, who at all times treated Gordon fairly. It is grossly misleading in that at no time did Gordon request an opportunity to obtain substitute counsel, nor did he proffer such substitute counsel. Finally, it is grossly misleading in that Gordon fails to point out that he relieved his counsel expressly because he wanted to conduct his own defense. Gordon's abrupt change of heart, following an adverse Initial Decision, should not serve as an avenue to get a second bite at the apple.***

> In electing to forego the assistance of counsel and to represent himself, Gordon was merely exercising a right freely available to him. Judge Young went beyond the mere recognition of this right, and applied those standards and practices generally reserved only for criminal actions by counseling Gordon on the ramifications of proceeding pro se, and ascertaining that Gordon fully understood the nature of his actions and was knowingly taking on the responsibilities of proceeding pro se. In short, the Judge did much more than was required. (emphasis in text)
> (Board's Reply Exceptions, at pp. 7-8)

The Commissioner has independently reviewed the relevant evidence contained in the record of this matter and finds and determines that respondent has failed to provide any competent evidence to warrant a reversal of the findings of fact and conclusions of law reached by the ALJ with respect to the Board's tenure charge No. 3 of inefficiency against respondent. The Commissioner hereby adopts as his own those findings and conclusions in the initial decision.

In reaching this determination, the Commissioner agrees with that specific finding and recommendation of the ALJ which holds that the tenure charge of inefficiency (Charge No. 3) against respondent to be true. The seriousness of such charge and the deleterious effect it had on the Board's elective music program are sufficient cause to warrant respondent's dismissal from his tenured teaching position without the necessity of a protracted hearing into the merits of the remaining tenure charges against him. The Commissioner so holds.

The courts of this state and the Commissioner have consistently held that fitness of a teaching staff member may be measured by a single isolated incident or by a series of related or unrelated incidents. In Redcay v. State Bd. of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E & A. 1944), our then-highest state court said:

> ***Unfitness to hold a post might be shown by one incident, if sufficient flagrant, but it might also be shown by many incidents. Fitness may be shown either way.*** (at 371)

Accordingly, in view of the foregoing, the Commissioner finds and determines that by virtue of respondent having been found guilty of the tenure charge of inefficiency, sufficient good cause has been established by the Board to warrant respondent's dismissal from his tenured teaching position in the School District of Passaic Township.

The Commissioner hereby directs that respondent shall be dismissed from his tenured teaching position in the Board's employ as of the date of this decision. 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

May 25, 1989

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL GORDON, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF PASSAIC TOWNSHIP,	:	DECISION
MORRIS COUNTY.	:	
	:	

Decided by the Commissioner of Education, May 25, 1989

For the Petitioner-Respondent, Riker, Danzig, Scherer & Hyland (Glenn D. Curving, Esq., of Counsel)

For the Respondent-Appellant, Klausner, Hunter & Oxfeld (Stephen B. Hunter, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Respondent's request for oral argument is denied as not necessary for a fair determination of the case.

November 8, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.EDU 6950-88
AGENCY DKT. NO. 285-9/88

MELVIN WHALEY,
Petitioner,
v.
BOARD OF EDUCATION, PASSAIC COUNTY TECHNICAL AND VOCATIONAL HIGH SCHOOL, PASSAIC COUNTY
. Respondent.

Marino Tedeschi, Esq. for petitioner

Patrick C. English, Esq. for respondent
(Dines and English, attorneys)

Record Closed: February 24, 1989 Decided: April 10, 1989

BEFORE **OLIVER B. QUINN, ALJ:**

Petitioner, a tenured teaching staff member at Passaic County Technical and Vocational High School, alleges that the Passaic County Technical and Vocational High

School Board of Education ("Board") violated his statutory and constitutional rights by acting to withhold his salary increment for the 1988/89 school year without providing him an opportunity for a hearing. Petitioner alleges that he was entitled to a hearing pursuant to N.J.S.A. 18A:25-7. The Board denies petitioner's allegations and submits that N.J.S.A. 18A:25-7 is inapplicable to this situation and that petitioner was not entitled to a hearing. The Board has moved for summary decision dismissing the petition.

PROCEDURAL HISTORY

On September 2, 1988, a verified petition was filed with the Commissioner of Education pursuant to N.J.S.A. 18A:6-9. The Board filed an answer to the verified petition on September 9, 1988. The matter was transmitted to the Office of Administrative Law (OAL) on September 22, 1988 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 November 29, 1988 and a prehearing order was entered. Pursuant to that order, the board filed a motion for summary decision with a brief and supporting affidavits on December 30, 1988. N.J.A.C.1:1-12.5. Petitioner filed his brief in opposition to the motion for summary decision on December 28, 1988. With the consent of the Board's attorney, petitioner's attorney was invited on February 21, 1989 to submit any facts in support of point 4 of his brief by February 24, 1989. Point 4 alleges that petitioner was denied constitutional rights because he is black and "all the members of the Board of Education as of June 1988 were Caucasian." Petitioner's attorney submitted a supplement to his brief on February 24, 1989 and the Board's attorney submitted a response on February 27, 1989. To allow full development of the record, I have considered all of these submissions.

FACTS

The following facts are not in dispute:

1. Petitioner is a tenured teaching staff member at Passaic County Technical and Vocational High School, Passaic County, and has been so employed since March 1968.

2. On June 8, 1988, petitioner was advised by letter from Frank D. Zaccaria, principal and acting superintendent, that the Board would discuss at its June 14, 1988 regular meeting a recommendation to withhold petitioner's salary increment for the 1988/89 school year based on his unsatisfactory performance during the 1987/88 school year (Exhibit R-6). The letter also informed petitioner that if he wanted the Board's discussion of his withholding to take place in public, he must provide a written request to that effect no later than 12:00 noon on June 14, 1988.

3. On Monday, June 13th, petitioner mailed a certified letter to the Board requesting public discussion of his salary increment withholding (Exhibit R-7). Petitioner's letter also requested a postponement of the June 14th scheduled discussion of his salary increment to afford him an opportunity to be present for such discussion with his attorney. Finally, the letter requested a computer printout of the most recent record of the attendance of all employees employed by the Board during the 1987/88 school year. The letter requested that the Board hold discussion in public of any "false and/or exaggerated report" filed by the following administrators regarding his performance: Carl J. Santaniello, superintendent, Councilman Frank D. Zaccaria, principal/acting superintendent, Ronald B. Brown, director of curriculum, Rubye V. Baker, personnel/affirmative action officer, Kent Bania, supervisor of adult continuing and apprentice education, Diana C. Lobosco, coordinator of BSI/ESL program.

4. On Monday June 13, 1988, a copy of petitioner's June 13, 1988 letter to the Passaic County Board of Education was hand delivered to Joseph E. Chumura, president of the Passaic County Technical and Vocational Education Association.

5. On Tuesday June 14, 1988, at 10:00 a.m., petitioner hand delivered a copy of his June 13, 1988 letter to the Board's business office. The Board honored petitioner's request that the matter be discussed in public session at its June 14th meeting.

6. The Board did not grant petitioner's request to postpone its June 14th discussion of his salary increment.

7. Neither petitioner nor his attorney attended the June 14, 1988 board meeting at which his salary increment withholding was discussed.

8. On June 14, 1988, at its regular meeting and following public discussion of the issue, the Board voted to withhold petitioner's salary increment for 1988/89 for unsatisfactory performance (Exhibit R-8).

9. On June 18, 1988, petitioner's attorney wrote a letter to the Board requesting the reasons for the Board's action in withholding his client's salary increment and a transcript of the June 14th "hearing." Petitioner's attorney also requested a "rehearing" (Exhibit R-9).

10. The Board responded to petitioner's attorney's letter by its letter of June 22, 1988 (Exhibit R-10).

11. The Board determined that petitioner's salary increment should be withheld for the following reasons: lack of planning, lack of preparation, poor evaluation, nonadherence to curriculum, lack of required scheduled meetings, failure to follow proper grading procedures, failure to turn in plan books, incomplete plan books and insubordination.

12. Petitioner's attorney appeared at a Board meeting on June 30, 1988 to request a "hearing" for petitioner since he had not appeared at the June 14, 1988 Board meeting.

13. Petitioner received numerous negative evaluations and observations during the 1987/88 school year (Exhibits R-1,R-2, R-3, R-4, R-5).

LEGAL DISCUSSION

A motion for summary decision

> ...may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be

> determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

N.J.A.C. 1:1-12.5(b). The motion for summary disposition is an efficient means of disposing of litigation which is available when there are no genuine issues of the material fact leaving a decision to be made on legal issues. In deciding whether there are such issues of fact, all reasonable inferences must be drawn against the movant and in favor of the opponent of the motion. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74-75 (1954). In the instant matter, petitioner alleges that he has a statutory and constitutional right to a "hearing" prior to the Board's action in withholding his salary increment. N.J.S.A. 18A:29-14 establishes that:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefore, to the member concerned.

Respondent argued in support of its motion for summary decision that petitioner was not entitled to a "hearing" on his increment withholding. In Fitzpatrick v. Montvale Board of Education, 1969 S.L.D. 4, 7, the Commissioner of Education held:

> Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so

> deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal proceedings necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge, the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgement is erroneous.

See also, Brown v. Board of Education of the Town of Cinnaminson 1974 S.L.D. 124, 126.

In the instant case, petitioner received many negative evaluations from his supervisors. Further, petitioner was given written notice of the June 14, 1988 Board of Education meeting at which his salary increment withholding was to be discussed. Petitioner had another engagement scheduled at the time of the June 14th Board meeting and he decided that the other engagement was more important than the Board meeting at which his salary increment withholding was to be discussed. Clearly, it was petitioner's prerogative to decide whether or not to attend the Board meeting. Petitioner alleges that while the Board honored his request to have his salary increment withholding discussed in public, it did not honor his request to have the discussion postponed from the June 14th scheduled date. Petitioner argues that Board's refusal to postpone the discussion violated his rights under N.J.S.A. 18A:25-7. That statute states:

> Whenever any teaching staff member is required to appear before the board of education or any committee or member thereof concerning any matter which could adversely affect the continuation of that teaching staff

> member in his office, position or employment or the salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a person of his own choosing present to advise and represent him during such meeting or interview. (Emphasis added.)

Petitioner's reliance on N.J.S.A. 18A:25-7 is misplaced in the instant case because that statute only applies where a teaching staff member is "required" to appear before a board of education. Petitioner in this matter was not required to appear before the Board of Education on June 14, 1988. There is no requirement that a petitioner appear when a board of education votes to withhold a salary increment. Boynton v. Board of Education of the Woodstown-Pilesgrove Regional School District 1980 S.L.D. 1335, 1351. Therefore, I **CONCLUDE** that N.J.S.A.18A:25-7 is inapplicable in the instant case.

Petitioner in his brief in opposition to the motion for summary decision asserts that the equal protection and due process clauses of both the New Jersey and United States Constitution were violated by the Board's meeting of June 14, 1988. Petitioner's brief is unclear as to what actually occurred which, in his view, violated his constitutional rights. At part three of his brief in opposition to the motion, petitioner states "that he is being treated more harshly than other teachers that are in the same school and he seeks discovery that will enable him to demonstrate to an impartial and fair Board his claim." At part 4 of his brief, petitioner states that he is "a member of the Black race" and that "he is being denied his due process and the equal protection of the law as stated in both the New Jersey State Constitution and the United States Constitution, since all the members of the Board of Education as of June 1988 were Caucasians." Finally, in a supplement to his brief dated February 23, 1989, petitioner's attorney states "Mr. Whaley has been teaching at Passaic County Technical Vocational High School for over 20 years. In that period of time, he has observed other teachers and he knows that other teachers are absent and late on many occasions. He also states thatsome of the teachers do not

prepare lesson plans and other required papers. However, no charges were brought against these teachers and he believes that race is the reason for the situation."

Petitioner has provided no support for these serious allegations. No supporting affidavits were filed with his brief, not even a sworn statement from the petitioner himself has been filed. Petitioner has not identified a "genuine issue as to any material fact" which would defeat a motion for summary decision. To draw any inference in petitioner's favor based on totally unsubstantiated allegations of race discrimination would be unreasonable and in contravention of the Judson standard. Because of the significance of any allegation of race discrimination, petitioner's attorney was afforded an opportunity, after the submission of his brief in opposition to the motion for summary decision, to substantiate by presentment of some supportive material facts, his allegations of racial animus. This was done with the consent of the Board's attorney. The only response received from petitioner's attorney was his own unsworn statement asserting that petitioner "knows" that other teachers have done what he was accused of doing without sanction and concluding that race is "the reason for the situation." That submission was woefully inadequate.

CONCLUSION AND ORDERS

I **CONCLUDE** that petitioner has failed to show that there is a genuine issue as to any material fact. Therefore, the Board's motion for summary decision is hereby **GRANTED.** I **ORDER** that the Board's motion for summary decision be granted and that the petition be dismissed with prejudice.

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** this Initial Decision with **Saul Cooperman** for consideration.

April 10, 1989
DATE

OLIVER B. QUINN, ALJ

Receipt Acknowledged:

4/11/89
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 12 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

vcb

MELVIN WHALEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL AND VOCATIONAL HIGH SCHOOL, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner disagrees with the ALJ's interpretation of N.J.S.A. 18A:25-7 averring that he is entitled to a hearing by right and to deny one is a denial of equal protection and due process under both the State and Federal Constitutions. Other exceptions state, inter alia, that school and Board officials are in a conflict of interest situation and lack impartiality. Moreover, petitioner states that discovery of material necessary for his defense has been denied him and asserts that the tape of the July 19, 1988 Board meeting was tampered with.

The Board replies to petitioner's exceptions by stating that objections were made by the Board about providing the attendance records of other staff members sought by petitioner because such information was totally irrelevant to the matter. It points out that no formal motion was made to compel discovery and the lack of response was not raised during the summary judgment. The Board also points out that no admissible evidence was submitted to the record that any tape was altered. Further, it avers that the tape in question was not altered and, because it is not a tape of the meeting at which the Board withheld petitioner's increment, the issue is irrelevant.

Upon a review of the record and the exceptions, the Commissioner is in complete agreement with the ALJ's findings and conclusions and grant of summary decision to the Board. As correctly recognized by the ALJ, N.J.S.A. 18A:25-7 does not apply to increment withholding action contested herein. N.J.S.A. 18A:29-14 does not require that the staff member whose increment is to be withheld appear before the board of education. Further, it is well settled in decisional law that a hearing before the board is not required prior to any withholding action. However, the ALJ also correctly recognized the impact of Fitzpatrick, supra, that the basic elements of due process must be accorded to the staff member. There is no question that these basic elements of due process were present in the instant matter. Petitioner had received numerous

negative evaluations during the 1987-88 school year which provided notice within the intendment of Fitzpatrick, i.e., knowledge that his superiors were less than satisfied with his performance. Moreover, he received advance notice that the Board would be considering the sanction, yet he declined to be at the Board meeting.

Accordingly, the recommended decision of the Administrative Law Judge dismissing the petition with prejudice is adopted as the final decision in this matter for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 26, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5697-88
AGENCY DKT. NO. 200-6/88

JOHN LULEWICZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

James S. Rothschild, Jr., Esq., for respondent
(Riker, Danzig, Scherer & Hyland, attorneys)

Record Closed: March 15, 1989 Decided: April 13, 1989

BEFORE OLIVER B. QUINN, ALJ:

John Lulewicz ("petitioner"), a tenured teaching staff member employed by the Livingston Township Board of Education ("Board"), alleges that the Board improperly and illegally determined his salary guide placement on the teachers' salary guide for the 1988-89 school year. The Board denies the allegation.

The matter was transmitted to the Office of Administrative Law on August 1, 1988 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing was held on October 28, 1988. The parties agreed to submit the matter for summary decision. The record closed upon receipt of final

briefs on March 15, 1989.

I FIND the following FACTS, which have been stipulated by the parties:

1. John Lulewicz, the petitioner, is a tenured teacher of music who has been employed by the respondent Livingston Board of Education for over 25 years.

2. During the 1985-86 school year, the petitioner was at the maximum step of the masters' column of the salary guide and received a salary of $35,075. Attached hereto as Exhibit A is a copy of the 1985-86 teachers' salary guide.

3. In the spring of 1986, the Livingston Board of Education voted to withhold the petitioner's increment for the 1986-87 school year. A copy of the 1986-87 teachers' salary guide for teaching staff members employed by the respondent is attached hereto as Exhibit B. During the 1986-87 school year, the petitioner received a salary of $35,075, the same salary he received in the 1985-86 school year.

4. In the spring of 1987, the respondent determined to withhold the petitioner's increment for the 1987-88 school year. A copy of the 1987-88 teachers' salary guide is attached hereto as Exhibit C. During the 1987-88 school year, the petitioner received a salary of $35,075, the same salary he received during the 1985-86 and 1986-87 school years.

5. On April 4, 1988, the respondent approved a resolution concerning the petitioner's increment. The resolution stated that the respondent had voted:

". . . to approve partial restoration of salary $37,950 reflecting the previously denied increment for John Lulewicz music teacher Collins for the 1988-89 school year."

7. On April 5, 1988, Robert S. Kish, Superintendent of Schools in respondent school district, sent the petitioner a letter concerning the partial restoration of his salary increment. A copy of the letter is attached hereto as Exhibit D. A copy of the 1988-89 teachers' salary guide for teaching staff members employed by the respondent is attached hereto as Exhibit E.

6. In the collective bargaining agreement between the Livingston Board of Education and the Livingston Education Association for the school years from July 1, 1987 to June 30, 1989, the numbers of the steps on the teachers' salary guides were changed. To maintain consistency for purposes of this stipulation, each of the salary guides submitted, 1985-86 (Exhibit A), 1986-87 (Exhibit B), 1987-88 (Exhibit C), 1988-89 (Exhibit E) retain the step numbering used in the agreement between the Livingston Board of Education and the Livingston Education Association for the school years from July 1, 1985 through June 30, 1987.

Petitioner's salary history for the school years 1985-86 through 1988-89, as stipulated above, is as follows:

School Year	Level	Step	Guide Salary	Salary Received	Difference
1985-86	M	15 (Max)	$ 35,075	$ 35,075	0
1986-87	M	15 (Max)	$ 37,380	$ 35,075	$2,305
1987-88	M	16 (Max	$ 40,075	$ 35,075	$5,000
1988-89	M	16 (Max)	$ 42,950	$ 37,950	$5,000

LEGAL ANALYSIS

Petitioner argues that he should receive the actual salary listed at the maximum step of the masters' column of the 1988-89 salary guide because the Board does not have the authority to "partially restore" a previously withheld increment. The Board argues that it has such authority. The parties' briefs are incorporated herein by reference.

N.J.S.A. 18A:29-14 provides 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. . . . It shall not be mandatory upon the board of education to pay . . . [a] denied increment in any future year as an adjustment increment (emphasis added).

Respondent school board withheld petitioner's increment in both the 1986-87 and 1987-88 school years for poor job performance. In the spring of 1988 respondent determined petitioner's performance warranted a salary increase, but not full restoration of the previously withheld increment increase. Respondent subtracted the amount of increment withheld in the previous two school years ($5,000) from the maximum salary petitioner would have earned if his increments had not been withheld. The Board is not required pursuant to the statute to restore a withheld increment in any future year. N.J.S.A. 18A:29-14.

Petitioner alleges the salary he received for the 1988-89 school year placed him slightly above step 14 and quite a bit below step 15 on the 1988-89 salary guide (Exhibit E). Petitioner describes his 1988-89 salary as being nowhere on the salary guide, which would be illegal. However, petitioner's contentions are misplaced. Respondent was merely acting under the authority vested in it by N.J.S.A. 18A:29-14.

In North Plainfield Education Ass'n v. Bd. of Ed., 96 N.J. 587 (1984), two teachers sought credit on the salary scale for the time spent on sabbatical. The Supreme Court in a per curiam decision stated:

> A teacher's entitlement to a salary increase under N.J.S.A. 18A:29-8 is subject to denial by a school board "for inefficiency or other good cause . . ." N.J.S.A. 18A:29-14. That is, the annual increment is in the nature of a reward for meritorious service to the school district. Board of Educ. of Bernards Tp. v. Bernards Tp. Educ. Ass'n, 79 N.J. 311, 321 (1979). Evaluation of that service is a management prerogative essential to the discharge of the duties of a school board. See, Id. Clifton Teachers v. Clifton Bd. of Educ., 136 N.J. Super. 336, 339 (App. Div. 1975). The determination of an annual increment after evaluation by a school board serves the dual statutory objectives of affording teachers economic security and of encouraging quality in performance. 96 N.J. at 593.

The fact that a teacher who has had an increment withheld will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision. . . Cf., Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).

In Masone v. Board of Education of the Borough of Rutherford, OAL Dkt. 10723-82 (May 10, 1984), Comm'r of Ed. (June 28, 1984), the board withheld permanently petitioner's salary increment for the 1982-83 school year. Petitioner contended the ALJ erred in determining the board was correct in placing him at step 17 of the 1983-84 salary guide. Petitioner asserted his proper placement was at step 18. Because the board was not withholding petitioner's increments for the 1983-84 school year, he contended he should be paid at the maximum step of the salary guide. Petitioner claimed that there was no "step" on which he must lag behind since he was paid at the maximum step for at least two years prior to his withholding.

The Commissioner agreed with petitioner and ruled that he was entitled to be placed at step 18 of the 1983-84 salary guide. Prior to the withholding of his increment in

1982-83, petitioner had been at the maximum step of the guide for several years (step 16) and all staff members with 20 plus years' service in the district at that time moved to the new maximum, step 18 of the new guide, in 1983-84. To place petitioner at step 17 would be inappropriate since he had met the requirements for placement at the maximum step several years prior to 1983-84 and prior to his withholding. Masone at 25.

However, the Commissioner pointed out that a board is not required to pay any denied increment pursuant to N.J.S.A. 18A:29-14. Further, he stated it is possible for a teacher to lag behind a step on the salary guide once an increment is withheld if a future board of education does not make an affirmative determination to advance the individual to the step he would have been on had the increment not been withheld. However, in Masone, the Commissioner found merit in petitioner's argument that having been at maximum prior to the withholding action, there is no step on which he must lag behind, in that step 17 represented 17 years of service in the district and was not a newly-created incremental step for those with 20 plus years of service. Masone at 26.

In the instant matter, petitioner's salary may very well appear to place him at a lower step, or at no step at all on the guide. However, the Board used the maximum step and salary that petitioner could receive had he not had his increments withheld, and merely subtracted the increment previously withheld. This was within the statutory authority of N.J.S.A. 18A:29-14 and the Masone interpretation of the statute.

In Chirico v. Board of Education of the Town of Belleville, (OAL Dkt. EDU 8994-84 (July 3, 1985,), Comm'r of Ed. (August 23, 1985) relied on by petitioner in the instant matter, respondent board withheld a director's increment. However, since no salary schedule existed in the school system, the board had no way to implement the provisions of N.J.S.A. 18A:29-14. In Chirico there were no higher steps from which petitioner could be kept nor any lower steps from the previous year at which he could be retained since the entire "no-step" salary schedule was renegotiated each year. Accordingly, the Commissioner ordered the board to return petitioner to the same salary "step" as the other three directors. Chirico at 20. In the instant matter there is a salary guide. Respondent Livingston School Board did place petitioner at the maximum step on the

guide. The Board merely exercised its option under N.J.S.A. 18A:29-14 not to restore petitioner's increment withheld in previous years.

In Dowling v. Board of Education of the Township of Middletown, (OAL Dkt. EDU 289-87 (May 22, 1987), Comm'r of Ed. (June 30, 1987), petitioner was at the maximum step of his salary guide. In January 1985, the board acted to withhold his increment for the 1986-87 school year. His salary was the same for 1985-86 as it was in 1984-85. In 1986-87, the Middletown Board of Education did not remove petitioner from the maximum salary step on the guide and place him at a lower step. Rather, it calculated his salary based on what he would have received at the maximum salary step given his years of service and level of training in 1985-86, absent the increment withholding from the prior year, and then subtracted the withheld amount.

The ALJ, in his initial decision in Dowling, found that when North Plainfield is viewed in its entirety, it is obvious that the Supreme Court stated and intended that a staff member whose increment is withheld can conceivably lag behind for the balance of his career should each successive board refuse to act affirmatively to reinstate the withheld increment.

> Based on the foregoing, it is obvious that the lagging behind has to do with dollars and not "steps" or "maximums." . . . Here, the Board identified the amount of increment that would be paid to individuals who did provide meritorious service in that year. There is no reason why the petitioner, absent future Board action, should not continue to lag behind his colleagues by the amount of the withheld increment inasmuch as they provided meritorious service for the year in question and he did not. Dowling Initial Decision at 8.

In the instant matter petitioner argues that the salary he is receiving for 1988-89 appears nowhere on the salary guide. The ALJ in Dowling stated that "common experience shows many instances in which an increment was withheld contemporaneously with the adoption of a new salary guide. Thus, the affected person was paid at the prior year's salary even though that salary appeared nowhere on the new guide. . . . In the

absence of any arguable statutory right to either an increment or a maximum salary, I must be guided by North Plainfield and the consonant decisions of the Commissioner." Dowling Initial Decision at 9.

The Commissioner in Dowling agreed with the ALJ and adopted the initial decision as the final decision. In so doing the Commissioner agreed with respondent school board's calculations of petitioner's salary. In the instant matter the Board used the same calculations to determine petitioner's 1988-89 salary. Therefore, petitioner's contention that he is being placed nowhere on the salary guide is contrary to the New Jersey Supreme Court's holding in North Plainfield, the various Commissioner's decisions cited, and the plain language of N.J.S.A. 18A:29-14. Therefore, petitioner's argument must fail.

CONCLUSION AND ORDERS

Respondent acted within the authority vested in it by N.J.S.A. 18A:29-14 when it subtracted previously withheld increments from petitioner's maximum step of the 1988-89 Livingston Teachers' Salary Guide. This action was within previous interpretations of the statute by both the New Jersey Supreme Court and the Commissioner of Education.

Based on the foregoing analysis, I **CONCLUDE** that the Board did not act illegally in placing petitioner at the maximum step on the salary guide and then reducing his salary by the amount previously withheld.

It is **ORDERED** that the petition 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** this Initial Decision with **SAUL COOPERMAN** for consideration.

April 13, 1989
DATE

OLIVER B. QUINN, ALJ

Receipt Acknowledged:

APRIL 17, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 18 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

am/e

JOHN LULEWICZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the initial summary decision in this matter, as well as the papers filed by the respective parties relative to the Motion for Summary Judgment. The Commissioner notes that petitioner has filed exceptions to the initial decision while respondent (Board) has filed replies thereto.

Petitioner excepts to what he considers an inference by the ALJ that the Board had somehow decided that petitioner's performance during the second year of his increment withholding merited some increase in pay. Petitioner contends that the Board provided no notice to him that it was in some way deciding to withhold any part of his increment, nor does a board have a right to withhold a partial increment.

Petitioner contends that since N.J.S.A. 18A:29-14 provides only for withholding of either employment increment or adjustment increment or both, failure to restore petitioner fully to the maximum step represents a violation of the aforesaid statute by virtue of both failing to notify petitioner as to its withholding and withholding only a portion of the increment to which he was entitled by virtue of his longevity in the district.

The Board's argument is simply based upon that portion of N.J.S.A. 18A:29-14 which holds that a board is not required to restore an increment previously withheld and, thus, its actions in increasing petitioner's salary to the maximum level, less the sum total of his previously withheld increments, did not represent a new withholding. The Board contends that the $5,000 amount that petitioner lags behind the existing maximum merely represents the sum total of two previous increment withholdings and that it is perfectly legal and appropriate for petitioner to continue to lag behind the maximum step by that amount until such time as the Board might decide to restore the previously withheld amount.

The Commissioner has carefully considered the arguments of the parties and the pertinent case law relative to this matter. Based upon such review, the Commissioner affirms the findings of the ALJ for the reasons contained in his initial recommended decision.

The Commissioner finds this matter to be on all fours with his previous determination in Dowling, supra.

The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

June 1, 1989

JOHN LULEWICZ,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 1, 1989

For the Petitioner-Appellant, Klausner, Hunter & Oxfeld (Nancy Iris Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Riker, Danzig, Scherer & Hyland (James S. Rothschild, Jr., Esq., of Counsel)

During the 1985-86 school year, John Lulewicz ("hereinafter Petitioner"), a tenured teaching staff member, was at the maximum pay step of the masters' column of the negotiated salary guide of the Board of Education of the Township of Livingston (hereinafter "Board") and received a salary of $35,075. In 1986-87 and 1987-88, the Board withheld Petitioner's increment. In both of those years, the salary amount for the maximum step increased as a result of collective negotiations, but because his increments had been withheld, Petitioner received the same salary as he had received in 1985-86.

The Board did not act to withhold Petitioner's increment for 1988-89, and, on April 4, 1988, it adopted a resolution approving "partial restoration" of Petitioner's salary to $37,950 for the 1988-89 school year. The salary provided by the negotiated guide for those individuals at the maximum step of the masters' column in 1988-89 was $42,950. The $5,000 subtracted from that figure by the Board in establishing Petitioner's salary reflected the amount of the increments withheld in the previous two years. At that point, although Petitioner had not challenged the Board's action in withholding his increments for 1986-87 and 1987-88, he petitioned the Commissioner, alleging that in 1988-89 he should have received $42,950, the salary set forth in that year's negotiated guide for those teaching staff members whose years of experience and training entitled them to placement at the maximum step of the masters' column.

On April 13, 1989, an Administrative Law Judge ("ALJ") concluded that the Board had not acted illegally in placing Petitioner at the maximum step on the salary guide and then reducing his salary by the amount previously withheld, relying primarily upon

North Plainfield Education Ass'n v. Bd. of Educ., 96 N.J. 587 (1984) and Dowling v. Board of Education of the Township of Middletown, decided by the Commissioner, June 30, 1987. The ALJ noted that "[t]he fact that a teacher who has had an increment withheld will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision." Initial decision, at 5. The ALJ asserted that it was obvious from North Plainfield "that a staff member whose increment is withheld can conceivably lag behind for the balance of his career should each successive board refuse to act affirmatively to reinstate the withheld increment." Id. at 7. Accordingly, the ALJ concluded that the Board acted within the authority vested in it by N.J.S.A. 18A:29-14 when it subtracted the amount of the previously withheld increments from the salary amount provided for the maximum step of the masters' column in the 1988-89 negotiated salary guide.

On June 1, 1989, the Commissioner adopted the recommended decision of the ALJ, finding this matter "to be on all fours" with Dowling, supra, and dismissed the petition.

Petitioner appealed the Commissioner's decision, arguing that it would be an improper result for teachers at the maximum step of the salary guide who lose their increments to "never be able to return to the maximum step of the salary guide, while all other teachers who lose increments would ultimately achieve the maximum step," brief in support of appeal, at 2, and that Petitioner's salary as established by the Board for 1988-89 did not appear on the negotiated salary guide.

After a careful review of this matter, we find Petitioner's arguments to be without merit, and we affirm the decision of the Commissioner for the reasons expressed therein.

As noted in Dowling, relied upon by the Commissioner, despite an erratic history, many of the questions surrounding increment withholding have now been resolved. It is now well established that an increment withholding is permanent unless and until a future board takes affirmative action to restore it, and the fact that a teacher may always lag behind is attributable to the effect of an earlier employment decision. See North Plainfield, supra; N.J.S.A. 18A:29-14.

As set forth in the facts, the Board herein, despite its characterization of its action as a "partial restoration," did not affirmatively act to restore the previously withheld increments, but, rather, adjusted Petitioner's salary to reflect that it was not withholding his increment for 1988-89. Thus, the central issue herein is whether the Board violated any provisions of the education laws in establishing Petitioner's salary for 1988-89.

N.J.S.A. 18A:29-14 provides that a district board may withhold "the employment increment, or the adjustment increment, or both" (emphasis added) of any member in any year. Despite the fact that it is not apparent from the record whether the Board expressly withheld Petitioner's adjustment increment in 1986-87 and 1987-88, as correctly set forth in Dowling, teaching staff members who have already reached the maximum salary step on the district's guide are

no longer eligible to receive annual employment increments since they have no new "steps" to achieve on the basis of years of service. Since Petitioner had served the requisite number of years without increment withholdings, he was at the maximum step of the salary guide in 1985-86 and no longer eligible to receive an employment increment.[1] As a result, the only increments which could have been subject to withholding when the Board acted pursuant to N.J.S.A. 18A:29-14 in 1986-87 and 1987-88 were Petitioner's adjustment increments. In so acting, the Board did not remove Petitioner from the maximum step on the salary guide, a placement to which he was entitled by his years of service, but, rather, withheld the amount of the contractual increase provided for those years for teaching staff members who had achieved the maximum step provided by the negotiated salary guide. While the Board's action sets Petitioner's 1988-89 salary at an amount below that established by the negotiated guide for employees whose years of service placed them at the maximum step in the masters' column of the district's salary guide, Petitioner's salary merely reflects the effect of the Board's decisions to withhold his adjustment increments in 1986-87 and 1987-88. See North Plainfield, supra.

Consequently, notwithstanding negotiated changes in the number of steps in the district's salary guide, Petitioner remained at the maximum step in 1988-89 based on years of employment. However, because of the Board's previous actions withholding his adjustment increments, his entitlement under the education laws, in the absence of either affirmative action by the Board restoring those increments or of an increment withholding for 1988-89, was limited to a salary amount which included an adjustment increment for that year reflecting the contractual increase, if any, negotiated through the collective negotiations process.

We emphasize that it was not mandatory for the Board to restore the previously denied increments. N.J.S.A. 18A:29-14. The Board's "partial restoration" of salary, in fact, provided Petitioner with that to which he was otherwise entitled for that year in the absence of a withholding -- an adjustment increment in the amount of $2,875, representing the negotiated increase in the guide salary at the maximum step of the masters' column in 1988-89

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[1] We note that an employment increment is based upon years of service and an adjustment increment is designed to bring a teaching staff member lawfully below his or her place on the salary schedule according to years of service to his or her place on the salary schedule according to years of service. While the definitional section, N.J.S.A. 18A:29-6, was repealed when the Teacher Quality Employment Act, 18A:29-5, L. 1985, c. 321, s.16 (1985), was enacted, that Act in no way altered the terms of N.J.S.A. 18A:29-14 or the Board's authority thereunder to withhold a teaching staff member's employment increment, adjustment increment, or both. Such withholding includes entire contractual amounts. Cf. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978).

($42,950) from that guide salary in 1987-88 ($40,075), the last year his increment was withheld.[2]

The fact that Petitioner will lag behind other teaching staff members who, as a result of entirely meritorious service, had not been subject to any increment withholdings, and whose years of employment entitled them to placement at the maximum step of the district's salary guide and to a salary amount which included adjustment increments for all years of employment does not violate the education laws. Rather, any discrepency between the salary of such staff members and Petitioner is the result of the Board's earlier employment decisions based on the quality of Petitioner's service. See Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311, 321 (1979).

Furthermore, the result under the education laws is consistent in any case in which an adjustment increment has been withheld and the district board has not acted to restore it, regardless of what step on the salary guide the teaching staff member occupies at the time of the withholding. In contrast to situations where the employment increment alone is withheld, when both the employment and adjustment increments or the adjustment increment alone is withheld, the affected individual may always lag behind.

Nor is this result altered by the fact that the salary amount established for Petitioner in 1988-89 is not set forth in the negotiated salary guide. Entitlement to salary amounts beyond statutory minimums is contractual and not an affirmative entitlement under the education laws. Dowling, supra; N.J.S.A. 18A:29-5 et seq. The statutory language of N.J.S.A. 18A:29-14 is express in providing authority to withhold employment and/or adjustment increments, and the effect of the terms of that statute must control the salary amounts to which Petitioner is entitled absent affirmative Board action to restore those previously withheld adjustment increments. See North Plainfield, supra.

Accordingly, we conclude that the Board did not violate the education laws in establishing Petitioner's 1988-89 salary at $37,950. We, therefore, affirm the decision of the Commissioner and dismiss the appeal.

November 8, 1989

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[2] We note that while the Board determined Petitioner's 1988-89 salary by subtracting the amount of increment withheld in the previous two years from the maximum salary Petitioner would have received absent those withholdings, the actual process involved is the addition of the amount representing the negotiated increase, if any, in the guide salary at the applicable step and column in the current year to the actual salary received in the previous year in which the increment was withheld.

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1694-89
AGENCY DKT. NO. #385-12/88

LONG BRANCH CITY
BOARD OF EDUCATION,
Petitioner,
v.
MAXIMILIANO H. PIZARRO,
Respondent.

Peter A. Sokol, Esq., for petitioner (McOmber & McOmber)

Thomas w. Cavanagh, Jr., Esq., for respondent (Chamlin, Schottland, Rosen, Cavanagh & Uliano)

Record Closed: April 17, 1989 Decided: April 17, 1989

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

This matter was originally opened by the Long Branch City Board of Education (Board) on December 12, 1988 when it determined by a majority vote of its full membership to certify to the Commissioner of Education for determination a charge of abandonment of position against Maximiliano H. Pizarro (respondent), a teacher with a tenure status in its employ. The Board alleged respondent abandoned his position by failing to report for work for the 1988-89 school year, for orally resigning his position without providing the sixty (60) days required notice pursuant to his contract, and for otherwise taking actions inconsistent with his continued employment status. Respondent denied abandoning his position of employment to the extent such a charge implies that he left his employment without knowledge of the Board and without affording it sixty days

notice of his intention to leave. After the Commissioner of Eduction transferred the matter on March 7, 1989 to the Offcie of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted April 11, 1989 by this judge with counsel to the parties. At that time counsel advised that respondent had tendered his resignation from employment with the Board, both orally and in writing. Respondent now contends that the entire matter is moot and the charges must be dismissed because of his voluntary relinquishment of his tenured employment with the Board. The Board, while acknowledging respondent voluntarily relinquished his employment and tenure status in its employ, now seeks to have respondent disciplined further because of his asserted failure to afford it sixty days notice in writing of his intention to resign. Oral argument on the respective motions was heard by telephone conference call on April 14, 1989. The conclusion is reached in this initial decision that the matter has been rendered moot by the resignation of respondent from the employ of the Board and that the Board's effort now to discipline respondent because of an asserted failure to afford it sixty days notice of his intention to resign is beyond the scope of this proceeding and it is not now a justiciable issue.

BACKGROUND FACTS

The background facts of this matter are not in dispute between the parties and are as set forth in paragraphs 3 through 10 of the affidavit of the superintendent of schools which was filed in support of the abandonment charge against respondent. Those paragraphs are reproduced here in full:

> ***
>
> 3. Maximiliano H. Pizarro has been a teacher with the Long Branch public school system since November 14, 1977, and has served as an ESL/History teach.
>
> 4. On June 10, 1988, Mr. Pizarro requested a leave of absence for the 1988-89 school year. A copy of that letter is attached hereto as Exhibit "A".
>
> > Exhibit "A" shows Pizarro, who had earlier received a scholarship during the 1986 summer to study at Oxford University in a political philosophy graduate program, requested a leave of absence for 1988-89 to do more graduate work in the field of history at Oxford University in England. The letter was sent by respondent to the chair of the Board's personnel committee.

5. On June 30, 1988, I (the superintendent) responded to Mr. Pizarro's requested (sic) by indicating that the Board of Education had considered and rejected his request. A copy of that letter is attached hereto as Exhibit "B".

> Exhibit "B", the superintendent's rejection letter, shows concern of the superintendent that respondent went outside the chain of command by writing directly to the Board and not to him. After giving reasons why the Board rejected his request, the superintendent then advised respondent that "***there is no contractural provision for a leave of absence for this purpose. However, it is within the right of the Board of Education to grant a leave of absence or a sabbatical if it so desires.

6. On July 30, 1988, Mr. Pizarro asked for reconsideration of his request by the Board of Education. A copy of that letter is attached hereto as Exhibit "C".

> Exhibit "C", addressed directly to the superintendent by respondent, shows respondent apologized for going beyond the chain of command, and he explained in detail his proposed studies at Oxford University.

7. Once again the Board reviewed and denied the request made by Mr. Pizarro of which he was informed on August 26, 1988. In my letter to him dated August 26, I indicated 'you will be expected to be on duty commencing September 1 when the district has its general orientation session for all certified staff.' A copy of that letter is attached hereto as Exhibit "D".

8. Mr. Pizarro did not show up to the orientation session on September 1, and has not been in attendance at his assigned position since September 1.

9. On September 1, 1988, Mr. Andrew Haynes, Principal of the Long Branch High School, received a telephone call from Mr. Pizarro indicating that he was resigning from his position.

10. On September 6, 1988, the Board of Education accepted his oral resignation and this was conveyed to him by my letter of September 7, a copy of which is attached hereto and made a part hereof as Exhibit "E".

> There is no Exhibit "E" attached to the superintendent's affidavit. Nevertheless, it is accepted as true that the Board accepted respondent's oral resignation from his employment

as a tenured teacher on September 6, 1988 and that the superintendent conveyed that acceptance to respondent by writing on September 7, 1988.

This concludes a recitation of the facts stipulated by the parties as set forth in the superintendent's affidavit. In addition to the foregoing facts, it is also stipulated that because the Board of Education then saw fit to certify charges during December, 1988 against respondent charging abandonment of position respondent caused his attorney to deliver to the Board on March 7, 1989 a resignation in writing as a means to corroborate his earlier oral resignation which, it is recalled, was accepted by the Board.

This concludes a recitation of all relevant and material facts for purposes of respondent's motion to dismiss on the grounds of mootness.

ARGUMENT

Respondent argues that he voluntarily relinquished his position of employment and his status of tenure with this Board on September 1, 1988 when he tendered his oral resignation to the high school principal. That that oral resignation was fully understood to be his intention to be relieved of his employment duties for 1988-89 in order to study at Oxford University in England was clearly understood by the Board because of the very fact it accepted his oral resignation from its employ on September 10, 1988. Furthermore, respondent points out that he corroborated his resignation from the Board's employ on March 7, 1989 when his attorney delivered to the Board a resignation in writing. Thus, respondent concludes the charge of abandonment of position is moot.

BOARD'S ARGUMENT

The Board contends that while the charge abandonment of position is moot because of his resignation from its employ, the matter is not moot because there remains the issue of whether he gave it sufficient notice under N.J.S.A. 28-8 to avoid being declared having engaged in unbecoming conduct by failing to give a written resignation with sixty days notice of intention to resign back in September when he failed to appear. The Board demands the issue be decided in its favor and that the Commissioner suspend respondent's certificate to teach for the maximum period of one year. Respondent opposes this request by the Board as being beyond the scope of this proceeding; that if the

issue is within the scope of this proceeding then summary decision would be inappropriate because there are material facts in dispute regarding the Board's knowledge of his intention to resign and his prior service to the Board by way of mitigation should that be necessary; and, that the Board and the superintendent seek now nothing more than to harass him because of his determined effort to study at Oxford University in order to make himself a better teacher.

DISCUSSION AND CONCLUSIONS

The facts in this case cry out that the tenure charge certified by this Board against respondent, abandonment of position, is rendered moot by virtue of respondent's oral resignation which the Board itself accepted on September 10, 1988. This case concerns itself solely with one tenure charge of abandonment of position against respondent. This case does not involve a charge of unbecoming conduct under N.J.S.A. 18A:28-8 because the Board of Education did not certify pursuant to law a charge of unbecoming conduct against respondent.

The facts in this case cry out that respondent evidenced his intention to study at Oxford University during 1988-89 in June 1988 to the Board when he requested of it a leave of absence. Regrettably, respondent went beyond the "chain of command" which apparently upset the superintendent and the Board. Nevertheless, the Board and the superintendent knew full well respondent's intention to study in England. Respondent orally resigned his position on September 1, 1988 and the Board accepted that oral resignation ten days later. The Board did not choose to refuse to accept the resignation because of respondent's asserted failure to give it sixty days notice. To the contrary, the Board accepted the oral resignation. Now, the Board having in hand respondent's voluntary relinquishment of its employment with it, continues to press to have respondent's certificate suspended for one year by piggy-backing onto its charge of abandonment of position a brand new charge of unbecoming conduct. Such piggy-backing is neither proper, appropriate, nor consistent with due process of law. Teachers with a tenure status must be given proper and appropriate notice of tenure charges to be brought against them and charges as certified by a board against a teacher with a tenure status must be strictly construed. The charge here of abandonment of position in no way contemplated another charge of unbecoming conduct against respondent.

Finally, the facts in this case cry out that it would have been to respondent's advantage not to be honest and forthright with this Board of Education and submit his resignation, albeit orally, on September 1, 1988 for it to clearly understand his intention of studying in England and giving up his tenure status of employment. Rather, it would have been to respondent's advantage to say nothing to the Board and simply go to England and study for the 1988-89 academic year and let the Board carry its burden of proof at a plenary hearing to prove the charge of abandonment of position given all the circumstances. That way, respondent would not now be facing an attempt by the Board to suspend his certificate for one year. Of course, respondent did not adopt that course of action because of his obvious professionalism and up-front dealing with the Board.

The conclusion is reached in this initial decision that the oral resignation of respondent from the employ of the Long Branch City Board of Education renders moot the charge of abandonment of position against him and renders this entire proceeding moot. The Board's motion for summary decision that respondent's resignation was untimely and that he therefore engaged in conduct unbecoming is **DENIED.** Even if the matter were not otherwise moot, summary decision would not be appropriate because respondent does put material facts in dispute. The matter 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.

April 17, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

April 18, 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 20 1989
DATE

Jaynee LaVecchia/KS
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF MAXIMILIANO H.	:	COMMISSIONER OF EDUCATION
PIZARRO, SCHOOL DISTRICT OF THE	:	DECISION
CITY OF LONG BRANCH, MONMOUTH	:	
COUNTY.	:	
	:	

The Commissioner has reviewed the initial decision in this matter. The Commissioner notes that the Long Branch Board of Education (Board) filed exceptions to the initial decision and respondent has filed replies thereto.

The Board's exceptions essentially argue that the ALJ erred in concluding that the matter of unbecoming conduct for failure to provide 60 days notice of intention to resign could not be considered since the Board's overall charge was abandonment of position. The Board asserts its position by pointing out that the charge of abandonment of position contains within it the following phrase:

> "...for orally resigning his position without providing the sixty (60) days required notice pursuant to contract..."
> (Board's Exceptions, at p. 2)

While conceding that the ALJ's finding that the charge of abandonment of position was rendered moot by respondent's resignation, the Board argues that the implicit charge of unbecoming conduct should have been considered by the ALJ in light of the liberality accorded to pleadings in the State of New Jersey.

The Board's adamant position in regard to the issue of enforcing the 60-day notice requirement is grounded in its belief that failure to impose the penalty of a one-year suspension of certificate would be sending a wrong message to other teachers that they may "cavalierly treat their responsibilities***." (Board's Exceptions, at p. 3)

Finally, since the question of whether or not respondent's intention to resign, if he did not receive the requested leave, is a matter subject to factual verification, the Board requests that the matter be remanded for a hearing on the matter of unprofessional conduct.

Respondent's reply exceptions urge affirmance of the ALJ's findings arguing that the Board's exceptions cite no legal precedent in support of its position. Respondent likewise takes exception to the contention that there may be factual matters in dispute since the Board seems to have accepted the facts utilized by the ALJ in his findings.

Respondent's basic position is summarized by the following:

> The Petitioner would appear to desire, as the Administrative Law Judge points out, to create a tenure case for unbecoming conduct when the initial allegation is related to abandonment of position.
>
> (Respondent's Reply Exceptions, at p. 2)

The Commissioner has carefully considered the arguments presented by the parties in their exceptions. Based upon the aforesaid review, the Commissioner affirms the findings of the ALJ for the reasons contained within the initial decision. The Commissioner finds the Board's argument that acceptance of the ALJ's conclusion will send an inappropriate message to other teachers who may be inclined to seek a leave and then resign, when denied, without benefit of the required notice, to be without merit. In carefully reviewing the documents submitted with the charges in this matter, the Commissioner is convinced of the sincerity of respondent herein. It appears obvious that the controverted issues in this matter arise out of the extremely tight timelines within which both parties were required to function since respondent was not informed of the acceptance of his scholarship until mid-June. While it is true that respondent could have resigned upon first notification of the Board's rejection of his request for leave, the Board is not altogether blameless since it also could have provided respondent with an opportunity to meet personnally with the Personnel Committee to obtain answers to its questions as to the relevance of respondent's graduate study to his teaching assignment in the Long Branch Public Schools.

In the final analysis, the Commissioner concludes that the ALJ was not only technically correct in his findings that the sole charge against respondent was abandonment of position, he likewise agrees that it was never respondent's intention to behave unprofessionally. The tenure charge in this matter is dismissed.

COMMISSIONER OF EDUCATION

June 1, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5696-88
AGENCY DKT. NO. 189-6/88

IN THE MATTER OF THE TENURE HEARING OF CARL GREGG, SCHOOL DISTRICT OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

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Joseph Jacobs, Esq., for petitioner Board of Education
Alan J. Zeller, Esq., for respondent Carl Gregg (Freeman, Zeller & Bryant, attorneys)

Record Closed: February 21, 1989 Decided: April 6, 1989

BEFORE **EDGAR R. HOLMES**, ALJ:

STATEMENT OF THE CASE

Carl Gregg, a guidance counselor at Atlantic City High School, is alleged to have engaged in sexual misconduct toward two female students during the 1987/88 school year.

PROCEDURAL HISTORY

The Atlantic City Board of Education certified tenure charges (seeking termination of respondent's employment) to the Commissioner of Education on June 21, 1988, pursuant to N.J.S.A. 18A:6-9 et seq.

An Answer was filed on July 26, 1988, and the matter was transmitted to the Office of Administrative Law (OAL) to be heard 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 September 27, 1988, and the issue was identified as whether respondent had physical sexual contact with, or sexually harassed, T.R. and/or M.J.; female students, on or about April 12, 1988, and in March 1988, respectively.

A plenary hearing convened December 20, 1988, and ended February 21, 1989.

STIPULATION

At the hearing the parties agreed to move into evidence copies of respondent's performance evaluations from 1970 through February 1988 and eight letters of recommendation. Except for one evaluation in September of 1970, respondent was uniformly marked "excellent" in all categories. The eight letters or character references remark favorably upon respondent's moral character and professionalism.

In addition, the parties stipulated that the Division of Youth and Family Services, after notification, did not investigate the alleged incidents because both students were 18 years old at the time. In addition, the Atlantic County Prosecutor's Office, after investigating the incidents, did not file charges against respondent.

SUMMARY OF TESTIMONY

T.R., a 1988 graduate of Atlantic City High School, testified that on April 12, 1988, she was peering out a window in back of the school auditorium when respondent placed his hands on her sides, kissed her, and told her she made "his dick hard."

Later in the day, T.R. described the event to M.J., another student. M.J. then told T.R. about a similar incident which occurred between her and respondent in March 1988.

Both girls filed written complaints with the Principal. M.J. complained that respondent felt her breasts and solicited her for oral and anal sex. She also stated in her complaint that respondent told her not to tell anyone because if she did "Bucky" and "Carrington" would be on his side. These are two school security guards. "Bucky" is Wilson Edmondson, Supervisor of Security.

M.J. was a special education student at the school and one of respondent's counsellees. T.R. was not, and had little or no contact with respondent prior to the alleged incident.

M.J. told the police that respondent offered her ten dollars for fellatio. At the hearing, she denied telling this to the police.

Sometime before April 28, 1988, Wilson Edmondson, a friend of the respondent, prepared a letter for M.J. requesting that the charges against respondent be dropped and asserting that they were a joke. Edmondson claimed in a deposition de bene esse, that M.J. asked him to prepare such a letter for her. He claimed he told no one in authority of this alleged conversation. M.J. testified that Edmondson tried to induce her to dismiss the charges as a "joke."

M.J. did write a letter requesting that the charges be dropped. However, instead of describing the charges as a joke, she said "I know what he said to me was wrong, but he probaly (sic) didn't mean to say it." M.J. gave both her note and Edmondson's note to Vice Principal Williams. Williams testified that when she did so she reiterated the charges and said they were "true."

Jean Martin, one of M.J.'s special education teachers, and her confidante according to Martin, testified that M.J. talked to her about the complaint. Martin said she then asked M.J. if she "was being truthful" and also asked her if she knew she could cost respondent his job. Thereafter, Martin alleges, M.J. said either "It didn't happen that way" or "It didn't happen." M.J. also asked Martin if she,

Martin, was angry with her. She then said, according to Martin, "I wish I hadn't said anything about the incident."

Two other teachers at the school, Audrea Rackley and Barbara L. Hutchins, testified that respondent was very professional. They doubted that the incident involving T.R. could have happened because there are always people in the hallway behind the auditorium and therefore the incident could not have been unwitnessed as T.R. professed.

Charles Gregg, respondent's brother, is also a teacher in the school. He alleged that M.J. came into his classroom one day in June, 1988, and, apropos of nothing said: "Mr. Gregg, this is full of bullshit; what they are doing to your brother is wrong. Your brother never touched me or said fresh things to me. You know what is going on between your brother and me. I told Mr. Faunce (the Principal) but he looked at me as though I was lying" He also alleges that she told Vice Principal Williams that the incident did not happen and he told her it was "too late" and that she and T.R. "better get their statements together."

Respondent testified that in 24 years as a teacher, guidance counsellor and coach, he never had a complaint filed against him. He described M.J. as one of his students who was "overly friendly." He sawT.R. only occasionally in the halls. He could not account for their complaints. He denied ever having any contact with either student which could have been misinterpreted as sexual contact. He too asserted that the hallway behind the auditorium was too well traveled for the incident T.R. described to be unwitnessed.

FACTUAL AND LEGAL DISCUSSION

This case turns on credibility. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." *In re Perrone*, 5 N.J. 514, 522 (1950). M.J. appeared to be telling the truth. She confronted respondent while she was on the witness stand. She was angry with him. Respondent cannot offer any explanation for her anger. She was consistent in her testimony on the main points; that he propositioned her and felt her breasts. M.J. was inconsistent in one thing; she is

alleged to have told the police that respondent offered her money in exchange for fellatio.

M.J. disputed "Bucky" Edmondson's version of the note. Edmondson claims M.J. approached him. M.J. says Edmondson pressured her to drop the charges. M.J. did in fact write a note asking that the charges be dropped, but she added that she knew what he said to her was wrong. This is not a retraction. Obviously Edmondson's pressure told on M.J.. She tried to discuss the matter with Martin who gave her no support or encouragement; only the guilty knowledge that respondent would lose his job.

M.J. went to respondent's brother and tried to shift the blame for prosecuting the tenure hearing to others; the principal and vice principal. Her courtroom demeanor, however, clearly indicated that she was telling the truth when she said that respondent tried to induce her to give him oral sex and that he felt her breasts.

T. R. was a better witness than M. J. She was always consistent in her testimony. T.R. also confronted respondent in the courtroom. She did not flinch nor avert her eyes. She, too, was angry with him. T.R. told her story in a straight forward fashion, exhibiting shyness, then anger, finally, disgust. She was unshaken on cross examination. In an attempt to discredit her testimony, several witnesses testified that they never knew the hallways behind the auditorium to be empty of students or teachers. This is not inconsistent with T.R.'s testimony that on April 12, 1988, there were at least two people in that hallway just before the second period bell; T. R. and respondent.

I do not believe the testimony of Edmondson that M.J. came to him and told him the incident was a joke. I believe M.J.'s version that Edmondson pressured her to say it was a joke in order to save his friend, respondent. He did not , after all , repeat her alleged statement to any person in authority, although Williams testified at the hearing that Edmondson spoke to him about the note. In his deposition, however, Edmondson was adamant that he did not tell anyone. It may be that he thought his conversation with Williams was "off the record." One way or the other - Edmondson is not a truth teller.

Edmondson was the supervisor of security and must have known that such an admission was damaging to M.J.'s case, if true. I believe that he did not report her alleged admission because she made none.

Edmondson's pressure however, did have an effect on M.J. She sought support from Martin and did not get it. Nevertheless, even to Martin, M.J. did not retract her statement. Martin offered two versions of what M.J. told her. Martin first said that M.J. said 'It didn't happen that way." She then paused in her testimony and weakly added "'Or it didn't happen'."

Only the latter phrase is a retraction and I do not believe M.J. spoke the latter words to Martin. I believe she may have said "It didn't happen that way." But of course Martin had already questioned her truthfulness and told her she was costing Gregg his job. This must have shaken M.J.'s confidence, and this is why she hedged. Her final remark to Martin was that she wished she hadn't mentioned the incident. This is an affirmation that the incident occurred, not a retraction.

Charles Gregg's testimony was designed to convey the message that there was a conspiracy to oust his brother from his job. Charles Gregg testified that M.J. told him that when she tried to get Williams and Faunce to believe that nothing happened between her and respondent they ignored her. Charles Gregg said Williams told M.J. to get her "statement together" with T.R. Williams denied, however, that M.J. ever retracted her statement. When M.J. gave Williams her own note (which is not a retraction), she reiterated that the complaint against Gregg was true.

FINDINGS OF FACT

I FIND that:

1. On April 12, 1988, respondent Carl Gregg, kissed T.R., placed his hand on her side and told her that she 'made his dick hard."

2. In March of 1988 Carl Gregg proposed to M.J. that she perform fellatio and engage in other sexual activity with him and he touched her breasts for the purpose of obtaining sexual gratification.

CONCLUSION

I **CONCLUDE** that Carl Gregg sexually harassed T.R. in April, 1988.

I FURTHER **CONCLUDE** that Carl Gregg had physical sexual contact with and sexually harassed M.J. in March of 1988.

Sexual contact with pupils warrants summary dismissal. *In the Matter of the Tenure Hearing of Fred Brown, School District of the City of Bayonne, Hudson County*, 70 S.L.D. 239, 241. Sexual contact by a teacher with a pupil is a violation of the teacher pupil relationship and may have life long consequences.

The Commissioner has always held that teaching is a public trust and its violation requires a heavy penalty. *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 S.L.D. 302. *In the Matter of Tenure Hearing of Ernest Tordo, School District of the Township of Jackson*, 1974 S.L.D. 97. The penalty of dismissal and loss of tenure is not too heavy a penalty under these circumstances.

Finally, I **CONCLUDE** that the Board's determination to dismiss the respondent be **AFFIRMED** and that the Answer of respondent Carl Gregg be dismissed **WITH PREJUDICE.**

This recommended decision may be adopted, modified or rejected by the **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION,** 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.

April 6, 1989
DATE

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

April 7, 1989
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

APR 10 1989
DATE

Mailed to Parties:
James J. Thurber, Jr.
OFFICE OF ADMINISTRATIVE LAW

dho

IN THE MATTER OF THE TENURE	:	
HEARING OF CARL GREGG, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Respondent excepts to the ALJ's determination in this matter criticizing his summary of testimony by T.R., M.J. and Norman Williams, vice-principal and supervisor of special education at Atlantic City High School, as compared to that actually given by them. Respondent assails the ALJ's statements that M.J. appeared to be telling the truth; that her testimony was consistent on the main points; and that M.J. was inconsistent in only one thing, i.e., that she alleged to have told the police that respondent offered her money in exchange for fellatio.

As to this, respondent avers that a reading of the transcript discloses that M.J.'s testimony was replete with so many contradictions that it would be almost laughable if not for the severity of the charges against respondent and the findings made by the ALJ as to M.J.'s truthfulness.

In support of this, respondent points to the fact that M.J. testified she received no help with the complaint form she filled out (P-10), yet, this was in direct conflict with her answers submitted to Interrogatories wherein she stated Mr. Williams helped her complete the complaint form. Further, respondent points out that (1) Mr. Williams could not remember whether or not he helped her, but that he probably helped her in spelling words and (2) Mrs. Martin, one of M.J.'s special education teachers, stated uncategorically after reviewing Exhibit P-10 that M.J. was not capable of preparing that document herself without assistance.

Respondent also points to the following inconsistencies:

1. M.J. testified that everything she wrote in the complaint form (P-10) was accurate and that she never told a different version even when she spoke to the police and prosecutors. However, a review of the transcript of her testimony to them (Exhibit A-1) and her testimony in the instant matter differs with respect to such things as:

(a) being offered $10.00 for fellatio,

(b) where she was supposed to have kicked him (leg v. penis),

(c) whether she actually screamed or not.

2. M.J. testified she never spoke to Mrs. Martin, one of her special education teachers, in contradiction to the teacher's testimony that M.J. spoke to her on several occasions and changed her version about the incident several times.

Respondent also charges that the ALJ ignored (1) the impact of M.J.'s admission that in June 1988 she went on her own accord to see his brother, Charles, a teacher at the same school and told him the charges were "bullshit" and (2) that this occurrence was immediately reported to the principal. Further, respondent characterizes the testimony of Mr. Williams as contradictory and bizarre and avers that the ALJ ignored the contradictions in his testimony. The specifics of the alleged contradictions are not identified for the Commissioner. However, respondent does address the fact that Mr. Williams testified that M.J. gave him at least two different notes, one of which he secreted away and never advised anybody of its testimony until testifying at this hearing and that the ALJ did not mention this fact in the initial decision.

Respondent likewise attacks the credibility of T.R. arguing that the ALJ distorted the contraditions of T.R.'s testimony and conveniently ignored others he believes were vital. In support of this allegation he points to T.R.'s testimony that she came to school late on the date of the purported incident at approximately 10:30 a.m. and that if a student is late for school and misses first period, the teacher counts it as a cut and the student is marked absent. However, her attendance records (P-14) indicated T.R. was present on April 12, 1988 and was not marked late or absent. As to this, respondent maintains that either the school records are wrong for that date or T.R.'s testimony that she was in a totally empty hallway at 10:30 a.m., when respondent allegedly approached her, is wrong. Moreover, respondent excepts to the ALJ's disregard of the testimony of Teachers Rickley and Hudgins that the area in question is never devoid of students even during classes and especially about 10:30 a.m.

Respondent further argues that, as noted by the ALJ, this case turns on credibility. However, respondent maintains that consideration must be given to the fact that the only testimony to these incidents was provided by the two students, both of whom, he avers, must be considered to be children. He contends this is particularly so with regard to M.J. since she is a special education student whose educational level, according to one of her teachers, Mrs. Martin, is that of a fifth grader. Respondent argues in this regard that the testimony by children must be used with great caution particularly where there is a conflict with their prior statements. He refers to In re Polito, 1974 S.L.D. 666, 676 which held that pupil testimony "***must be used with great caution and particularly where, as here, such use requires a final adjudication grounded primarily on the basis of the testimony.***"

As to this, respondent argues that the ALJ found that "M.J. appeared to be telling the truth" (Initial Decision, ante) but he did not find that she was, in fact, telling the truth. Thus, it was on this basis of an "appearance" that he has been terminated from his position of 24 years with an otherwise exemplary record. As such, respondent avers that it is improper and inconsistent with prior decisions and New Jersey case law to permit such controverted testimony to be used as the sole basis upon which to terminate his employment.

Upon a thorough review of the record, respondent's exceptions, and the transcript of one day of hearing submitted to the record, the Commissioner adopts the recommended decision of the ALJ dismissing respondent from his tenured position as guidance counselor. The transcript of the witnesses testifying on December 22, 1988, M.J., S.M., T.R. and Mr. Williams, was vigorously scrutinized. Moreover, it is noted for the record that there was no submission of the transcripts of the testimony of any other witnesses which would have permitted the Commissioner to independently evaluate the testimony of those other individuals referred to in respondent's exceptions. In accordance with In re Morrison, 216 N.J. Super. 143 (App. Div. 1987), if respondent believed the testimony of those other witnesses needed to be reviewed by the Commissioner to support his exceptions, respondent had the responsibility to provide the transcript of their testimony to the Commissioner (Morrison at 159).

In examining the charges in this matter, the Commissioner is in full agreement with the ALJ and respondent that the case turns on credibility. He is also fully cognizant of the need to assess pupil testimony, even pupils who have reached the age of majority as herein, with great caution particularly when each of the two incidents was alleged to have occurred only between, and in the presence of, two individuals, the student and respondent.

Upon a thorough review of the record and the transcript with respect to T.R., who was the first student to file a complaint against respondent, thus triggering the chain of events leading to tenure charges against respondent, the Commissioner agrees with and adopts as his own the findings and determination of the ALJ that respondent sexually harassed T.R. in April 1988 by placing his hands on her side, kissing her, and telling her that she "made his dick hard." (Initial Decision, ante) T.R.'s testimony was direct, forthright, and consistent. Respondent's efforts to discredit her through the issue of not being marked as absent or tardy on Exhibit P-14 is rejected by the Commissioner. T.R. testified without contradiction that on April 12, 1988, the day of the alleged incident, the seniors reported late to school; thus, at 10:30a.m., first period was still being conducted and second period was to start in approximately 10 minutes. Her explanation of the system for marking absences and tardies was not only undisputed, but was also corroborated by Mr. Williams. See Tr. 134, 143, 163-166, 169-171 12/20/88.

Essentially what that testimony reveals is that P-14 is a print-out of attendance taken in homeroom which in the 1987-88 school year was after first and second periods. That attendance print-out is distinct from the attendance taken for individual class periods. Thus, if a student arrives late to school but is present in homeroom, as T.R. testified occurred with her on April 12, 1988, that student is deemed to be neither absent nor tardy. However, if he or she is absent for first period, attendance taken in that particular class would indicate an absence or cut for that given class. This perhaps becomes more clear when looking at Exhibit P-13, T.R.'s report card. Absences are recorded in two distinct ways, i.e., (1) by month in the lower left portion of the report card which reflects the absences reported on P-14 for homeroom attendance and (2) by classroom attendance found in the far right portion of the card which reflects absences reported for each separate class. As may be seen in examining the two types of recording, they are not identical.

Insofar as T.R. is concerned, she was present at school during homeroom on April 12, 1988, thus, she was not recorded as either absent or tardy for the purpose of the type of attendance documented by Exhibit P-14. Thus, her credibility has not been lessened by that particular exhibit nor by her testimony as a whole.

Having carefully considered the charge of unbecoming conduct against respondent as it relates to T.R., and having given due regard to the opportunity of the ALJ as the trier of fact to judge the credibility of the witnesses, and having scrutinized thoroughly the record in this matter, and having concluded that the unbecoming conduct charge with respect to T.R. is true, the Commissioner finds and determines that the incident involving T.R. unto itself is sufficiently flagrant to warrant respondent's dismissal, notwithstanding his prior unblemished record and highly favorable evaluations. In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944), the highest court in New Jersey ruled that unfitness to hold a position might be shown by one incident, if sufficiently flagrant, or by many incidents (at 371). In the instant matter, respondent's actions in regard to T.R. were egregious and despicable. Thus, removal from his position is not too severe a penalty.

Having ruled that this one incident was sufficient to warrant dismissal, the Commissioner will now turn to the charges as they relate to M.J. Having carefully reviewed the record and charges as they relate to M.J. who came to the attention of the school administration when T.R. filed her complaint and was asked if she knew of anyone else who had experienced a problem with respondent, the Commissioner agrees that there are a number of inconsistencies between her testimony in this proceeding and that given to the prosecutor's office (Exhibit A-1), such as (1) her being offered $10 to commit fellatio, (2) in what part of the body she allegedly kicked respondent, and (3) how she actually came to be in respondent's presence during the incident in question. He is also aware of other inconsistencies as well, such as, her testimony

as to not having given Edmondson's note to Williams and the issue of what help was given by the vice-principal in writing the note. However, the Commissioner disagrees that the ALJ ignored these inconsistencies. His statement in the initial decision, ante, was addressing the consistency in her testimony on the main points of the allegations, i.e., that he propositioned her and felt her breasts but that on the point of being offered money she was inconsistent. As to this, the Commissioner agrees that she was credible insofar as those main points. Moreover, in the Commissioner's judgment, it is significant in determining M.J.'s credibility that she never recanted on those main points. Even when she agreed to try to drop the charges and copied the security guard's note (Exhibit P-12) she refused to write that it was a joke.

While recognizing that he has the power to make new or amended findings and determinations as to credibility, the Commissioner must, however, give due regard to the opportunity of the ALJ to judge the witnesses' credibility in this matter. Having reviewed the exceptions and the record, including the December 20, 1988 transcript, and assessed with caution the testimony of M.J., a special education student, and having weighed the inconsistencies in that testimony, the Commissioner agrees with the ALJ's findings and conclusion that respondent had physical sexual contact with, and sexually harassed, M.J. for the reasons stated in the initial decision.

As to the exceptions relative to the testimony of the vice-principal, Mr. Williams, the Commissioner finds that he unquestionably exercised poor judgment when unilaterally deciding not to pass the Edmondson note to higher authorities. In so doing, he exceeded his responsibility to be an objective "information gatherer" by making a personal judgment that the note should not be passed on or that it had nothing to do with the matter. The Commissioner does not find, however, that this error in judgment discredits his testimony as a whole.

Accordingly, the Commissioner determines that respondent is and shall be dismissed from his tenured position as of the date of this decision. It is further ordered that the 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

June 2, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 8544-88
AGENCY DKT. NO. 319-9/88

EILEEN GLOWACKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent.

Eileen Glowacki, *pro se*

Glenn T. Leonard, Esq., for respondent

Record Closed: 4/20/89 Decided: 4/20/89

BEFORE **PHILIP B. CUMMIS**, ALJ:

Eileen Glowacki, an employee of the Board of Education of the Borough of North Arlington, Bergen County, contends she is entitled to employment as a supplemental teacher in the 1987-88 school year and seeks the intervention of the Commissioner of Education in awarding her this job title along with salary differential, pension benefits, and any and all other benefits to which she may be entitled as a teacher.

The petition of appeal was filed on September 29, 1988, at the Bureau of Controversies and Disputes of the Department of Education. Respondent's answer to the petition was filed on November 16, 1988. Thereafter, the Commissioner transmitted the matter to the Office of Administrative Law on November 23, 1988, 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 February 7, 1989, at the Office of Administrative Law, 185 Washington Street, Newark, NJ, and an order was entered establishing, *inter alia*, hearing dates of April 5, 6, 25, and 26, 1989. A motion for summary judgment filed by respondent was received on March 22, 1989, and petitioner's answer to this motion was received on April 4, 1989. On April 5, 1989, the first scheduled hearing date, a conference was held at the Office of Administrative Law between the administrative law judge and all parties. At that conference, the motion was discussed and it was agreed that since the answer to the motion was not received until the day before the hearing, the administrative law judge would review the motion and its answer and render a decision on the motion for summary judgment prior to the next scheduled hearing date of April 25, 1989.

ISSUES

Respondent contents that petitioner's claim is barred by *N.J.A.C.* 6:24-1.2(b), the 90-day statute of limitation rule on education cases.

Respondent secondly alleges that petitioner's claim is barred by *N.J.S.A.* 34:13A-5.4(c) in that it is an unfair labor practice and should be pursued with the Public Employees' Relations Commission.

Respondent next contends that petitioner's claims are barred by the doctrines of laches, estoppel and waiver.

In answer to respondent's allegations, petitioner contends that she is not barred by the 90-day statute of limitations in that she filed the petition within 30 days from the date of receipt of the Board's letter dated August 31, 1988, giving final notice of its determination, well within the 90-day period. Petitioner further contends that her right to the higher position of teacher is a statutory entitlement and thus the statute of limitations is inapplicable.

FACTS

Respondent approved the appointment of petitioner as a teacher's aide on August 17, 1987, at the North Arlington High School beginning September 8, 1987, at the rate or $9 an hour, equivalent to $9,400 per year.

Petitioner contends that she was never placed in a teacher's aide position, but instead was assigned to the high school's resource room as a supplemental teacher. Petitioner alleges shewas aware on the first day of her employment that she was performing the duties of a supplemental teacher. Petitioner did not file a petition for relief with the Commissioner until September 29, 1988, one year later. Petitioner further alleges in her petition that she was listed as a supplemental instructor in the 1987-88 directory of school staff. She also points out in her petition that teacher observations were made on October 7, 1987, at which time she was observed. Petitioner was required to complete Supplemental Instruction Monthly Payroll Certification forms. She filled out student report cards and made lesson plans for students assigned to her for supplemental instruction. Petitioner contends that all of the above led her to believe that she was in fact a teacher and not an aide. By letter dated March 18, 1988, petitioner applied for enrollment in the Teachers' Pension and Annuity Fund, which letter was acknowledged by John R. Prunetti, assistant director of the Division of Pensions in his letter to petitioner dated April 19, 1988.

DISCUSSION

N.J.A.C. 6:24-1.2 provides in pertinent part that:

> (a) To initiate a contested case for the commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall serve a copy of a petition upon each respondent. The petitioner then shall file proof of service and the original of the petition with the commissioner.
>
> (b) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

The issue as to when the 90 days begins to run was addressed in *North Plainfield Educ. Ass'n v. Bd. of Ed. of the Boro. of No. Plainfield*, 96 *N.J.* 587 (1984). In *North Plainfield*, two teachers pursuant to the collective bargaining agreement between the Board and the North Plainfield Education Association took a sabbatical leave for the second semester of the 1978-79 academic year to pursue full-time graduate study. Each received 75 percent of full pay and earned a master's degree while on sabbatical.

When the teachers returned to classroom teaching in September 1979, each remained on the same step, although in the master's degree category for the 1979-1980 year.

On November 12, 1979, the Association filed a grievance with the board claiming that the failure to move the teachers to the next step on the salary guide for the 1979-80 school year constituted a violation of the negotiated agreement. The Board denied the grievance and the Association sought arbitration. On July 22, 1989, the arbitrator ruled in favor of the board.

The following year, 1980-81, each teacher advanced one step on the guide. On September 29, 1980, the Association filed a petition with the Commissioner requesting an order directing the board to advance the teachers an additional step. The Commissioner transferred the case to the Office of Administrative Law as a contested case.

The administrative law judge found that the teachers were aware of the challenged action when they received their first paycheck for the 1979-80 school year. However, their petition was not filed until September 29, 1980, more than nine months after the expiration of the 90-day period of limitations. The Supreme Court of New Jersey held that the ALJ correctly concluded that the petition was time barred. *North Plainfield* at 594.

The Court further stated:

> If the annual increment were a statutory entitlement, as the Appellate Division concluded, the ninety-day period of limitations contained in *N.J.A.C.* 6:24-1.2 would not apply, and the petition for prospective relief would have been timely. Because the award of the annual increment is not a matter of statutory right, but is subject to "denial for inefficiency or other good cause," *N.J.S.A.* 18A:29-14, it is subject to the time bar provided in the regulation issued by the Commissioner pursuant to that statute.

In the instant matter, petitioner claims that the 90 days should not run because she has a statutory entitlement to the position of supplemental teacher. In petitioner's brief, she does not specifically mention any particular statute, but it appears that she is seeking relief under *N.J.S.A.*18A:29-5 which provides for minimum salaries for full-time teachers in a school district.

N.J.S.A. 18A:29-5 provides in part:

> The minimum salary of a full-time teaching staff member in any school or educational services commission who is certified by the local board of education or the board of directors of the educational services commission as performing his duties in an acceptable manner for the previous academic year pursuant to *N.J.A.C.* 6:3-1.19 and 6:3-1.21 and who is not employed as a substitute on a day-to-day basis shall be $18,500.00 for an academic year and a proportionate amount for less than an academic year.

The only reported case which found that a "statutory entitlement" tolls the statute of limitations is *Lavin v. Hackensack Bd. of Ed.*, 90 *N.J.* 145 (1982). The *Lavin* court found that *N.J.S.A.*18A:29-11, which allows credit to teachers for time in active military service in time of war, is an emolument which bears no relationship to the service to be rendered as a teacher and, therefore, the court concluded that the statute of limitations should not be applied. The court held that "where the benefit is not directly related to the employment service, but is being awarded for a totally unrelated reason, the recipient is truly the beneficiary of a statutory entitlement quite apart from the employment as such." *Lavin* at 150.

In *Polaha v. Buena Regional School Dist.*, 212 *N.J. Super.* 628 (App. Div. 1986), appellant was hired by the school district in September 1979 as the community education director for the Buena Regional School District. He was rehired each year until the district board on March 8, 1983, eliminated the position and informed appellant of its action. On July 12, 1983, the district board created a part-time position to supervise the Community Enrichment Program. Appellant, on July 23, 1983, requested appointment to the new part-time position. He allegedly received no answer to his request and on September 26, 1983, again demanded the position with a prorated salary based upon his former rate. Exchanges of correspondence until November 1, 1983, attempted to resolve the matter without success. Appellant filed his appeal with the Commissioner on November 9, 1983.

The case was sent to the OAL as a contested matter. The ALJ denied the district board's motion to dismiss appellant's petition as time barred under *N.J.A.C.* 6:24-1.2. The administrative law judge concluded that appellant should not be penalized for his attempt to settle the matter through negotiations, that the 90-day period did not start until the latter part of October 1983, and that the petition was filed in a timely manner consistent with *N.J.A.C.* 6:24-1.2.

However, on appeal, the State Board of Education did not consider the tenure issue on its merits as its disagreed with the Commissioner and held that appellant's claim was time barred. The Board declared:

> That a right derived from statute is involved does not excuse compliance with the 90-day requirement where the right is functionally related to service as a teacher. *North Plainfield Ed. Ass'n v. Bd. of Ed. of the Boro. of No. Plainfield*, 96 *N.J.* 587 (1984) [*sic*]. Thus, contrary to the Commissioner's determination, where, as here, abridgement of tenure of seniority rights is asserted, the petition must be filed in accordance with the requirements of *N.J.A.C.* 6:24-1.2.

The State Board also observed:

> 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 would occur.

The Board went on to state:

> [We] emphasize that no indication is present in this case of circumstances warranting relaxation under *N.J.A.C.* 6:24-1.19 [*sic*]. Therefore, we conclude that Mr. Polaha's claim is time-barred.

[*Polaha* at 632]

The Appellate Division affirmed the State Board's determination that *N.J.A.C.* 6:24-1.2 was applicable to petitioner's claim notwithstanding the assertion of a statutory right to tenure. The only reported case that allowed such a right to toll the 90-day requirement was *Lavin*. However, the appellate court reversed the State Board's determination that there was no indication of circumstances warranting relaxation of the rule and remanded the matter to the Commissioner.

On remand, the Commissioner did not address the relaxation issue. He stated that petitioner entered into a period of negotiations with the Board in an effort to resolve the matter which did not result in a formal rejection or refusal until some time in October 1983. Thus, the Commissioner concurred with the ALJ's original conclusion that petitioner "should not be penalized for his attempt to settle the matter through negotiations, that the 90-day period did not start until the later part of October 1983, and that the petition was filed in a timely manner consistent with *N.J.A.C.* 6:24-1.2." (Comm'r Decision on remand, Nov. 20, 1986, at 2).

Once again, the district board appealed to the State Board on the grounds that a teacher's election to negotiate is not cause to disregard the requirements of *N.J.A.C.* 6:24-1.2. The State Board agreed with the district board, stating that:

> We agree with the Board that where a cause of action has accrued under the education laws as the result of board action, an individual's attempts to negotiate with the board so as to alter its determination does not in itself toll the period of limitations established by *N.J.A.C.* 6:24-1.2. We emphasize that, as argued by the Board, it is well established that a teacher's decision to arbitrate a controversy does not toll the limitations period. *e.g., Riley v. Hunterdon Central High School Bd. of Ed.*, 1973 *N.J. Super.* 109 (App. Div. 1980); *Bd. of Ed. of Bernards Tp. v. Bernards Tp. Ed. Ass'n*, 79 *N.J.* 311 (1979). We can find no basis to distinguish an election by an employee to pursue negotiations so as to conclude that such negotiations automatically toll the time limit established by the regulation.
>
> Under the education laws, a cause of action accrues and the time period for filing commences when a petitioner has notice of a final action by a board that is the subject of a dispute. *N.J.A.C.* 6:24-1.2. Where a petitioner has had adequate notice, any negotiations are aimed at altering the final determination of the board upon which his cause of action is based. Although a petitioner may in some instances successfully negotiate so as to alter that determination, such attempts cannot be viewed as compelling excusal [*sic*] from the procedural requirements that must be met in order to entitle him to adjudication of his legal rights. To hold otherwise would seriously undermine the purpose for which those requirements are imposed. We therefore reject the Commissioner's determination that because petitioner here attempted to settle this matter through negotiations, the 90-day period did not commence until the latter part of October 1983, when those attempts proved unsuccessful.

[State Board Decision, March 4, 1988 at 4-5]

However, the State Board concluded that relaxation of the rule pursuant to *N.J.A.C.* 6:24-1.17 under the circumstances of the *Polaha* case was warranted.

N.J.A.C. 6:24-1.17 amending *N.J.A.C.* 6:24-1.19 provides:

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

In *Miller v. Morris School District*, #364-80 (February 25, 1980), the limited circumstances under which the 90-day rule will be relaxed were addressed at length. The Commissioner stated that:

> Enlargement of the time period is thus warranted in only three instances: where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination and where a matter of significant public interest is involved. *Brunetti v. New Milford*, 68 *N.J.* 576, 586 (1975); *Schack v. Trimple*, 28 *N.J.* 40, 48, 50-51 (1958); *Reahl v. Randolph Township Municipal Utilities Authority*, 163 *N.J. Super.* 501, 109 (App. Div. 1978), *certif. den.* 81 *N.J.* 45 (1979).

In *Weir v. Board of Education of the Northern Valley Regional High School District*, OAL Docket No. EDU 8609-83, decided June 7, 1984 (aff'd App. Div., A-3520-84T6, April 9, 1986), Judge Weiss sought a "compelling reason" to relax the strict application of *N.J.A.C.* 6:24-1.2.

> Thus, my consideration of all the surrounding circumstances leads me to conclude that no compelling reasons exist for relaxation of the bar. There is no constitutional issue involved, nor such a major educational policy question that the public interest would be disserved by not reaching it. While the "merits" of the controversy are surely important to petitioner, this is not the test. As the undersigned observed in an Initial Decision in *Bogart;* "The point to be made is that there will always be an arguably harsh result when the 90-day rule is applied. But the cases which have interpreted and applied the rule teach that this is no reason not to use it. Indeed, if the rule was relaxed simply because the result would be harsh if applied, then the rule might as well be ignored in its entirety on nearly every occasion." *Bogart* at 5. (*Weir* at p. 8)

In the case at bar, petitioner has not made a showing that there was a substantial constitutional issue presented. Moreover, there was no informal administrative determination made, and this matter cannot be deemed a matter of significant public interest. Thus, the rule should not be relaxed. Under *North Plainfield,* the 90 days would begin to run when the ALJ determines that petitioner had constructive notice of the Board action that is the subject of this controversy. In her petition, petitioner asserts that she first became aware that she was performing the duties of a supplemental teacher in the fall of 1987 during the first several months of her employment.

Also established is that on or about January 29, 1988, the petitioner contacted the Division of Pensions regarding her status. (Exhibit R-2) If the foregoing allegations in her petition did not establish that petitioner had notice of the Board's actions, her January 29, 1988 letter certainly did. Thus, the 90 days could run from that date and petitioner would still be out of time, having filed her petition on September 28, 1988. Further, unlike *Polaha*, this was not a situation in which petitioner was in the midst of negotiations with the Board so as to toll the 90-day period. There is insufficient evidence to establish this fact.

Respondent has moved for summary decision. The applicable rule in New Jersey is *N.J.A.C.* 1:1-12.5(b) which states:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

This section is substantially the same as Rule 4:46-2 of the New Jersey Court Rules, which has been interpreted by the courts. The role of the judge in summary decision motions is to determine whether there is a genuine issue as to a material fact, but not to decide the issue if he decides that a genuine issue exists. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 73 (1954). Summary decision is designed to allow the judge quickly and inexpensively to dispose of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a hearing. *Judson* at 74.

Because, in the instant matter, the facts are not in dispute and petitioner does not have a statutory entitlement similar to that in *Lavin*, this matter is ripe for summary decision.

CONCLUSION

In the instant matter, it is apparent that petitioner was well aware that she was no longer performing the duties of a teacher's aide sometime in the fall of 1987. Yet she did not file her petition with the Commissioner until September of 1988, well past the 90-day period.

As established by case law, petitioner's statutory entitlement is not sufficient to warrant tolling of the statute of limitations. The only reported case was the *Lavin* case which dealt with statutory entitlement to military credit. In addition, it does not appear that the petitioner was negotiating with the Board of Education as was the case in *Polaha* which relaxed the 90-day filing requirement of *N.J.A.C.* 6:24-1.2 pursuant to *N.J.A.C.* 6:24-1.17.

I therefore **CONCLUDE** that the 90-day statute of limitations has run against petitioner. I further **CONCLUDE** that petitioner is not entitled to relief by way of statutory entitlement or by way of relaxation of the 90-day rule.

I therefore **ORDER** that the petition of Eileen Glowacki be **DISMISSED** and that summary judgment be entered in favor of respondent, North Arlington Board of Education.

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.

OAL DKT. NO. EDU 8544-88

I hereby file this initial decision with **SAUL COOPERMAN** for consideration.

4/20/89
DATE

PHILIP B. CUMMIS, ALJ

Receipt Acknowledged:

4/24/89
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 25 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

EILEEN GLOWACKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, 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, as well as the Board's reply to exceptions, were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

It is petitioner's contention that the ALJ erred in granting the Board's motion for summary judgment by virtue of the fact that the 90-day rule set forth in N.J.A.C. 6:24-1.2(b) does not apply to her claim which is made under the provisions of N.J.S.A. 18A:16-11 and 18A:29-5. In this regard, petitioner relies on the language of the court in North Plainfield, supra, in support of her contention that her claim is based upon a statutory entitlement. The Commissioner observes that the ALJ in his initial decision has provided a comprehensive analysis of those cases in which the issue of statutory entitlement has been raised in connection with the application of the 90-day rule.

The Board in reply to petitioner's exceptions maintains that the ALJ correctly found and concluded that petitioner's claim is time-barred pursuant to the 90-day rule cited herein.

More specifically in rejecting petitioner's arguments made by way of her exceptions, the Board states in pertinent part:

> ***The central issue raised by the petition filed herein involves a factual determination as to petitioner's status. Petitioner's argument, however, proceeds upon the assumption that she, in fact, holds the supplemental teacher position as she alleges. That determination, however, is disputed by the respondent and would be a matter that could only be determined after a preliminary hearing. Petitioner's claim is one arising under the education laws and one which is subject to the 90 day filing requirements of N.J.A.C.

> 6:24-1.2 as Judge Cummis correctly held. Petitioner confuses the issue of the timeliness with which she pursued her claim with an issue of statutory entitlement which exists only after and, if, she successfully proved her claim at trial. The 90 day requirement controls the timeliness of the filing of the claim and Judge Cummis correctly concluded that petitioner failed to meet the 90 day requirement. (emphasis in text)
> (Board's Reply Exceptions, at pp. 1-2)

and further that

> The issue that was properly decided by Judge Cummis in favor of respondent and against petitioner involved the failure of the petitioner to file her petition within the 90 day requirement of N.J.A.C. 6:24-1.2. Judge Cummis, in his decision, makes reference to the undisputed factual support for his conclusions that petitioner knew of her claim and, in fact, pursued her claim through the Division of Pensions long before filing the action against respondent. The documents and stipulations constituting the record for purposes of disposition of the summary judgment motion are replete with factual information which establishes beyond doubt that petitioner was well aware of the existence of her claim and, in fact, in writing, some six months or more prior to filing her claim herein, demanded of the Board that she receive the compensation and emoluments of the position which she alleged she held. (Id.)

The Commissioner has reviewed the respective positions of the parties pertaining to those findings and conclusions set forth by the ALJ in the initial decision. Based upon those undisputed facts set forth in the record of this matter, in the Commissioner's judgment, the cases cited by the ALJ in the initial decision support his findings and conclusion that petitioner's claim does not rise to the level of a statutory entitlement but rather is susceptible to the provisions of the 90-day rule set forth in N.J.A.C. 6:24-1.2(b).

In reviewing the relevant undisputed facts in this matter, the ALJ's findings and recommendation that petitioner's claim is time-barred in accordance with the above-cited regulations and that summary judgment be entered in favor of the Board, the Commissioner hereby adopts as his own the findings and conclusions set forth in the initial decision. In view of the foregoing, the Commissioner finds and determines that the 90-day rule effectively bars petitioner's claim and that petitioner is not entitled to relief by way of statutory entitlement or by way of relaxation of the 90-day rule.

Accordingly, the instant Petition of Appeal is dismissed and summary judgment can be and is hereby entered in favor of the Board of Education of the Borough of North Arlington.

COMMISSIONER OF EDUCATION

June 6, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5351-88
AGENCY DKT. NO. 197-6/88

RONALD F. REILLY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

Myles C. Morrison, III, Esq., for respondent
(Dillon, Bitar & Luther, attorneys)

Record Closed: March 13, 1989 Decided: April 26, 1989

BEFORE **OLIVER QUINN,** ALJ:

Petitioner, a tenured music teacher employed by respondent school board ("Board"), alleges that the Board acted improperly in withholding his salary increment for the 1988-89 school year. Specifically, petitioner alleges that the facts upon which the Board based its action were untrue or, if true, that his actions were appropriate to a teaching staff member. The Board denies the allegations and avers that its action in withholding petitioner's salary increment was reasonable.

PROCEDURAL HISTORY

On June 28, 1988, petitioner filed a verified petition with the Commissioner of Education. On July 19, 1988, respondent filed an answer to the verified petition. On July 21, 1988, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held on October 28, 1988, and a prehearing order entered. A hearing was held on February 9, 1989, at the Office of Administrative Law in Newark, New Jersey. The record was held open to allow for the submission of posthearing briefs. Both parties submitted posthearing briefs and the record was closed on March 13, 1989.

DISCUSSION OF TESTIMONY AND EVIDENCE

Petitioner, Ronald Reilly, testified in his own behalf. Petitioner has been a teacher since 1965 and has taught at the Brooklawn Middle School in the Parsippany-Troy Hills school district since 1985. He is certified as a K through 12 music teacher. In school year 1987-88 petitioner taught sixth grade instrumental class and seventh grade woodwinds and band, and provided individual music lessons to students. Petitioner testified that the sixth grade band, also known as intermediate band, had some students who were not interested in the band. Those students were allowed to just sit in the band class as long as they did not disrupt the other students. Petitioner testified that he "isolated" individual students who disrupted class by talking, laughing or making noises with their instruments. He indicated that this isolation was similar to a form of discipline utilized in the Brooklawn Middle School cafeteria. Petitioner made specific reference to a memo issued by Kenneth Graham, the assistant principal, in which Mr. Graham suggested that isolation to a side table in the cafeteria would be a useful consequence in the event that a student misbehaved in the cafeteria (Exhibit P-2).

Reilly described two forms of isolation that he utilized for disruptive students in his sixth grade band class. He would first make those students sit up against the wall of the band classroom. He referred to a photo, Exhibit P-10, which depicts a student sitting in the disciplinary position against the wall. If a student, after being made to sit against the wall, continued turning around and disrupting the band class, Reilly would make the student sit in a storage closet adjacent to the band

room. He submitted a photo depicting the storage closet (Exhibit P-9). Reilly testified that he would sit the student directly inside the door of the storage closet so that he could see the student but the student could not make eye contact with other students in the band room. He placed students in the storage closet on three occasions for disciplinary reasons, but ceased the practice when he was told by the assistant principal to do so.

Reilly then testified regarding several incidents which occurred in his sixth grade band class on February 11, 1988, and on which the Board based its withholding action. He had had a sinus infection for three weeks and was on medication and feeling lightheaded and nauseous on February 11. A colleague, Maryann Vidovich, offered to teach his 10th period sixth grade band class because she observed that he was not feeling well. However, because the school was to be closed for vacation the following week, he decided to attempt to complete his day's responsibilities. Reilly stated that he was scheduled to teach a trumpet class in the 11th period which consisted of several students who were also in the 10th period band class. However, because he was ill, he told those students toward the end of the 10th period class to go to their regularly scheduled 11th period academic classes because he was too sick to give them trumpet lessons that day. He said that the students had to pack up their instruments quickly so that they would not be late for their 11th period academic classes. Reilly explained that students were assigned to regularly scheduled 11th period academic classes, but those who took trumpet lessons were released from their academic classes for that purpose. On February 11, because the trumpet lessons were canceled by Reilly, he sent them back to their academic classes. Reilly admitted that he did not notify any school administrator prior to releasing the students to their academic classes and canceling the 11th period trumpet lessons. He admitted he should have sought permission to cancel the class, and attributed his failure to do so to his illness.

Reilly stated that two students, J. S. and S. H., refused to pack up their trumpets to go back to their academic classes. He testified that S. H. would not put his trumpet in its case and was resisting going to his academic class. Reilly said that as he took the trumpet from S. H. and went to put it in its case, S. H. grabbed the trumpet and attempted to pull it back. As S. H. pulled the trumpet back, Reilly let it go. He said that if the trumpet hit S. H., it was from the force of S. H. pulling the trumpet away from him rather than his thrusting the trumpet at S. H.

With regard to student J. S., who also was resisting returning to his academic class, Reilly said that student was "playing around" with his trumpet. He said he held J. S. on his shoulder, turned him around to face him, and told him to pack up his instrument, which the student did.

Reilly testified that he believed the reason the students resisted going to their 11th period academic classes on February 11 after he canceled their trumpet lessons was that they had not done the homework for the academic classes. Students were released from academic classes to attend the trumpet lessons. Petitioner speculated that, in anticipation of having the trumpet class, the students had not done their homework for the academic classes and, therefore, were not comfortable with being required to attend those classes without their homework. He further stated that approximately six students withdrew from his music class following the February 11 incident based on parental requests. He indicated that most of the students who withdrew from his class were friends and their families were friends.

Petitioner then described an incident involving student J. M. He said that the student would not stop talking and playing around in the sixth grade band class, so he made the student sit in the front of the band room next to the podium. When the student refused to follow his directions to sit up by the podium, petitioner "held him by the arm and sat him down." He submitted a photograph, Exhibit P-3, showing where he made student J. M. sit in the front of the room near the podium.

Reilly then testified in response to the allegation that he engaged in name calling while interacting with students. He said that that charge arose out of an incident involving a student who was not performing well with his trumpet. Reilly said he suggested that the student switch to baritone horn. The student rejected the switch and did not show any improvement on the trumpet. Further, the student became a disciplinary problem in the music class. Reilly admitted that at one point he said to the student "Will you please stop acting like a jerk." He indicated he had used this phrase at other times, but stopped using the phrase when the assistant principal told him it was inappropriate. Reilly testified that he had also on occasion told students "Don't act stupid." He did not consider either of these phrases to constitute "name calling."

Reilly then described several meetings he had with the assistant principal regarding the incidents previously testified to. On February 11, he met with Assistant Principal Graham and was told that two students, J. S. and S. H., had accused him of poking one of them in the neck and hitting the other one with a trumpet. Reilly gave Graham his version of what happened. He referred to the last three pages of Exhibit R-2, the preliminary incident report prepared by the assistant principal. These three pages are Reilly's handwritten account of what happened on February 11 and were prepared by him on February 11. He testified that the accusations made against him by the students were efforts by the students to retaliate against his strong discipline in the band class. He characterized the incident with student S. H. as being one in which, as he attempted to take the student's trumpet from him and put it in its case, the student "brazenly yanked the trumpet back" from him. Petitioner further stated, "if the trumpet then struck him at all, it was of his own doing." Reilly characterized his encounter with student J. S. who had accused him of poking him as follows: "J. S. continued his attention-getting discourse, oblivious to my commands, and still holding his trumpet. With my right forefinger I tapped him on the left front shoulder and turned him to face me as he was facing the front of the band room and again asked him to please put his trumpet away. He did and proceeded to his next class."

Reilly testified that on February 25, 1988, he met with Assistant Principal Graham and a representative of the school's professional association. He said that at that meeting the assistant principal confronted him with a new set of allegations made by several students and advised him that the decision had been made to impose discipline even without giving him an opportunity to respond to these new allegations. Petitioner testified that despite the decision to impose discipline on him, he did prepare and submit a written response to the allegations against him (Exhibit P-13).

Reilly then testified regarding an incident and official reprimand that he had received on March 24, 1986 (Exhibit R-1). That reprimand arose out of an altercation with another staff member which occurred on March 13, 1986. Reilly alleged that an agreement was made between himself and the district administration that the letter of reprimand would be removed from his personnel file after one year if there were no other incidents. He indicated that he did not know if the agreement was put in writing.

Maryann Vidovich testified on petitioner's behalf. She is the band director at Brooklawn Middle School and teaches band classes and gives individual instrument lessons. She testified as to her observations on February 11, 1988. She said she offered to cover the 10th period sixth grade band class for Reilly because he told her he felt ill, but he decided to teach the class himself. Vidovich said she went to the band room towards the end of Reilly's 10th period band class and stood by the classroom door. She referred to Reilly's photograph Exhibit P-11, which shows the view of the band room she had from the entrance door. The photograph showed that Vidovich could see the riser and the area where students were seated during the class. Vidovich said the trumpet students were packing up and leaving as she arrived at the band room. She did not observe Reilly's tussle with student S. H., nor did she observe his incident with student J. S. She testified that she saw nothing out of the ordinary as the band class ended and the students left the room. Vidovich said that while she "wasn't paying that much attention," she saw nothing "unusual." She indicated she had met with Assistant Principal Graham and told him that she saw nothing unusual at the close of the 10th period band class on February 11.

Ms. Vidovich further testified that one of the students who accused petitioner Reilly of striking him, J. S., is in one of her classes this school year. She stated that J. S. on one occasion was making noise and disrupting her band class. After class J. S. and S. H., who was not involved in the disruptive incident in her class, came to see her. Vidovich said she gave J. S. detention after school for disrupting the band class. She said J. S. told her that Reilly had never hit him. She further testified that during the 1987-88 school year she had observed J. S. "hanging around and trying to be friendly with Mr. Reilly and to get back into the band." She said she observed the same thing during the 1988-89 school year.

Joseph Pandolfo, Jr., testified for petitioner. Mr. Pandolfo is a part-time band director at the Brooklawn and Central Schools in the Parsippany-Troy Hills District. He testified that he had taught student J. S. after the February 11, 1988 incident with Mr. Reilly, and that J. S. had told him that Mr. Reilly did not hit him and only poked him to get his attention.

Peter Boor also testified for petitioner. Mr. Boor is the band director and instrumental teacher at Whippany Park High School in Hanover Park, New Jersey. Mr. Boor also served as director of a summer program at the Mt. Tabor Summer Band

School, which is held at the Brooklawn School. He testified that J. S. was a student in the summer program in 1988 and that as director of the program, he had to discipline J. S. during that summer program. Mr. Boor testified that J. S. accused Mr. Boor's 16-year-old son, who was also a student and a teacher assistant in the summer program, of hitting him. He said J. S. was running and jumping in the halls, and when his son told him to stop, J. S. attempted to hit him. Mr. Boor's son blocked the punch and reported the incident to his father and the registrar. Later in the summer after J. S. was accused of hitting another student, J.S. met with Mr. Boor and told Mr. Boor that his son had hit him. The witness did not personally observe the incident between his son and J. S. Mr. Boor further testified that over his 28 years of teaching, he had "touched students to gain their attention or to emphasize an instruction." He stated that he had also isolated students as discipline for disruptive behavior. He equated these disciplinary actions to those he had previously heard Mr. Reilly testify about, and he indicated that, in his opinion, they were appropriate.

Kenneth Graham, the assistant principal at Brooklawn Middle School, testified for the Board. Graham has been assistant principal for four years. On February 11, 1988, the school's guidance counselor, Marcia Pazel, came to see him regarding the incidents that occurred in Mr. Reilly's 10th period sixth grade band class. Graham said he also spoke to the school nurse, Lucia Brown. He then met with two of the students involved, J. S. and S. H. Graham testified that J. S. told him Mr. Reilly had "poked him in the throat" and that S. H. told him Mr. Reilly had "shoved his trumpet into him." Graham testified that both students appeared shaken and nervous. He said the boys told him they had been fooling around during the band class and Mr. Reilly got mad. They also told him that earlier in the week, Mr. Reilly called a student a "jerk" and sat some students up against the wall. Graham testified that on February 11 he personally saw a red mark below student J. S.'s throat which J. S. told him had been caused by Mr. Reilly poking him. Mr. Graham then spoke to Mr. Reilly who "minimized" the incident. Graham asked Mr. Reilly to submit a written statement, which was subsequently submitted. Graham attached Mr. Reilly's report to his own report on the February 11, 1988 incident, and the reports were then submitted to Assistant Superintendent B. Perlett (Exhibit R-2).

Graham testified that on February 19 after the students returned to school from a week's vacation, he met with Mr. Reilly's 10th period sixth grade band class and invited any student who wanted to come to his office to talk to him about the alleged incidents to do so. Thirteen of the students in the class came to his office.

Graham said that in his discussions with the 13 students from Reilly's class the students voiced several complaints against Reilly, including that he had called students "stupid" and "jerks," that he seemed to have problems with the trumpet section, that he pushed student J. S. into a chair, that he picked up a chair one day when he was mad and accidentally hit a student in her head, that he pushed a trumpet in student S. H.'s ribs, that he was yelling and name calling, that he poked student J. S. below the Adam's apple, that he made fun of students and that he was angry and yelling at the end of the 10th period on February 11.

Graham also testified that he met with the guidance counselor, who told him that 11 or 12 students from Reilly's 10th period band class came to her office immediately after the February 11th class in "a very emotional manner."

On February 22, 1988, Graham submitted his final report on the February 11, 1988 incidents (Exhibit R-3). That report summarized all of his interviews relevant to the incidents. Graham testified that he met with Reilly and a representative of the Parsippany-Troy Hills Education Association on February 25. At that meeting he discussed what he saw as improprieties based on his discussions with the students. Mr. Graham concluded that the students were "traumatized" and were afraid of Mr. Reilly. He instructed Mr. Reilly not to touch students, not to call students derogatory names, not to cancel classes without prior administrative approval, and not to put students in the storage closet or against the wall for disciplinary reasons. Graham prepared a confidential report summarizing that February 25 meeting (Exhibit R-4). Graham testified that he showed Mr. Reilly his incident report on the occurrences of February 11, 1988 (Exhibit R-3), and asked for a written response. Mr. Reilly submitted a written response (Exhibit P-13). Graham characterized Reilly's response by stating that Reilly did not deny any of the incidents in question, but expressed the feeling that the students exaggerated the incidents. Graham testified that he recommended that Reilly's salary increment be withheld based on the February 11 incidents. He further testified that during orientation he instructs teachers that touching students and name calling should never occur.

On cross-examination, Graham stated that he did not conclude after investigating the February 11 incidents that Mr. Reilly "hit" S. H. with his trumpet, but rather that he shoved him with it out of anger. With regard to J. S., Graham concluded that there was "physical contact" between Reilly and the student which caused the red mark that Graham observed on the student's neck. Graham

concluded that the physical contact occurred while Reilly was disciplining J. S. Graham further testified that he concluded that Reilly grabbed student J. M. by the arm and pushed him down onto a chair in the front of the band classroom. With regard to the interviews Mr. Graham conducted with students a week after the February 11 incident on the students' return from vacation, he testified that he did not know if the students had discussed the incident with each other over the school break. He confirmed that some of the students he interviewed said they did not observe the incidents involving J. S., S. H. or J. M., while other students said they saw some or all of the incidents involving those three students. Graham confirmed that he decided to impose some form of discipline on Mr. Reilly for the February 11 incidents even prior to receiving Reilly's response to his final report (Exhibit P-13). Graham further testified that none of the instructions given to Mr. Reilly after the February 25 conference have been breached by Mr. Reilly. That is, there have been no further incidents of touching students, calling students names, canceling classes without administrative approval or making students sit facing the wall or in the storage closet.

Graham testified that he decided to discipline Mr. Reilly because he believed that Reilly's size and actions traumatized the students, who were 11 years old, and that Reilly's actions on February 11 were unnecessary. Graham also testified that he never reported these incidents to the Division of Youth and Family Services (DYFS) because he did not feel the degree of physical harm involved warranted reporting the incidents as child abuse.

The Board also presented Marcia Pazel as a witness. Ms. Pazel is the guidance coordinator at the Brooklawn Middle School. She testified that on February 11 in the late afternoon a group of 10 to 12 students from Mr. Reilly's 10th period band class came into her office "very excitedly and agitated and upset." She said the students chose J. M. as their spokesman, and she met with him. He told her Mr. Reilly had "pushed" S. H.'s trumpet into him and "poked" J. S. and that earlier Mr. Reilly had "shoved" him, J. M., into a chair. Ms. Pazel then referred the matter to the assistant principal, Mr. Graham.

The final witness for the Board was Lucia Brown, the school nurse at Brooklawn School. Ms. Brown testified that she is also employed by the Morristown Memorial Hospital. She stated that on February 11, J. S. came to her office "crying hysterically

and very upset." J. S. told Ms. Brown that Mr. Reilly had "poked" him in the throat. She testified that she observed a reddened area between four and six inches large on J. S.'s neck. On cross-examination, Ms. Brown admitted that the mark was much smaller than four to six inches but that, notwithstanding the size, there was clearly a red mark on J. S.'s neck. She said she did not think the mark could be caused by the manner of touching described by Mr. Reilly in his direct testimony, which she heard while present at the hearing. Ms. Brown further testified that she examined S. H. in her office, but saw no marks on him. She submitted a written report which was attached to Mr. Graham's final report on the February 11 incident (Exhibit R-3).

FINDINGS OF FACT

Having heard the testimony and observed the witnesses and having reviewed the exhibits, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

1. Petitioner, Ronald F. Reilly, is a tenured teacher of music employed by the Parsippany-Troy Hills Township Board of Education.

2. On April 12, 1988, the Board voted to withhold petitioner's salary increment for the 1988-89 school year. It cited four reasons as the basis for its decision:

   (a) Physical contact with three students while in the process of "disciplining" them.

   (b) Having students sit facing the wall in the band room or kept within the confines of the instrumental music storage closet (with door open) as a means of discipline.

   (c) Canceling a regularly scheduled instrumental lesson/class without administrative approval.

   (d) The use of name calling while interacting with students.

3. In the 1987-88 school year, petitioner taught sixth grade intermediate band class as a regularly scheduled 10th period class. In addition, petitioner gave instrumental music instruction on a rotating basis to students who were released from academic classes in order to attend such instruction.

4. On February 11, 1988, petitioner was scheduled to teach sixth grade band class in the 10th period and to give instrumental music instruction to trumpet students in the 11th period.

5. Petitioner occasionally encountered disciplinary problems in his sixth grade band class.

6. On occasion, petitioner would discipline disruptive students in the sixth grade band class by having them sit up against the wall of the classroom, facing the wall away from the other students. If a student who was placed up against the wall continued to turn around and disrupt the class, he or she would then be made to sit inside an open instrument storage closet adjacent to the band classroom. Because the closet door was open, petitioner could observe the student isolated in the closet, but the student was placed in a chair at an angle that prevented the student from seeing the other students in the band class.

7. A total of five students were disciplined in these ways in February 1988.

8. The instrument storage room is not a dark area. It is a small, well-lit area which could be observed by petitioner from his position on the podium of the band class.

9. While students placed up against a classroom wall or in the storage closet could see the teacher, their circumstance was such that they could not participate in the learning process while being so disciplined.

10. On February 25, 1988, at a conference meeting with Kenneth Graham, the assistant principal at Brooklawn School, petitioner was instructed to

cease utilizing the aforementioned forms of discipline, and he complied with those instructions.

11. On February 11, 1988, petitioner was ill with a sinus infection. February 11, 1988, was a Thursday, and a one-week vacation was scheduled for the following week. Despite his illness, petitioner taught most of his classes on February 11.

12. On that date petitioner's schedule called for him to teach the sixth grade band class during 10th period and to provide trumpet instruction to students during the 11th period. Petitioner's 10th and 11th period classes were scheduled for the same band room. Several students scheduled for the 11th period trumpet lessons were also in the 10th period band class.

13. Toward the end of the 10th period band class, petitioner advised the students that he did not feel well and was canceling the 11th period trumpet lessons. He instructed the students to return to their regularly scheduled academic classes for the 11th period. Petitioner took this action without the permission of any school administrator.

14. The students were not left in an unsupervised state, but were specifically instructed to return to their assigned academic classes.

15. Early in the 10th period band class several students were acting up. Petitioner instructed the students to be quiet. Several students obeyed, but one student, J. M., continued acting up. Petitioner instructed J. M. to come to the front of the band room and sit in a chair next to him by the podium. J. M. did not respond. Petitioner then took J. M. by the arm and put him in a chair in the front of the band room next to the podium.

16. Approximately two to three minutes before the end of the 10th period class, petitioner informed the trumpet students that he was canceling their 11th period instrumental music lessons and instructed them to pack up their instruments so that they would not be late for their 11th period academic classes. Some of the trumpet students protested that they wanted trumpet lessons and refused to pack their instruments away.

Subsequently, most of the trumpet students packed up their instruments and began leaving the class.

17. Two students, S. H. and J. S., refused to put their trumpets away. Petitioner attempted to enforce his order that the students pack up and leave the band room. He took hold of S. H.'s trumpet so that he could put it into its case. S. H. pulled the trumpet back from petitioner. As S. H. pulled the trumpet back from petitioner, petitioner let go of the trumpet, causing it to strike S. H. from the force of his pulling the trumpet towards himself.

18. Student J. S. also resisted petitioner's instructions to pack up and leave the 10th period band class. J. S. had his back turned to petitioner and was chanting that he wanted a lesson. Petitioner held J. S. around his shoulder and neck and turned the student so that he faced him. In so doing, petitioner supplied sufficient force to cause a red mark to appear around J. S.'s throat area. J. S. then left the classroom.

19. Students S. H. and J. S. were traumatized as a consequence of petitioner's actions. Following these incidents, they went to the guidance counselor, the nurse and the assistant principal's offices.

20. On other occasions, petitioner made statements such as "Will you please stop acting like a jerk" and "Don't act stupid" to students.

LEGAL DISCUSSION

N.J.S.A. 18A:29-14 authorizes a board of education to withhold for inefficiency or other good cause a staff member's salary increment. The standards upon which an increment withholding can be reviewed are set forth by the Appellate Division in *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288 (App. Div. 1960). Those standards are:

1. Whether the underlying facts were as those who made the evaluation claim; and

2. Whether it was unreasonable for the board of education 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; and that the burden of proving unreasonableness is upon the appellant.

In *Colavita v. Hillsborough Township Board of Education*, 1983 *S.L.D.* __ (Commissioner's Decision, Nov. 3, 1983), an administrative law judge stated:

> . . . The reason for an increment withholding action need only be supported by a showing the board had reasonable basis to take the controverted action. There is no need to prove by a preponderance of credible evidence that the allegations against petitioner are true. To do so would convert an increment withholding action into a tenure case and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of *N.J.S.A.* 18A:29-24 . Slip opinion at 13.

It is further noted that "the decision to withhold an increment is therefore 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).

Petitioner argues that the Board's action in withholding his salary increment was improper because the degree of physical contact was not as great as described by the victim students. Petitioner argues that under *Kopera* this difference in degree of physical contact or harm renders the underlying facts to be other than those on which the action was based. Respondent characterized petitioner's case as consisting ". . . of his attempts to downplay the severity of his conduct. Thus, in his mind he did not pull J. M. across the music room, slam down a chair and push J. M. into the chair. Rather, he 'took' J. M. by the arm, 'led' him across the room and 'told' him to sit in the chair. Similarly, in his mind he did not 'poke' J. S. in the throat or push S. H.'s trumpet into his stomach. Rather, he 'touched' J. S. on the shoulder to get his attention and played tug of war with S. H.'s trumpet so that if he were, in fact, bumped by the trumpet, it was as a result of S. H. having pulled it away from Mr. Reilly." Respondent's brief, at 2-3. It is clear that the physical contact used by petitioner in disciplining the three students resulted in traumatization, upset and, in one instance, a clearly visible bruise around the neck area. In its policy statement on

corporal punishment (Exhibit R-5), the Board says: "Competent teachers should never find it necessary to resort to physical force or violence to maintain discipline or compel obedience except where an immediate danger exists to persons or property. . . ." The policy statement defines corporal punishment to include:

1. [using] force or fear to discipline a pupil unless it is necessary to:
   a. quell a disturbance threatening physical injury to others;
   b. obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
   c. act in self-defense, or
   d. protect persons or property.
2. [touching] a pupil in an offensive way even though no physical harm is intended.

The policy further states that teaching staff members who resort to "unnecessary or inappropriate physical contact with a pupil" will face sanctions. Petitioner has not shown that his actions were permissible under this policy statement.

It is also clear that petitioner's practice of having students sit facing the wall in the band room or being confined in a instrumental music storage closet was an unacceptable practice. That is made clear by the fact that the assistant principal instructed petitioner to cease utilizing those disciplinary strategies. Petitioner attempts to legitimatize these "isolation" disciplinary practices by analogizing them to the practice of isolating disruptive students at a separate table in the cafeteria. The purpose of cafeteria period is to eat, while the purpose of the classroom period is to learn. Thus, it would appear that supervising guidelines for the cafeteria would not be immediately transferable to the classroom. Petitioner submitted as his Exhibit P-2 a copy of a memo outlining cafeteria supervisory procedures. That memo clearly limits its contents to application in the cafeteria, as opposed to in the classroom. In fact, the same individual who authored the cafeteria supervisory procedure, Kenneth Graham, is the assistant principal who instructed petitioner to cease his isolation disciplinary practices within the classroom.

Petitioner admitted in his testimony that he canceled his February 11, 1988 regularly scheduled instrumental lesson class without administrative approval.

Finally, petitioner admitted having addressed students with phrases such as "Will you please stop acting like a jerk" and "Don't act stupid." It is not unreasonable for the Board to characterize the use of these phrases as inappropriate name calling.

With regard to the isolation discipline, petitioner submitted photos to support his description of the storage closet as a well-lit area. Notwithstanding that fact, it was not unreasonable for the school board to disapprove of that form of discipline.

Petitioner presented several witnesses to support him. One witness, Maryann Vidovich, testified that she stood by the door to the band classroom on February 11, 1988, and did not observe Mr. Reilly's incidents with students S. H. or J. M.; yet Reilly himself testified that these incidents occurred. Other witnesses told of incidents involving student J. S. that occurred in different programs and different schools, totally unrelated to the February 11, 1988 incidents with Mr. Reilly. One witness, Peter Boor, told of an incident that allegedly occurred in a summer band program between J. S. and Boor's son, but Boor did not see the alleged confrontation. Another witness, Joseph Pandolfo, Jr., testified that J. S. told him Mr. Reilly did not hit him but "only poked him to get his attention." It would not be unreasonable for the school board to consider poking inappropriate physical contact with a student.

Petitioner also argues that the Board has presented no nonhearsay evidence to support the facts on which it based its action. In her brief, petitioner's counsel quotes *N.J.A.C.* 1:1-15.5.(b), which states: "Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." In the instant matter, it is not hearsay evidence that supports the facts on which the Board based its action. Rather, it is the testimony of the petitioner. Petitioner admittedly had physical contact with three students while in the process of disciplining them, although he chose to characterize the contact in words and degree different from those chosen by the Board. Petitioner admitted making students sit facing the wall in the band room or in the confines of the instrument music storage room as a means of

discipline. Petitioner admitted canceling the regularly scheduled instrumental lesson class on February 11 without administrative approval, and petitioner admitted using phrases such as "stop acting like a jerk" and "don't act stupid," which the board characterizes as name calling. The burden of proof in this appeal rests with petitioner. *See, Kopera.* Petitioner has failed to meet his burden of establishing, by legally competent evidence, that the facts underlying the Board's action in withholding his salary increment were not as claimed, and that the Board's conclusion, based on those facts, was unreasonable.

CONCLUSION AND ORDER

I **CONCLUDE** that the Board did not act improperly in withholding petitioner's salary increment for the 1988-89 school year. It is **ORDERED** that the Board's action in withholding petitioner's salary increment for the 1988-89 school year is **AFFIRMED** and that the increment for school year 1988-89 be withheld.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 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(c).

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

April 26, 1989
DATE

OLIVER QUINN, ALJ

Agency Receipt:

April 26, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 1 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

amr/e

RONALD F. REILLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner's exceptions are a nearly verbatim iteration of his post-hearing submission, which is incorporated herein by reference. Essentially, petitioner disagrees with Finding of Fact No. 9 that students facing the wall or being placed in the instrument storage room as a disciplinary measure were not made a part of the learning process; Finding of Fact No. 17 that S.H. was struck by a trumpet; Finding of Fact No. 18 that petitioner held J.S. by the shoulder and neck causing a red mark to appear around his throat; and, finally, Finding of Fact No. 20 that petitioner made statements such as "Will you please stop acting like a jerk," and "Don't act stupid." He claims these factual findings are based on hearsay testimony and must, therefore, be dismissed. By way of summary of his position, petitioner includes the following statements:

> ***[I]t is respectfully submitted that the Board of Education acted incorrectly in withholding Reilly's increment for the 1988-89 school year. The serious allegations against Reilly of physical contact with a student are simply untrue. The actual facts which did occur: Reilly took J.M.'s arm to move him to a seat when J.M. was disruptive and refused to move to a seat, Reilly touched J.S. on the shoulder to turn him around so J.S. would pay attention to Reilly, Reilly physically isolated students so they would cease being disruptive pursuant to what he understood to be a school policy about isolating students when they were disruptive and ceased following such a policy when directed to by Graham, Reilly on one occasion when he was feeling extremely sick cancelled an instrumental

> music class prior to the start of the class and told students to report to their regularly scheduled academic classes, and Reilly on one occasion told a student to stop acting like a jerk and never did so again when directed by Graham, do not justify the withholding of an increment.
>
> For these reasons we request that the Commissioner determine that the Respondent acted incorrectly in withholding the Petitioner's increment and order that the Petitioner's increment for the 1988-89 school year be restored to him. (Petitioner's Exceptions, at pp. 25-26)

Upon a careful and independent review of the record of this matter, which it is noted does not include the transcripts of the hearing below, the Commissioner adopts as his own the conclusion of the Office of Administrative Law that petitioner has failed to meet his burden of establishing by a preponderance of the credible evidence that the facts underlying the Board's action in withholding his salary increment were not as claimed. The Commissioner further finds that the Board's conclusion to so withhold, based on those facts, was unreasonable. Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960)

Without a transcript provided by the parties upon which he might arrive at his own independent findings of fact, the Commissioner adopts as his own the credibility determinations arrived at by the ALJ, as well as the ALJ's factual conclusions based upon such credibility determinations. However, the Commissioner does not rely upon the ALJ's recitation of Michael Colavita v. Hillsborough Township Board of Education, Somerset County, decided by the Commissioner November 3, 1983, aff'd St. Bd. May 2, 1984, rev/rem'd N.J. Superior Court, Appellate Division March 28, 1985, aff'd St. Bd. November 2, 1985 for the standard of review in a withholding matter in that the Appellate Division reversed the Commissioner and the State Board on other grounds in that case. Instead, he relies on Kopera, supra, for the proper standard of review in a withholding matter.

The Commissioner would emphasize that petitioner has admitted to cancelling his regularly scheduled instrumental lesson class on February 11, 1988 without acquiring administrative approval; admitted to using such phrases as "Will you please stop acting like a jerk" and "Don't act stupid," in addressing students; and admitted removing students to remote areas of the classroom, facing away from the instructional area as a means of discipline, among other admissions relative to the incidents in question. The Commissioner finds that the standard of review in a withholding matter is not that of a tenure matter. "***To withhold an increment on such a salary schedule, it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal under the

Teachers' Tenure Act." (Kopera, 1960-61 S.L.D. at 62) Accord, Trautwein v. Board of Education of the Borough of Bound Brook, 1980 S.L.D. 1539, Cert. den. 84 N.J. 469 (1980). See also 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 and In the Matter of the Manchester Regional High School District Board of Education and the Manchester Regional High School Education Association, decided by the Commissioner February 19, 1987, Decision on Motion May 5, 1987, aff'd St. Bd. July 1, 1987, PERC Decision August 20, 1987. Instead, the burden falls to petitioner to persuade the Commissioner that the underlying facts were not as claimed and that it was unreasonable for the Board to conclude, as it did, upon those facts that the incidents in question rose to the level of withholding his increment. Inasmuch as petitioner has admitted to the facts stated above, the Commissioner finds, for the same reasons expressed by the ALJ, that the Board did not act unreasonably in acting to withhold petitioner's increment.

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

COMMISSIONER OF EDUCATION

June 9, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 5354-88
AGENCY DKT. NO. 187-6/88

THOMAS VALANZOLA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,
Respondent,
and
ROBERT MAGGIULLI,
Intervenor.

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

Mark T. Janeczko, Esq., for respondent (Janeczko & Cedzidlo, attorneys)

Alfred Maurice, Esq., for intervenor

Record Closed: March 20, 1989 Decided: May 3, 1989

BEFORE **OLIVER B. QUINN,** ALJ:

Petitioner, a tenured teacher of physical education, health and driver education, alleges that the Board of Education (respondent) violated his tenure and seniority rights by refusing to reemploy him. Respondent seeks summary decision dismissing the matter because petitioner's petition was filed beyond the 90-day time period set forth in *N.J.A.C.* 6:24-1.2.

PROCEDURAL HISTORY

The petitioner filed his verified petition on June 22, 1988. The Board filed its answer on July 12, 1988, and the matter was transmitted to the Office of Administrative Law on July 21, 1988, 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 27, 1988, and a prehearing order was subsequently entered. A subsequent prehearing conference was held on January 17, 1989, at which time it was agreed that the only disputed issue is whether petitioner filed his petition in a timely manner pursuant to *N.J.A.C.* 6:24-1.2(b). The parties agreed to submit the matter for summary decision, and the record was closed upon receipt of final briefs on March 20, 1989. A list of exhibits is attached to this decision.

FINDINGS OF FACT

I **FIND** the following **FACTS** which have been stipulated by the parties:

1. Petitioner, Thomas Valanzola, was initially employed by respondent as a teacher of physical education, health and driver education in September 1971.

2. Valanzola continued to serve in said capacity through June 1982.

3. Valanzola was properly certified to teach physical education, health and driver education at the time of his employment and attained tenure as a teacher pursuant to *N.J.S.A.* 18A:28-5.

4. While employed by the Board as a physical education teacher, Valanzola was assigned to teach at the secondary level (grades 9-12) and grades 7 and 8 in a departmentalized setting.

5. At a regular meeting held on April 21, 1982, the respondent resolved to abolish one full-time physical education teaching position (J-1). Valanzola was notified of this action in a letter dated April 23, 1982, in which Valanzola was also notified of a recommendation for the termination of his employment as the result of this reduction in force (J-2).

6. At a special meeting conducted by the respondent on April 26, 1982, it adopted a resolution terminating the employment of Valanzola, effective June 30, 1982 (J-3). Valanzola was notified of this resolution in a letter dated April 27, 1982 (J-4).

7. Attached hereto and made a part hereof as Exhibit J-5 is a listing of employees utilized by the Board in 1982 in determining which physical education teacher would be terminated effective June 30, 1982.

8. Subsequent to receiving notice of his termination, Valanzola notified the respondent of his desire to challenge such termination (J-6). His request was acknowledged in a letter dated May 24, 1982 (J-7). On June 17, 1982, Valanzola and the Board met in a closed session to discuss the termination of his employment. As set forth in a letter dated June 22, 1982, the Board voted to uphold its prior decision eliminating Valanzola's position of employment (J-8).

9. Respondent maintained a preferred eligibility hiring list for the 1988-89 school year (J-21). No preferred eligibility or seniority list can be located for the years 1982-83 through 1987-88.

10. Respondent has not offered a position of employment to Valanzola at any time since September 1, 1982.

11. For each year from 1982-83 through 1988-89, inclusive, teachers employed by the respondent have received ten sick days per year plus accumulated sick days from the previous year.

12. Petitioner learned of Lori DeLuca's hiring into his former position sometime during calendar year 1986; he learned of Robert Maggiulli's hiring into the position in spring 1987.

LEGAL DISCUSSION

A motion for summary decision:

> . . . may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
> *N.J.A.C.* 1:1-12.5(b).

The motion for summary disposition is an efficient means of disposing of litigation which is available when there are no genuine issues of the material fact, leaving a decision to be made on legal issues. In deciding whether there are such issues of fact, all reasonable inferences must be drawn against the movant and in favor of the opponent of the motion. *Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 74-75 (1954).

In the instant matter, the parties have stipulated to all material facts. Therefore, I **CONCLUDE** that summary decision is appropriate in this matter.

Respondent herein moves for summary decision arguing that petitioner's petition was not timely filed. *N.J.A.C.* 6:24-1.2(b) states:

> 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.

In *Meyer v. Board of Education of the Township of Wayne*,OAL DKT.EDU 9410 (Nov. 1, 1983), aff'd in part, rev'd in part, Commissioner of Ed. (Dec. 20, 1984), aff'd in part, rev'd in part, State Bd. of Ed. (March 6, 1986), aff'd (N,J, App. Div. Sept. 24, 1987, A-3175-85T6), the State Board of Education determined that "the notice provided by the Board of its action must be specific and definite so that a petitioner is informed both of the action taken by the Board and the fact that he was affected by that action." *Meyer*, State Board., slip op. at 8. The State Board further stated

public interest involved.

Petitioner contends that the Board failed to comply with its statutory obligation to reemploy him pursuant to *N.J.S.A.* 18A:28-12, which states:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and shall be reemployed by the body causing dismissal.

Here, the Board has failed to comply with the requirements of *N.J.S.A.* 18A:28-12 in that it did not maintain a preferred eligibility list and did not offer reemployment to petitioner when vacancies occurred in his former position. However, petitioner failed to challenge the Board's illegal conduct within the time prescribed by *N.J.A.C.* 6:24-1.2(b). Consequently, despite the Board's actions in violation of its statutory obligations, petitioner is left with no redress. Petitioner stipulated to the fact that he had actual knowledge that his former position had been filled both during calendar year 1986 and again in the spring of 1987. Conspicuously, petitioner has asserted no reason whatsoever for his failure to [illegible] the Board's action prior to the filing of his June 22, 1988 verified petition. [illegible]ioner had no reason for not challenging the

1855

I **CONCLUDE** that relaxation of the 90-day rule is not warranted in the instant matter. There is no substantial constitutional issue presented nor is judicial review of an informal administrative determination sought. Finally, there is no significant

Petitioner argues that if a determination is made that his cause of action accrued more than 90 days prior to the filing of his verified petition, then *N.J.A.C.* 6:24-1.17 should be applied to relax the 90-day rule. *N.J.A.C.* 6:24-1.17 states:

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

In *Miller v. Morris School District*, OAL DKT. EDU 364-80 (Feb. 25, 1980), the Commissioner addressed the circumstances under which the 90-day rule should be relaxed.

> Enlargement of the time period is thus warranted in only three instances: where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination and where a matter of significant public interest is involved. *Brunetti v. New Milford*, 68 *N.J.* 576, 586 (1975); *Schack v. Trimple*, 28 *N.J.* 40, 48, 50-51 (1958); *Reahl v. Randolph Township Municipal Utilities Authority*, 163 *N.J. Super.* 501, 509 (App. Div. 1978), cert. den. 81 *N.J.* 45 (1979). *Miller,*

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

5/3/89
Date

OLIVER B. QUINN, ALJ

Receipt Acknowledged:

5/5/89
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 8 1989
Date

OFFICE OF ADMINISTRATIVE LAW

ms/e

THOMAS VALANZOLA, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY, RESPONDENT,	:	DECISION
AND	:	
ROBERT MAGGIULLI, INTERVENOR.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed as were the replies filed by the Board and intervenor.

In addition to reiterating the arguments set forth in his brief, petitioner's exceptions aver that the application of N.J.A.C. 6:24-1.2(b) is unduly harsh and deprives him of his ability to vindicate his rights.

Petitioner points to the fact that the ALJ found that the Board failed to comply with the requirements of N.J.S.A. 18A:28-12, i.e., that he be placed and remain on a preferred eligibility list for seniority and be reemployed whenever a vacancy occurs in a position for which he is qualified. Yet, because he had constructive knowledge of the employment of DeLuca and Maggiulli, he may not vindicate his rights. As to this, petitioner argues that because the Board has a mandatory duty to preserve the rights of a tenured teacher via N.J.S.A. 18A:28-12, the claimed validity of "constructive notice" should be rejected and under no circumstances should the Board be permitted to avoid the consequences of its actions. He avers that the Board is essentially claiming that because it has gotten away with violating his rights for so many years, any claims made by him should be barred as untimely.

Petitioner also avers that in the event that his cause of action accrued at a time prior to May 1988, N.J.A.C. 6:24-1.17 should be applied as he will suffer a significant injustice if the Petition of Appeal is barred.

Upon review of the record in this matter, the Commissioner is in full agreement with the findings and determination of the Administrative Law Judge. His analysis of the issues and conclusions of law are accurate. Petitioner had admitted notice of the employment of DeLuca and Maggiulli and, yet, he sat on his rights for close to two years in the former instance and a year in

the other. The matter is thus time-barred pursuant to N.J.A.C. 6:24-1.2(b). The fact that the Board failed in its responsibility under N.J.S.A. 18A:28-12 to maintain his name on a preferred eligibility list does not constitute grounds to exempt application of the 90-day filing requirement set forth in N.J.A.C. 6:24-1.2(b).

Upon review of the record, the Commissioner determines that no evidence is found that justifies petitioner's delay in filing his appeal for so many months beyond the time in 1987 he admitted notice of the employment of Maggiulli, the record of two teachers whose position petitioner claims. Therefore, it is concluded that no basis exists to waive or relax the filing requirement under the provisions of N.J.A.C. 6:24-1.17.

Accordingly, the Petition of Appeal in this matter is dismissed. However, it is emphasized that this ruling does not prevent or preclude petitioner from filing a Petition of Appeal in accordance with the provisions set forth in N.J.A.C. 6:24-1 et seq. in the future if he has reason to believe a new cause of action has arisen which violates his tenure and seniority rights. See Paul Gordon v. Board of Education of the Township of Passaic, decided March 27, 1986. The Board's dereliction in complying with the mandates of N.J.S.A. 18A:28-12 does not preclude such a filing, nor does the determination of untimeliness in this matter.

Finally, the Board is ordered to take immediate action to assure compliance with the requirements of N.J.S.A. 18A:28-12 by reviewing its preferred eligibility lists and by taking any and all corrective action necessary to assure that the lists are updated and accurate.

June 16, 1989

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 5959-88
& EDU 5961-88
AGENCY DKT. NOS. #234-7/88
& #232-7/88

NATHAN SCHIENHOLZ AND
WAYNE FULLER,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING, MERCER COUNTY,
Respondent,
and
WAYNE E. PICKERING,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

Robert M. Schwartz, Esq., on behalf of the petitioners, Nathan Schienholz and Wayne Fuller

John J. Barry, Esq., on behalf of the petitioner, Wayne E. Pickering

David W. Carroll, Esq., on behalf of the respondent

Record Closed: March 20, 1989 Decided: May 4, 1989

BEFORE BEATRICE S. TYLUTKI, ALJ:

This consolidated matter concerns the allegation of the petitioners, Nathan Schienholz, Wayne Fuller and Wayne E. Pickering, that the respondent, the Board of Education of the Township of Ewing, Mercer County (Board), should have appointed one of them as principal of Ewing High School.

The joint petition of Mr. Schienholz and Mr. Fuller, and the separate petition of Mr. Pickering, were transmitted by the Commissioner of Education (Commissioner) on August 9, 1988, to the Office of Administrative Law for determinations as contested cases pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matters were initially assigned to Administrative Law Judge Joseph Lavery, who conducted the prehearing conference on September 29, 1988. At that time, David W. Carroll, Esq., on behalf of the respondent, moved to consolidate the matters for hearing. This motion was unopposed by the petitioners and was granted by Judge Lavery, as reflected in his prehearing order of October 3, 1988.

Prior to the hearing, Robert M. Schwartz, Esq., on behalf of the petitioners, Mr. Schienholz and Mr. Fuller, moved for summary judgment. John J. Barry, Esq., on behalf of the petitioner, Mr. Pickering, supported the motion for summary judgment. Mr. Carroll, on behalf of the respondent, opposed the motion and argued that there were factual disputes in this matter. Judge Lavery orally denied the motion for summary judgment in view of the respondent's representation of factual disputes, and he memorialized it in a written order dated May 1, 1989.

Prior to the hearing, the matter was transferred to the undersigned for the purpose of conducting the hearing and rendering an initial decision. The hearing took place at the Office of Administrative Law in Mercerville, New Jersey, on January 18-19, 1989. After the receipt of additional briefs, the record in the matter closed on March 20, 1989.

FINDINGS OF FACT

On the first day of the hearing, the parties stipulated to the following facts:

1. The Ewing Township Board of Education is the governing body for a kindergarten through twelfth grade school district which currently

operates four elementary schools (grades K-6), Fisher Junior High School (grades 7, 8 and 9) and Ewing High School (grades 10, 11 and 12).

2. Petitioner Schienholz' employment history in the Ewing Township School District is as follows:

Dates	Position Held
September 1, 1971 - June 30, 1983	Elementary principal
July 1, 1983 - March 11, 1985	Teacher, grades 7,8 and 9 (basic skills)
March 12, 1985 - Present	Elementary school vice principal

Schienholz holds certifications as a teacher (with endorsements to teach elementary and social studies), principal and school administrator [D-1]. Prior to coming to Ewing in 1971, Schienholz was a seventh and eighth grade social studies teacher, and director of federal programs in a K-8 district.

3. Petitioner Fuller's employment history in the Ewing Township School District is as follows:

Dates	Position Held
1959 - 1967	Teacher (7, 8 and 9th Math)
1967 - 1968	Acting junior high school principal (grades 7, 8 & 9)
1968 - 1971	Junior high school vice principal
1971 - 1972	Middle school vice principal (Grades 6 and 7)
1972 - 1973	High school vice principal (Grades 10, 11 and 12)
August 7, 1973 - June 30, 1982	Middle School principal (Grades 6 and 7)
July 1, 1982 - Present	High school vice principal (Grades 10, 11 and 12)

For seniority purposes, Fuller's service from 1973 to 1982 as a grade 6 and 7 middle school principal has been classified as that of "elementary school principal." See Exhibit J-1 attached hereto. Fuller holds certifications as secondary school teacher (with endorsements to teach mathematics and social studies), principal and school administrator [D-2].

4. Petitioner Pickering's employment history in the Ewing Township School District is as follows:

Dates	Position Held
July 1, 1970 - June 30, 1983	Elementary school principal
July 1, 1983 - January 16, 1984	Elementary school teacher (Resigned to accept out of district position as elementary school principal - See Exhibit J-2 attached).

Prior to 1970, Pickering was an elementary school teacher and elementary supervisor for seven years in Pennsylvania. In New Jersey, he holds certification as elementary school teacher, principal and school administrator [P-2].

5. The terminations of petitioners' service in their respective positions as elementary principals were all the result of lawful and good faith decisions by the Board to close schools and modify the school and grade structure of the district.

6. Since the reductions in force were implemented, and in conformance with NJSA 18A:28-12 and NJAC 6:3-1.10, the Board has prepared and maintained a preferred eligibility list for the position of elementary school principal. The list, the validity of which is stipulated, is attached hereto as Exhibit J-3.

7. In 1984, a vacancy in the position of principal of Ewing High School occurred. After a widely advertised search, the Board appointed an outside candidate, Clement Crea. Crea served for approximately fifteen months when he left to accept a position as superintendent in another district. Over the next nine months, Everett Mills, a Ewing High School vice principal, and John Gusz, an assistant superintendent in Ewing, served successively as acting principal of Ewing High School. Dewey Bookholdt, another vice principal in the high school, was appointed high school principal in July 1986 and served for just under two years. He resigned to return to a vice principal's position at Ewing High School, effective the end of the 1987-88 school year.

8. In April 1988, the Board formally commenced a personnel search to fill the position by July 1, 1988. Attached hereto as Exhibits J-4 and J-5, respectively, are true copies of the notice of vacancy and the text of a job advertisement. The vacancy was widely advertised in local, state and national publications, as well as internally within the school district.

9. Petitioner Schienholz submitted an application for the position of high school principal in 1984. He did not submit an application in 1986 or 1988.

10. Petitioner Fuller submitted an application for the position of high school principal in 1984 and again in 1986. He did not submit an application in 1988.

11. Petitioner Pickering did not submit an application for the position of high school principal in 1984, 1986 or 1988.

12. On June 23, 1988, the board secretary received a letter, attached hereto as Exhibit J-6, from Robert S. Schwartz, Esq. The contents of the letter were shared with the Board at its June 27, 1988, meeting.

13. Following receipt of applications and a selection and interview process, the superintendent ultimately recommended that the Board appoint Dr. Benjamin S. Miller to the position. Attached hereto as Exhibit J-7 is the superintendent's written recommendation to the Board. The Board of Education accepted the recommendation and formally voted on June 27, 1988, to appoint Dr. Miller as principal of Ewing High School, effective July 1, 1988.

14. Dr. Miller holds certification as a principal in New Jersey. [P-1]

At the hearing, Mr. Fuller testified as to his academic background (R-4), and as to his work experience in the various positions he has held in the Ewing Township School District, as set forth in the stipulation of facts.

Mr. Fuller stated that he applied for the high school principal position in 1986 after the resignation of Mr. Crea, and that it was his understanding that Mr. Crea had recommended him for the position. At that time, Mr. Fuller was interviewed for the high school principal position and was rated as the top candidate for the position. Mr. Fuller was requested to attend another interview for the position and he refused, since he did not think it was necessary. However, he indicated that he still wanted to be considered for the position (R-1, R-2).

According to Mr. Fuller, he saw the 1988 notice of vacancy as to the high school principal position but did not apply, since he had not been successful when he had previously applied in 1986. He informed the Board's representatives, just before Dr. Miller was hired, that he was entitled to the high school principal position due to his tenure rights and that he was contemplating this litigation if the position were not given to him.

Based on his experience, Mr. Fuller recognized that there are differences in the responsibilities of an elementary school principal and those of a high school principal.

Mr. Schienholz also testified regarding his work experience in the various positions he has held, as set forth in the stipulation of facts. Mr. Schienholz holds a master's degree in elementary school administration (R-3), and he acknowledged that he has never taught or been an administrator in a high school.

Mr. Pickering did not testify at the hearing; however, additional information regarding his academic background was introduced into evidence (R-5).

Dr. Dennis G. Kelly testified that he became the superintendent of schools for the Ewing School District on April 1, 1988. Even prior to assuming his responsibilities in this position, Dr. Kelly was aware that the principal of the Ewing High School had submitted his resignation and that there were allegedly serious problems at the high school. After assuming the position, Dr. Kelly spent a substantial amount of time talking to parents, teachers and students regarding the high school and determined that there were, in fact, serious problems, and that the high school's reputation was on the decline. According to Dr. Kelly, there were disciplinary problems, a lack of school spirit and a perception by the teachers that they were not supported by the administrators in the high school or by the school district's central office.

At the initiation of Dr. Kelly, there was a broad-based search for a new principal for the high school. Dr. Kelly and eight administrators and teachers participated in a selection committee which reviewed the applications of forty candidates. None of the three petitioners submitted an application for the position. The committee then narrowed the list to ten candidates, who were interviewed and whose credentials were reviewed and checked. The committee then narrowed the list to four candidates and the four candidates were again interviewed. As a result of this process, Dr. Miller was ranked number one and Dr. Kelly recommended him for appointment as principal of the Ewing High School.

Just before the Board appointed Dr. Miller to the position, both Dr. Kelly and the Board members were informed that the petitioners felt that the position should be given to one of the tenured principals on the preferred eligibility list (J-6).

Dr. Kelly testified that he recommended Dr. Miller for the position because of his broad administrative experience, specifically, as a junior high school principal in Miami, Florida, and as a high school principal in Winchester, Virginia (R-6). Dr. Kelly did not know Mr. Pickering; however, based on the information in his personnel record, which lists both his academic and work experiences, Dr. Kelly felt that he was not qualified for the position of high school principal. Based on his review of Mr. Schienholz's personnel record, Dr. Kelly concluded that most of his work experience was on the elementary and middle school level and that Mr. Schienholz lacked the necessary experience for the high

school principal position. Dr. Kelly recognized that Mr. Fuller had academic training in secondary education and that he had experience on the high school level; however, he felt he could not recommend Mr. Fuller for the position because of the volatile situation in the Ewing High School. In view of the problems at the high school, Dr. Kelly stated that all three petitioners lacked the experience, skills and personal leadership qualities needed to serve as principal. Dr. Kelly testified that there are differences between the role of high school principal and elementary school principal, and expressed his position that New Jersey should have separate certifications for elementary and secondary principals, as it did prior to 1970.

Dr. Kelly recognized that all three petitioners held certifications as principals which allow them to hold the position of principal of any school, grades K to 12. However, he felt that the qualifications for the position of high school principal go beyond the need for a certification and include academic and work experience as well as positive personality traits.

Dr. Miller is currently the principal of Ewing High School, pursuant to an employment contract which expires on June 30, 1989 (P-4).

I FIND that there are no factual disputes in this matter.

CONCLUSIONS OF LAW

In brief, all three petitioners allege that they have tenure rights to the position of high school principal, and they challenge the decision of the Board to hire a non-tenured person for that position. Further, Mr. Pickering alleges that he is entitled to the position based on seniority, pursuant to N.J.S.A. 18A:28-12.

The first issue in this matter relates to the scope of the tenure rights of the petitioners.

Tenure is a statutory right which is to be liberally constructed in order to achieve its purpose, namely, to provide tenure to teaching staff members, Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 72 (1982). A teaching staff member must meet the statutory conditions in order to achieve tenure. To acquire tenure, a teaching staff member must be a citizen of the United States, N.J.S.A. 18A:28-3; must hold an

appropriate certificate for the position, N.J.S.A. 18A:28-4; must hold one of the positions set forth in N.J.S.A. 18A:28-5; and must meet the length of employment requirement set forth in N.J.S.A. 18A:28-5. The title of "principal" is one of the positions listed in the tenure statute, N.J.S.A. 18A:28-5.

Based on the facts, I **CONCLUDE** that all three petitioners meet the statutory requirements for tenure in the position of principal.

Mr. Carroll, on behalf of the Board, did not deny that the three petitioners have tenure. However, he argued that the tenure statute is ambiguous as to the scope of the tenure rights and that the statute should be interpreted to recognize that the petitioners' work experiences as principals were on the elementary school level and to limit their tenure rights to elementary school principal positions. Both Mr. Schwartz and Mr. Barry disagreed with this position and argued that there is no ambiguity in the language of the tenure statute and no legal basis to limit the petitioners' tenure rights to a certain type of principal position. I agree with the petitioners, and I **CONCLUDE** that the statute clearly provided that tenure, including tenure rights, is not acquired in specific assignments but in one of the positions enumerated in N.J.S.A. 18A:28-5. See, Howley and Bookholdt v. Ewing Bd. of Ed., 1982 S.L.D. 1328; Williams v. Plainfield Bd. of Ed., 1980 S.L.D. 1552, aff'd, 176 N.J. Super. 154 (App. Div. 1980), certif. den., 87 N.J. 306 (1981); DiNunzio v. Pemberton Bd. of Ed., 1977 S.L.D. 24; Stranzl v. Paterson Bd. of Ed., 2 N.J.A.R. 16 (1980).

In addition, I **CONCLUDE** that tenure rights are separate and distinguishable from seniority rights. As argued by the petitioners, seniority is used in reduction in force (RIF) cases to decide rights among tenured teaching staff members and cannot be used to determine the rights to a position between tenured and non-tenured personnel.

The seniority regulation establishes certain job categories for the computation of seniority, based on length of service, N.J.A.C. 6:3-1.10, and the list of job titles in these categories is substantially larger and more specific than the list of positions in the tenure statute, N.J.S.A 18A:28-5. However, it is clear that the seniority categories are not intended to affect or limit the statutory provisions for tenure or the rights of persons who gain tenure, Howley and Bookholdt; Williams; DiNunzio.

Therefore, I CONCLUDE that all three petitioners have tenure rights to the position of high school principal and that their tenure rights are not limited to the position of elementary school principal. In addition, I CONCLUDE that, as to the position of elementary school principal, all three petitioners have seniority rights based on their services in elementary school principal positions prior to the RIFs, and that none of the petitioners has any seniority rights to the high school principal position since none of them served in that position.

There have been two recent decisions of the Appellate Division of the Superior Court regarding tenure rights in RIF cases. In Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), the court recognized that a tenured teacher has tenure rights to a position that are superior to those of a non-tenured teacher. However, the court also recognized that the State Board of Education (State Board) had, in its September 3, 1986 decision, established as a policy that in a RIF case, a board's obligation to consider tenure could be balanced by "sound educationally based reasons for its decision to retain a non-tenured teacher" (at 515-16). However, the court did not consider the legal merits of this policy statement by the State Board since it was not an issue in the case. Relying on this policy statement in the State Board's decision in Capodilupo, the Board argued in this matter that it had sound, educationally-based reasons for its decision to hire Dr. Miller as the Ewing High School principal.

In Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), the court also recognized that tenure rights are superior to the rights of a non-tenured teacher with experience in a specific position. The court stated:

> The tenure statute authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF. N.J.S.A. 18A:28-13. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 n. 4 (1983); Capodilupo v. West Orange Tp. Ed. Bd., 218 N.J. Super. 510, 514 (App. Div. 1987). The statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers. Under current regulations, seniority is measured by years of employment in specific job categories which are normally narrower than the subject fields which are endorsed on teachers' certificates. See N.J.S.A. 18A:28-5; N.J.A.C. 6:3-1.10(b).
>
> Seniority is a statutory concept created by Chapter 28 of Title 18A, a chapter which deals only with the various aspects of tenure. Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n, 98 N.J. 523, 531 (1985). It does not purport to create employment

> rights for non-tenured employees. This court has thus held that non-tenured teachers whose contracts are not renewed by reason of a RIF are not entitled to the reemployment rights conferred by Chapter 28. Union City Bd. of Ed. v. Union Cty. Teach. Assn., 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977). Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. Capodilupo v. West Orange Tp. Ed. Bd., supra.
>
> The State Board of Education attempted to fairly resolve a tension it perceived between tenure and seniority. The State Board's solution was to rule that tenure does not permit a teacher to claim an assignment in a job category in which he has no seniority against a non-tenured teacher with experience in the category. The Board cited N.J.S.A. 18A:28-10, which invokes seniority to determine job rights in a RIF, and reasoned that since Bednar had no seniority teaching art on a secondary level, his rights were not violated by reducing his hours while retaining a full-time non-tenured secondary art teacher.
>
> The defect in the Board's approach is this. N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinative. But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher "seniority." The tension perceived by the State Board between tenure and seniority is one the Board created. Its only proper resolution is to rule that the rights conferred by the tenure statute may not be dissolved by implementing regulations.
>
> The State Board's approach may or may not represent sound educational policy. However, it erodes tenure rights which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature. See In re Jamesburg High School Closing, 83 N.J. 540, 547 (1980). [Bednar at 242-43]

Based on the language in the Bednar case, I agree with the petitioners' argument that the court rejected any exception to tenure rights based on sound educational reasons for retaining a non-tenured person. See, DeCarlo v. South Plainfield Bd. of Ed., OAL DKT. EDU 6111-87 (June 20, 1987), adopted, Comm. of Ed., Aug. 4, 1988. I CONCLUDE that the Board's representation of sound, educationally-based reasons for its decision to retain Dr. Miller is not relevant in view of the petitioners' tenure rights.

The next issue is the respondent's argument that the petitioners' tenure rights to the high school principal position existed only at the time they lost their positions due to RIFs. In support of its position, the Board cited the State Board's decision in Geiling - Hurley v. Edison Bd. of Ed. (Nov. 5, 1986), aff'd (N.J. App. Div., Oct. 5, 1987, A-1959-86T8) (unreported). In that case, the State Board stated:

> In Capodilupo, we emphasized that the principles enunciated in that decision are applicable only when a district board acts under the authority granted by N.J.S.A. 18A:28-9. Capodilupo, supra, at 20. N.J.S.A. 18A:28-9 is not implicated when, as here, a board fills a vacancy six months after the reduction in force that resulted in the termination of a tenured teacher's employment, and therefore, Capodilupo is not applicable to this case. [Geiling-Hurley, State Board decision at 5, note 1]

I agree with Mr. Schwartz's argument that this matter can be distinguished on the facts from the decision in Geiling-Hurley. Further, I do not find any merit to the Board's argument, in light of the more recent decision of the State Board in Mirandi v. West Orange Bd. of Ed. (Apr. 7, 1989). In Mirandi, the State Board recognized that a teaching staff member had tenure rights to a position despite a two-year lapse between the RIF and the vacancy. The State Board recognized that after a RIF, a teaching staff member is placed on a preferred eligibility list for reemployment and is eligible by statute, N.J.S.A. 18A:28-12, for reemployment "whenever a vacancy occurs in a position for which such person shall be qualified." Therefore, I CONCLUDE that the three petitioners' tenure rights to the high school positions were not foreclosed by the passage of time between the RIFs and the creation of this vacancy.

The last issue in this matter is whether the petitioners are barred from relief in this matter on the grounds of waiver and/or estoppel. All three petitioners were subject to a RIF in either 1982 or 1983, and as tenured principals they were placed on the preferred eligibility list in order of seniority for reemployment as elementary school principals. As to this eligibility list, N.J.S.A. 18A:28-12 provides:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this State, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service, except that the period of that service shall not be credited toward more than four years of employment or seniority credit.

However, in addition to their tenure-seniority rights to any future vacancies in the position of elementary school principal, the three petitioners had tenure rights to any grade level principalship position which became vacant and their tenure rights would be superior to the rights of any non-tenured person.

Since the petitioners were entitled for the high school principal position because of their tenure rights, they should have been formally offered the position by the Board. From the facts, it is clear that the position was not offered to any of the petitioners. It is also clear from the facts that the Board's policy was to post the vacancy and request applications. Most certainly, all of the petitioners were familiar with this policy, and, in the past, both Mr. Schienholz and Mr. Fuller had submitted applications for the high school principal position. There was no indication at the hearing that any of the petitioners was unaware of the vacancy in the high school principal position.

Mr. Carroll argued that all three petitioners are estopped from claiming the high school principal position since none of them applied for the position in 1988. He argued that the Board relied on their silence and apparent lack of interest as well as on their failure to submit an application, and that the Board and its administrators in good faith invested a great deal of time, money and effort in reviewing applications, conducting telephone interviews, calling references, bringing candidates to the district for in-depth interviews, and discussing and analyzing all of the applications.

As argued by Mr. Carroll, waiver is the voluntary and intentional relinquishment of a known right. City of East Orange v. Bd. of Water Comm'rs., 41 N.J. 6 (1963). Estoppel, which may arise by silence or omission, operates to prevent a party from disavowing its previous conduct if it would violate the demands of justice or good conscience. Royal Associates v. Concannon, 200 N.J. Super. 84 (App. Div. 1985); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334 (1979). Waiver is distinguished from estoppel in that the latter requires reliance. County Chevrolet, Inc. v. North Brunswick Tp. Pl. Bd., 190 N.J. Super. 376 (App. Div. 1983).

Although there are a number of cases holding that tenure cannot be waived, these cases are distinguishable from this matter since they establish that the vesting of tenure, pursuant to N.J.S.A. 18A:28-5, cannot be waived or modified, Spiewak; In the Matter of the West Morris Reg. S.D., 1981 S.L.D. 732. After a person has tenure, he or she can waive a right acquired by tenure. See, Lange v. Audubon Bd. of Ed., 26 N.J.

Super. 83, 88 (App. Div. 1953); Collins v. New Milford Bd. of Ed., OAL DKT. EDU 5847-85 (July 21, 1986), adopted, Comm. of Ed. (Sept. 3, 1986).

I am persuaded by Mr. Carroll's argument, and I CONCLUDE that all three petitioners are barred by waiver and estoppel from claiming their tenure rights to the position of high school principal. Each of the three petitioners has had extensive work experience in the New Jersey school system and either knew or should have known about their tenure rights.

At the time of his resignation, Mr. Pickering referred to the eligibility list and his continued interest in an elementary school principal position. However, he did not apply for the position of high school principal on the three occasions that the position was vacant in 1984, 1986 and 1988.

Mr. Fuller applied for the high school principal position in 1984 and 1986, but not in 1988. In 1986, Mr. Fuller wrote to the then superintendent, declining an opportunity to be interviewed again for the high school principal position and stating that he wished to be judged on his record in the district. He was offered an opportunity to reconsider that decision but again declined, stating that he would honor any decision made by the selection committee.

Mr. Schienholz applied for the high school principal position in 1984, but not in 1986 or 1988.

Further, the facts show that in 1984, a non-tenured person was appointed to the high school principal position, and none of the petitioners objected on the basis of a violation of their tenure rights. Also, at the hearing, none of the petitioners presented any reason as to why they delayed in asserting their tenure rights to the high school principal position.

It is clear from the facts that all three petitioners were aware of the 1988 vacancy in the position of high school principal and of the nationwide recruitment effort of the Board to fill the vacancy. However, during this period of time, none of the petitioners indicated to the Board or its administrators any interest in the position or any claim to the position because of their tenure rights. It was not until after the selection process was over that the petitioners, literally on the eve of the appointment of Dr.

Miller, first informed the Board of their interest in the position. I **CONCLUDE** that this was too late and that the Board's appointment of Dr. Miller under these circumstances was reasonable. Most certainly, as of June 27, 1988, the date of the Board meeting when Dr. Miller was appointed, the paramount concern of the Board was to appoint a new principal for the high school, especially in view of the problems that existed in that school.

Since I have **CONCLUDED** that all three peittioners have waived and are estopped from asserting their tenure rights as to the position of high school principal, it is not necessary to consider which of the three petitioners would have been entitled to this position.

Therefore, I **ORDER** that the petitions in this matter be **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.

May 4, 1989
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

5-4-89
DATE

Seymour Cohen
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 8 1989
DATE

Jayne LaVecchia/K.S.
OFFICE OF ADMINISTRATIVE LAW

caj

NATHAN SCHIENHOLZ AND WAYNE FULLER,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
WAYNE E. PICKERING,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
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 exceptions of Petitioners Pickering, Schienholz, and Fuller, as well as the Board's reply exceptions, were filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In reviewing the findings and conclusions of the ALJ in the instant matter, the Commissioner finds and determines that she correctly concluded that the undisputed facts clearly establish that the seniority claimed by petitioners is not at issue herein.

The central issue to be determined is whether any of the petitioners by virtue of their tenure and certifications as principals could lay claim to the position of high school principal presently occupied by a nontenured employee whom the Board selected to fill such vacancy on or about June 27, 1988.

In order to reach such a determination, the Commissioner relies on the Court's holdings in Capodilupo, supra, and Bednar, supra. Both of these cases were decided by the Court in 1987 and have prospective application. In rendering these decisions, the Court laid to rest the issue of whether persons who obtained tenure under their endorsed certificates are limited to the seniority

category in which they served or whether their tenure protection extends to other positions covered by the endorsement on their certificates over nontenured teaching staff members.

In this regard, the Court in Bednar held in pertinent part that:

> The tenure statute authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF. N.J.S.A. 18A:28-13. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 n.4 (1983); Capodilupo v. West Orange Twp. Ed. Bd., 218 N.J. Super. 510, 514 (App. Div. 1987). The statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers. Under current regulations, seniority is measured by years of employment in specific job categories which are normally narrower than the subject fields which are endorsed on teachers' certificates. See N.J.S.A. 18A:28-5; N.J.A.C. 6:3-1.10(b).
>
> Seniority is a statutory concept created by Chapter 28 of Title 18A, a chapter which deals only with the various aspects of tenure. Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n, 98 N.J. 523, 531 (1985). It does not purport to create employment rights for non-tenured employees. This court has thus held that nontenured teachers whose contracts are not renewed by reason of a RIF are not entitled to the reemployment rights conferred by Chapter 28. Union Cty Bd. of Ed. v. Union Cty. Teach. Assn., 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977). Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. Capodilupo v. West Orange Tp. Ed. Bd., supra. (at 242-243)

Prior to the Court's ruling in these decisions, tenured teaching staff members had to compete with nontenured persons by applying for positions outside their seniority categories, notwithstanding the fact that they possessed the appropriate endorsements on their certificate for the position they were seeking. After Bednar and Capodilupo, boards were precluded from creating "competing rights" between tenured and nontenured employees for vacancies which tenured teaching staff members were certified to fill. Boards were first required to notice such tenured teaching staff members of those vacancies for which they were tenure eligible before considering opening those positions to nontenured teaching staff members. Boards, however, have the discretion of selecting which of those tenured teaching staff members, who were interested in the vacancy, were best qualified to serve the needs of the school

district, without considering their seniority to the vacancy since they had no seniority in the category in which the vacancy occurred.

The undisputed facts of this case clearly establish that Petitioners Fuller and Schienholz were qualified by their tenure for the vacancy of high school principal which existed on June 27, 1988 before the Board employed a nontenured person to fill that position. The Commissioner disagrees with the ALJ's finding that Petitioner Pickering was tenure eligible for the position of high school principal on June 27, 1988 by virtue of the fact that he voluntarily resigned from employment in the Ewing Township School District on January 16, 1984, before the holdings in Bednar and Carodilupo were handed down by the Court. In this regard, the ALJ's finding and conclusion are reversed.

Finally, the Commissioner finds and determines that the Board was required to notice Petitioners Fuller and Schienholz that they were tenure eligible if interested in being considered for the position of high school principal before the Board opened this position to other nontenured applicants. (Carodilupo and Bednar)

It is evident from the undisputed facts in the record of this matter that the Board did not first provide such information to Petitioners Fuller and Schienholz but, rather, it would have required them to apply for the high school principal vacancy and be considered with all other nontenured candidates for the position. This the Commissioner finds is in direct contravention of Bednar and Carodiluro by virtue of the fact that the Board's action created "competing rights" for the position for nontenured persons who were not eligible to apply if either Petitioners Fuller or Schienholz indicated interest in the vacant position of high school principal.

There is no evidence in the record to establish that the Board did, in fact, comply with the mandate of the Court in Bednar or Capodilupo. Accordingly, insofar as the ALJ reaches a different finding and conclusion against Petitioners Fuller and Schienholz based upon the doctrine of estoppel, they are hereby set aside and judgment is entered by the Commissioner on their behalf.

The exceptions and replies filed by the parties are noted and incorporated by reference herein.

The Commissioner hereby reverses the Board's action of June 27, 1988 in hiring a nontenured person to fill the vacancy of high school principal. He further directs the Board without delay to interview Petitioners Fuller and Schienholz in order to arrive at an informed decision as to which of these tenured principals will be selected as the principal of the high school in the School District of Ewing Township.

IT IS SO ORDERED.

Pending State Board

COMMISSIONER OF EDUCATION

June 19, 1989

NATHAN SCHIENHOLZ AND WAYNE FULLER,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT-APPELLANT,	:	STATE BOARD OF EDUCATION
AND	:	DECISION ON MOTION
WAYNE E. PICKERING,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, June 19, 1989

For the Petitioners-Respondents, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Carroll & Weiss
(David W. Carroll, Esq., of Counsel)

For the Petitioner-Cross/Appellant, John J. Barry, Esq.

On June 19, 1989, the Commissioner rendered his final decision in this matter, holding that the Board of Education of the Township of Ewing (hereinafter "Board") had acted improperly in filling a vacancy for a high school principal by employing a non-tenured individual in the position rather than either Nathan Schienholz or Wayne Fuller, petitioning teaching staff members who were tenured as principals but had no seniority in the seniority category applicable to the assignment at issue. Having concluded that a third petitioner, Wayne Pickering, was not "tenure eligible" for the position in that he had "voluntarily resigned from employment" in the district prior to the Appellate Division's decisions in Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987) and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. (App. Div. 1987), the Commissioner reversed the Board's action and directed it to consider and select either Petitioner Schienholz or Petitioner Fuller for the position.

By separate appeals to the State Board, both the Board and Petitioner Pickering have challenged the Commissioner's decision, and the matter is now pending before us.

The Board, joined by Petitioner Pickering, is now seeking a stay of the Commissioner's decision pending our decision on the merits.

We have carefully reviewed the arguments presented by counsel, including the letter on behalf of Petitioner Pickering and the letter memorandum in opposition to the motion filed on behalf of Petitioners Schienholz and Fuller. On the basis of those arguments and the circumstances as represented in the supporting affidavit of the district's superintendent, we conclude that a stay of the Commissioner's decision is warranted in this case.

In so concluding, however, we reject the Board's argument that it is inappropriate for the State Board of Education to evaluate whether a stay of a Commissioner's decision is warranted by reference to the standards articulated in Crowe v. De Gioia, 90 N.J. 128 (1982). In contrast to an application for emergent relief or a preliminary injunction, see Zanin v. Iacono, 198 N.J. Super. 490, 498-99 (Law Div. 1984), where a party seeks a stay of a Commissioner's decision, the underlying matter has been the subject of adjudication through the administrative process and the Commissioner has rendered a final decision which, pursuant to N.J.S.A. 18A:6-25, is binding unless and until reversed on appeal. We find that it is consistent with the statutory framework governing appeals to require that a party show a likelihood that he will succeed on the merits of his pending appeal as one element in our assessment of whether we should set aside the Commissioner's decision in the interim. Further, as set forth in Board of Education of the Township of Irvington v. Mayor and Council of the Township of Irvington, decision on motion by the State Board, September 7, 1988, and as reflected by the determinations cited by the Board, we recognize that, in applying the standards articulated in Crowe v. Di Gioia, it is our task to engage in a delicate balancing of the interests of the parties and the public as they may be affected by the granting or denying of a stay. c.f. Yakus v. United States, 321 U.S. 414, 440 (1977).

October 4, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3773-87
AGENCY DKT. NO. 51-3/87

BELMAR BOARD OF EDUCATION,
Petitioner,
v.
ASBURY PARK BOARD OF EDUCATION,
Respondent, Counter-Petitioner
and Third-Party Petitioner,
v.
SOUTH BELMAR BOARD OF EDUCATION,
Third-Party Respondent,
v.
BRADLEY BEACH BOARD OF EDUCATION,
Third-Party Respondent
and Counter-Petitioner.

Kenneth B. Fitzsimmons, Esq., for the petitioner (Sinn, Fitzsimmons, Cantoli, West and Pardes, attorneys)

Richard D. McOmber, Esq., and **Craig E. Darvin,** Esq., for the respondent (McOmber and McOmber, attorneys)

James M. Blaney, Esq., for the third-party respondent (Starkey, Kelly, Blaney and White, attorneys)

Bernard F. Boglioli, Esq., for the third-party respondent and counter-petitioner (Boglioli and Stein, attorneys)

Record Closed: December 21, 1988 Decided: April 14, 1989

BEFORE BEATRICE S. TYLUTKI, ALJ:

I - STATEMENT OF THE CASE

This matter concerns the requests filed by the Belmar Board of Education (Belmar Board) and the Bradley Beach Board of Education (Bradley Board) for authorization to terminate their respective sending-receiving relationships with the Asbury Park Board of Education (Asbury Board). The basis for these requests is primarily the failure of the Asbury Park School District (Asbury District) to gain certification after three separate evaluations, pursuant to the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq.; N.J.A.C. 6:8-1.1 et seq.

The Asbury Board opposes both requests and alleges that neither the Belmar Board nor the Bradley Board can meet the requirements set forth in N.J.S.A. 18A:38-13, since each termination would have substantial negative impacts on the quality of education, finances and racial composition of the Asbury Park High School (APHS).

Also, the Asbury Board requests that the Commissioner of Education (Commissioner) order both the Belmar Board and the Bradley Board to comply with the statutory ratios governing the assignment of their students to the APHS and to develop and implement programs to correct inaccurate perceptions regarding the APHS, and that he order the Belmar Board to establish an equitable and non-discriminatory method for the assignment of students.

II - PROCEDURAL HISTORY

On March 27, 1987, the Belmar Board filed a petition with the Commissioner requesting the termination of its sending-receiving relationship for grades 9 through 12 with the Asbury Board. Pursuant to the statutory ratio, the Belmar Board is required to assign 43.5 percent of its students to the APHS. Its other students are assigned to the Manasquan High School (MHS).

In its petition, the Belmar Board alleges that there would be no substantial negative impacts from the termination of the sending-receiving relationship, pursuant to N.J.S.A. 18A:38-13, and submits a feasibility study prepared by Dr. William W. Ramsay,

dated March 10, 1987 (P-10). The Belmar Board requests the Commissioner to authorize it to send all of its high school students to the MHS either on a specified date or pursuant to a four-year phase-out plan.[1]

In its answer, filed with the Commissioner on April 16, 1987, the Asbury Board opposes the termination of its sending-receiving relationship with the Belmar Board and alleges that the termination would have substantial negative impacts, pursuant to N.J.S.A. 18A:38-13, and that the feasibility study does not satisfy the statutory requirements. Attached to its answer, the Asbury Board filed a counter-petition in which it requests that the Commissioner direct the Belmar Board to send all of its students to the APHS [2] or that he require the Belmar Board to assign 44.3 percent of its students to the APHS for at least 15 years, pursuant to an equitable and non-discriminatory assignment program.[3] Also attached to its answer, the Asbury Board filed a third-party petition,[4] in which it alleges that both the South Belmar Board of Education (South Belmar Board) and the Bradley Board are considering or planning to seek the termination of their sending-receiving relationships with the Asbury Board. The Asbury Board requests that the Commissioner enjoin such actions for a period of 15 years and requests reliefs similar to those set forth in its counter-petition against the Belmar Board.[5]

In response to the Asbury Board's third-party petition, the Bradley Board filed an answer and a counter-petition on May 21, 1987, in which it requests the termination of its sending-receiving relationship for grades 9 through 12 with the Asbury Board.[1] Pursuant to the statutory ratio, the Bradley Board is required to assign 93 percent of its students to the APHS. Its other students are assigned to the junior and senior high

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1 In this initial decision, the requests of both the Belmar Board and the Bradley Board will be considered on the basis of a four-year phase-out of the students.

2 By order dated January 8, 1988, I dismissed the relief requested by the Asbury Board that all students attend the APHS (Appendix IV, D).

3 By order dated June 2, 1988, I granted, in part, the request of the Asbury Board to amend the reliefs set forth in its counter-petition against the Belmar Board (Appendix IV, H).

4 The third party petition in this matter was filed prior to the effective date of the revised rule which does not allow third party practice, N.J.S.A. 1:1-1.3 (effective date, July 1, 1987).

5 By order dated February 10, 1988, I dismissed the relief requested by the Asbury Board that all Bradley Beach students attend the APHS; by order dated June 2, 1988, I granted, in part, the request of the Asbury Board to amend the reliefs set forth in its third-party petition (Appendix IV, E, H).

schools operated by the Neptune Board of Education (Neptune Board). In its counter-petition, the Bradley Board alleges that the termination would not cause any substantive negative impacts, pursuant to N.J.S.A. 18A:38-13, and submits a feasibility study prepared by the Kiernan Corporation, dated May 1987 (C-1). However, the Bradley Board did not designate where it wants to send its students if it is authorized to terminate its sending-receiving relationship with the Asbury Board.[6]

The South Belmar Board filed an answer to the Asbury Board's third-party petition and thereafter filed a motion for summary judgment. In its motion, the South Belmar Board represented that it was not contemplating any action to terminate its sending-receiving relationship with the Asbury Board. Pursuant to the statutory ratio, the South Belmar Board is required to assign 33 percent of its students to the APHS; the remainder are assigned to the MHS. The Asbury Board did not oppose the motion, and on April 22, 1988, I issued an initial decision in which I ordered the dismissal of that portion of the Asbury Board's third-party petition which relates to the South Belmar Board. This initial decision was adopted by the Commissioner in a decision dated June 6, 1988 (Appendix IV, G).

This matter was transmitted to the Office of Administrative Law on May 29, 1987, for a determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

The prehearing conferences took place on July 16, 1987, and October 21, 1987. At the first prehearing conference, the Bradley Board was represented by Robert H. Otten, Esq., who was replaced (by letter dated August 7, 1987) by Bernard F. Boglioli, Esq. Also at the first prehearing conference, the Asbury Board was represented by J. Peter Sokol, Esq., who was replaced (by letter dated August 12, 1987) by Richard D. McOmber, Esq. The South Belmar Board did not participate in the prehearing conferences or in the hearing, except for brief appearances by its attorney, James M. Blaney, Esq., at the first two days of the hearing for the purpose of requesting that the South Belmar Board be dismissed as a party.

In the prehearing order of July 24, 1987, I set forth the issues in this matter (Appendix IV, A, as amended).

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6 During the hearing, I ruled that the Bradley Board is not required by law to designate where it wants to send its students if and when its current sending-receiving relationship with the Asbury Board is terminated (Order dated March 25, 1988, Appendix IV, F).

Prior to the first day of the hearing, scheduled for November 2, 1987, Mr. McOmber, on behalf of the respondent, moved to place the matter on the inactive list of cases so that the Asbury Board could initiate a regionalization study. In addition, Mr. McOmber requested that the hearing be adjourned because of the illness of R. Thomas Jannarone, Jr., the Superintendent of Schools for the Asbury District.

During a telephone conference call on October 8, 1987, I denied the requests to adjourn the matter, as confirmed by a written order dated October 20, 1987 (Appendix IV, C). This order was modified by the Commissioner, who granted a two-month adjournment because of the illness of Mr. Jannarone (Appendix IV, C).

Also during the telephone conference call on October 8, 1987, I refused to sign certain subpoenas duces tecum presented to me by the Asbury Board, and by letter dated October 27, 1987, the Commissioner's office decided not to review this action (Appendix IV, B).

There were 43 hearing days, between November 2, 1987, and August 29, 1988,[7] at the Asbury Park Municipal Court. Thirty witnesses testified and over 200 exhibits were admitted into evidence (Appendices I and II).

After the presentations by the Belmar Board and the Bradley Board, Mr. McOmber, on behalf of the Asbury Board, moved to dismiss their requests to terminate their respective sending-receiving relationships on the basis that neither had presented a prima facie case, pursuant to N.J.S.A. 18A:38-13. After hearing the oral arguments of the parties, I denied the motion, as confirmed by my written order dated March 25, 1988 (Appendix IV, F; 16T84-161; 17T4-10).

Prior to the conclusion of the hearing, Mr. McOmber moved to amend the reliefs sought by the Asbury Board. After consideration of the arguments of the parties, I granted part of this motion (Appendix IV, H).

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7 Citations to hearing transcripts in this initial decision will be in accordance with Appendix III.

I held a post-hearing conference with the parties on September 21, 1988. At that time there was a discussion regarding the fact that some of the consultants hired by the parties used different data bases—some from different sources and others prepared at different times—for the preparation of the charts and projections that are included in their reports. For purposes of the briefs of the parties and the initial decision to be rendered in this matter, the Asbury Board and the Belmar Board stipulated that the charts and projections in R-35, R-37 (except for p. 10), R-40, R-42, R-43, R-48 (Tables I, II, III), R-49 (Table I), P-31, C-10 and C-11 will be used for the matters covered therein. The Bradley Board did not agree to participate in this stipulation. Contrary to the implication in the Asbury Board's post-hearing reply brief (at 12-13), both Mr. McOmber, on behalf of the Asbury Board, and Kenneth B. Fitzsimmons, Esq., on behalf of the Belmar Board, entered into this stipulation only to simplify the statistical analysis, and both of them acknowledged that the stipulation was not intended in any way to impugn the approach, analysis or conclusions of the other consultants.

After receipt of the briefs, the record in this matter closed on December 21, 1988. At my request, the period of time for the filing of the initial decision was extended until April 23, 1989 (Orders of Extension, dated January 26, 1989, and March 10, 1989).

III - APPLICABLE STATUTE

Cases dealing with the termination of sending-receiving relationships are governed by the provisions of N.J.S.A. 18A:38-13, which provides that:

> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law, shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the

> requested change in designation or allocation if no substantial negative impact will result therefrom.

Prior to the 1986 amendment (L. 1986, c. 156), N.J.S.A. 18A:38-13 provided that a school district asking to terminate its sending-receiving relationship had to show "good and sufficient reason" for the termination. However, even before this amendment, case law dictated that the school district also had to show that the termination would not cause any negative impacts. Washington Bd. of Ed. v. Upper Freehold Reg. Bd. of Ed., et al., OAL DKT. EDU 2710-80 (Feb. 23, 1981), adopted, Comm. of Ed. (March 4, 1981), remanded, State Bd. of Ed. (Sept. 2, 1981), on remand, 1982 S.L.D. 928, adopted, Comm. of Ed., 1982 S.L.D. 955, remanded, State Bd. of Ed. (Dec. 7, 1983), on remand, OAL DKT. EDU 1020-83 (Oct. 9, 1984), adopted, Comm. of Ed. (Nov. 9, 1984), aff'd, State Bd. of Ed. (June 5, 1985), aff'd, N.J. App. Div. (Sept. 17, 1986, A-5164-84T1) (unreported); Brielle Bd. of Ed. v. Manasquan Bd. of Ed., et al., OAL DKT. EDU 8406-83 (Nov. 16, 1984), adopted, Comm. of Ed. (Jan. 18, 1985), rev'd, State Bd. of Ed. (August 7, 1985), limited remand, N.J. App. Div. (Sept. 30, 1985, A-5701-84T6) (unreported), decided, State Bd. of Ed. (March 5, 1986), appeal dismissed, N.J. App. Div. (July 17, 1986, A-5701-84T6) (unreported).

By the 1986 amendment, the Legislature clearly intended to enact a new standard for the termination of sending-receiving relationships and to relieve the petitioning school district of the burden of showing "good and sufficient reason" for the termination. The Assembly bill that embodies the amendatory language contains the following statement:

> This bill amends existing law to modify the standard to be applied by the Commissioner of Education when a local board of education applies for permission to alter or terminate a sending-receiving relationship with another board. At present, when a local board seeks to change or end an arrangement under which it sends high school students to another district or receives high school students from another district, the commissioner will approve the application only upon the showing of "good and sufficient reason." This bill would provide instead that the commissioner's decision should be based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils and the effect on the racial composition of the pupil population of the districts. The commissioner is required to grant the requested change in designation or allocation if no substantial negative impact will result. [Assembly Bill No. 2072]

The State Senate, in its consideration of the Assembly bill, added its own statement, which in part states that:

> At present, when a local board seeks to change or end an arrangement under which it sends high school students to another district or receives high school students from another district, the commissioner shall grant approval only upon the showing of "good and sufficient reason." Under the provisions of this bill that standard would be changed and the commissioner would grant the requested change upon a finding that "no substantial negative impact will result therefrom." [Senate Education Committee Statement regarding Assembly Bill No. 2072]

This legislative intent was recognized by the State Board of Education (State Board) in its decision in Cranbury Bd. of Ed. v. Lawrence Bd. of Ed., OAL DKT. EDU 8626-82 (Aug. 1, 1985), adopted, Comm. of Ed. (Sept. 30, 1985), rev'd, State Bd. of Ed. (Apr. 3, 1987), appeal dismissed, N.J. App. Div. (Apr. 22, 1988, A-4253-86T1) (unreported). In its opinion,[8] the State Board stated that in the past, the statutory scheme had reflected a policy of ensuring stability in sending-receiving relationships (Id. at 9). The State Board stated that the amendment to N.J.S.A. 18A:38-13 recognized that a receiving district does not have "a statutory right to continue as the receiving district for a particular sending district indefinitely or to perpetuity" and that "the most significant educational decision made by a sending district is the decision concerning where its students will be educated" (Id. at 9-10).

Since the Cranbury decision, there have been two cases decided pursuant to N.J.S.A. 18A:38-13, as amended. In Absecon Bd. of Ed. v. Pleasantville Bd. of Ed., OAL DKT. EDU 7152-86 (Apr. 6, 1988), adopted, Comm. of Ed. (June 1, 1988), aff'd, State Bd. of Ed. (Oct. 7, 1988), the Commissioner stated that, pursuant to N.J.S.A. 18A:38-13, as amended, the burden is initially on the sending district to present "an educationally based reason for withdrawal supported by a presentation of facts and some support for a claim of no significant impact on the receiving district," and then the

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8 The State Board issued its decision in the Cranbury case after the effective date of the 1986 amendment to N.J.S.A. 18A:38-13. However, since the matter was heard and decided by the Administrative Law Judge and the Commissioner before the effective date of the amendment, the State Board decided the matter pursuant to the previous provisions of the statute.

burden shifts to the receiving district "to demonstrate it will suffer 'significant negative impact' " (Id. at 37).

Later, in Englewood Cliffs Bd. of Ed. v. Englewood Bd. of Ed., OAL DKT. EDU 1086-86 (April 18, 1988), mod., Comm. of Ed. (July 12, 1988), the Commissioner stated that N.J.S.A. 18A:38-13, as amended, required him to make "an equitable determination" based on "all the circumstances" (Id. at 2), and he held that "even when positive educational benefits may accrue from granting withdrawal in a sending-receiving relationship, those benefits can be outweighed by serious and compelling reasons such as racial imbalance for that issue is of utmost importance to the State. Branchburg, supra" (Id. at 15).

Having reviewed the legislative history and the language contained in N.J.S.A. 18A:38-13, as amended, as well as the decisions in the above-mentioned cases, I **CONCLUDE** that the statute requires the Commissioner to consider all facts relevant to the termination and mandates that the Commissioner grant the request unless the termination would have a substantial negative impact as to one or more of the following factors: (1) the quality of education received by the affected students, (2) the finances of the affected school districts, and (3) the racial composition of the student population in the affected schools.

As to the interpretation of N.J.S.A. 18A:38-13, as amended, I have accepted Mr. McOmber's argument that the statute does not provide for a balancing of the three factors by the Commissioner and that the termination request must be denied if there is one or more negative impacts. It has been consistently recognized that the language of a statute speaks for itself and that it must be construed in accordance with the clear meaning of the language. Perez v. Pantasote, Inc., 95 N.J. 105 (1984); Singleton v. Consol. Freightways Corp., 64 N.J. 357 (1974); State v. A.A. La Fountain, Inc., 67 N.J. Super. 285 (Law Div. 1961).

Therefore, the main issue in this matter is whether the termination of the sending-receiving relationships by either the Belmar Board or the Bradley Board (or both) would result in any substantial negative impacts. Initially, the burden of proof is on the Belmar Board and the Bradley Board to show an educationally-based reason for the termination and to show that there would be no substantial negative impacts. The burden then shifts to the Asbury Board to show that it will suffer one or more substantial negative impacts (Cranbury, State Bd. decision at 17).

At this juncture, it is appropriate to discuss another issue dealing with the interpretation of N.J.S.A. 18A:38-13, as amended.

This matter was the first case initiated after the adoption of the amendment to N.J.S.A. 18A:38-13, and there was no precedent or regulations indicating what should be contained in the feasibility study required by the statute.

As part of its petition and feasibility study, the Belmar Board elected to present its reasons for requesting the termination of its sending-receiving relationship, its representation as to why there would be no substantial negative impacts and the reasons why it wanted to send all of its students to the MHS. The Bradley Board made a similar presentation, except that it did not indicate where it would send its students if the sending-receiving relationship with the Asbury Board was terminated. As stated, I ruled that N.J.S.A. 18A:38-13 does not specifically require a school district to make such a designation (Appendix IV, F).

In its post-hearing brief, the Asbury Board renewed its argument that the Bradley Board's case is defective since it did not identify the high school where it wishes to send its students, based on the decisions in the Absecon case. In that case, the Commissioner determined that the petition to terminate the sending-receiving relationship should be dismissed for a number of reasons, one of which was the failure of the Absecon Board of Education to designate an alternative school. Although the Commissioner recognized that there was precedent for terminating a relationship prior to the designation of an alternative school, he stated:

> In accordance with N.J.S.A. 18A:38-13 as amended, the Commissioner now deems information as to a proposed new high school relationship an integral part of the feasibility plan required by law to be submitted prior to his equitable determination whether to sever on the basis of all of the circumstances. [Absecon, Comm. of Ed. decision at 47]

Recently, the State Board affirmed the Commissioner's decision in the Absecon case and stated:

> We agree, and find that Absecon's failure [to designate an alternative is] in this case fatal to its application. The language of N.J.S.A. 18A:38-13 clearly contemplates that a sending district provide its proposed alternative for educating its students when it seeks withdrawal or change in designation. Furthermore, at

> minimum, it is the obligation of the State Board of Education to insure that the students of the sending district will have an educational alternative, and to permit withdrawal in the absence of a demonstrated alternative would contravene that responsibility. Accordingly, the State Board of Education will not direct termination without knowing where the senders' children are to be educated. [Absecon, State Bd. decision at 2]

Mr. Boglioli argued that the Bradley Board's position in this matter is clearly distinguishable from the facts in the Absecon case, and I agree with him. In this matter, the Bradley Board did not independently initiate the matter but rather was brought into the case by the Asbury Board's third-party petition. Further, as represented by Mr. Boglioli, the Bradley Board has an existing relationship with the Neptune Board and apparently plans to ask that board to accept the rest of its high school students if the termination is approved. Although the Neptune schools were not "formally" designated by the Bradley Board, information regarding the Neptune schools was introduced into evidence (C-16; C-25; 12T67-80). Also, the decisions in Absecon were issued after I had ruled that N.J.S.A. 18A:38-13 does not mandate that the petitioning school district designate an alternative school and after the Bradley Board had presented its case at the hearing. To have adjourned the hearing at that juncture and to have required the Bradley Board to formally arrange for the acceptance of its students by another school board would have been impractical and unfair to all of the parties.

I recognize that it has been established that the statutory interpretation by an agency responsible for administering an act should be given great weight and its interpretation should not be set aside unless there is a showing that said interpretation is inconsistent with the enabling statute. N.J. Ass'n of Health Care Facilities v. Finley, 83 N.J. 67 (1980); State v. Council of State College Locals, 153 N.J. Super. 91 (App. Div. 1977), certif. den., 78 N.J. 326 (1978); N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544 (1978); Peper v. Princeton University Bd. of Trustees, 77 N.J. 55 (1978). However, I **CONCLUDE** that it would be unfair to the Bradley Board to apply the interpretation of the Commissioner and the State Board retroactively and dismiss its counter-petition at this juncture. Therefore, I will proceed with a consideration of the Bradley Board's request to terminate with the understanding that, if the termination is approved, it will be conditioned upon the passage by the Bradley Board of a resolution designating the Neptune schools as its choice and upon a formal acceptance by the Neptune Board of the additional high school students.

IV - FINDINGS OF FACT

Except as noted, I FIND that the facts in this matter are not in dispute. The disputes among the parties concern the significance of the facts as they relate to the standards contained in N.J.S.A. 18A:38-13 for the termination of sending-receiving relationships.

A - PRIOR LITIGATION

The APHS has been accepting students from other school districts in the area since approximately 1915. When the apportionment of secondary students was made pursuant to the provisions of Chapter 210, P.L. 1944 (R.S. 18:14-7, now N.J.S.A. 18A:38-12), fifteen school districts were sending some or all of their students to the APHS.

After 1944, six of these school districts stopped sending any students to the APHS. At the end of the 1964-1965 school year, the Ocean Board of Education, which had been sending the largest number of students to the APHS, terminated its sending-receiving relationship upon completion of its own high school. In September 1965, the Asbury Board, after an initial objection, consented to terminate its sending-receiving relationship with the Spring Lake Board of Education. This consent was accepted by the Commissioner. Spring Lake Bd. of Ed. and Manasquan Bd. of Ed. v. Asbury Park Bd. of Ed., 1965 S.L.D. 133.

Since these withdrawals, the APHS has been receiving students from seven school districts: Allenhurst, Avon, Belmar, Bradley Beach, Deal, Interlaken and South Belmar.

The Asbury Board has expanded time and money in an effort to prevent some of these remaining school districts from terminating their sending-receiving relationships. In 1959, the Bradley Board requested that twenty students be reassigned from the APHS to the Neptune schools and the Asbury Board refused the request. The Bradley Board petitioned the Commissioner to approve this request on the basis that the APHS was overcrowded and had to have double sessions in order to accommodate all of its students. The Commissioner granted the petition for a temporary period until such time as the APHS returned to a single-session schedule. Bradley Beach Bd. of Ed. v. Asbury Park Bd. of Ed., 1959-60 S.L.D. 159.

In 1962, the Allenhurst Board of Education (Allenhurst Board) petitioned the Commissioner for permission to send its high school pupils to the Shore Regional High School (SRHS) rather than to the APHS. The Commissioner denied the petition on the grounds that the Allenhurst Board did not have good and sufficient reasons to terminate the relationship. Allenhurst Bd. of Ed. v. Asbury Park Bd. of Ed., 1964 S.L.D. 110. However, by order dated September 5, 1963, the Commissioner temporarily allowed twenty-four Allenhurst students to attend the SRHS because of the overcrowded condition in the APHS. Ibid.

In 1964, the Allenhurst Board requested the Commissioner to extend this temporary change of designation, and the Deal Board of Education (Deal Board) and the Interlaken Board of Education (Interlaken Board) filed petitions requesting that their high school students be allowed to attend the SRHS because of the overcrowding at the APHS. The Commissioner heard the matters concurrently, granted the Allenhurst Board's petition since the APHS was still on double sessions, and denied the petitions of the Deal Board and the Interlaken Board as untimely since the double session program at the APHS had been going on for some time. Ibid.; Deal Bd. of Ed. v. Asbury Park Bd. of Ed., 1964 S.L.D. 111; Interlaken Bd. of Ed. v. Asbury Park Bd. of Ed., 1964 S.L.D. 115.

In 1967, the Asbury Board filed a petition because the percentage of Belmar students assigned to the APHS had dropped below the statutory 44.3 percent since the Belmar Board had a policy of free choice as to high school attendance. The Commissioner ordered the Belmar Board to assign the statutory percentage of its high school students to the APHS. Asbury Park Bd. of Ed. v. Belmar Bd. of Ed. and Manasquan Bd. of Ed., 1967 S.L.D. 275. In 1969, the Commissioner required the South Belmar Board to assign the statutory percentage of its high school students to the APHS. South Belmar Bd. of Ed. v. Asbury Park Bd. of Ed. and Manasquan Bd. of Ed., 1969 S.L.D. 156. This decision was modified by the State Board of Education to give the South Belmar Board a longer period of time to comply with the statutory percentage. Ibid.

In the early 1970s, the Commissioner granted the Asbury Board's petition for an order requiring the Shore Regional High School District Board of Education, the Interlaken Board and the Deal Board to cease the procedure whereby the SRHS accepted private tuition students. Asbury Park Bd. of Ed. v. Bds. of Ed. of Shore Regional High School District, Deal and Interlaken, 1971 S.L.D. 221, aff'd, State Bd. of Ed., 1971 S.L.D. 228.

In the mid 1970s, the Commissioner rejected the petition of the Avon Board of Education to terminate its sending-receiving relationship with the Asbury Board and rejected its argument that tuition difference was a good and sufficient reason to terminate the relationship. In the Matter of the Application of the Bd. of Ed. of Avon-by-the-Sea, 1976 S.L.D. 465, aff'd, State Bd. of Ed., 1976 S.L.D. 472, aff'd, 1977 S.L.D. 1275 (N.J. App. Div., June 3, 1977).

Also in the mid 1970s, the Bradley Board filed a petition requesting that more high school students be allowed to attend the Neptune schools since the Neptune Board charged a lower tuition. The Commissioner denied this petition for the same reasons set forth in the Avon case. Bradley Beach Bd. of Ed. v. Asbury Park Bd. of Ed. and Neptune Bd. of Ed., 1977 S.L.D. 959.

In 1979, the Asbury Board petitioned the Commissioner for an order requiring the Belmar Board to comply with the Commissioner's 1967 decision regarding the assignment of students. The Commissioner granted the petition and ordered the Belmar Board to comply with the 1967 decision and assign additional students to the APHS to remedy the past deficiencies. Asbury Park Bd. of Ed. v. Belmar Bd. of Ed. and Manasquan Bd. of Ed., 1979 S.L.D. 308.

Based on these facts, I **FIND** that there is a pattern of attempts by sending school districts to terminate or modify their relationships with the Asbury Board, and that there is a likelihood that if either or both the Belmar Board or the Bradley Board were allowed to terminate their relationship at this time, other school districts would file similar petitions.

B - COMMUNITY CHARACTERISTICS

The City of Asbury Park (Asbury Park), the Borough of Belmar (Belmar) and the Borough of Bradley Beach (Bradley Beach) are located in Monmouth County, and each community borders on the Atlantic Ocean. Asbury Park is the largest in both physical size and population (R-37 at 1). Between 1970 and 1980, there was a population increase in all three communities; however, between 1980 and 1986 there has been a population decrease in Asbury Park and Belmar, and a small population increase in Bradley Beach (R-37 at A-1, A-2). Between 1970 and 1980, there was an increase in the population of school-aged children in all three communities (A-37 at A-4 - A-6), and between 1980 and

1987 there has been a decrease in births in Asbury Park and Belmar and an increase in births in Bradley Beach (R-37 at A-8 - A-10).

While all three communities are essentially fully developed, Asbury Park has recently undertaken a substantial urban renewal program (R-37 at 1). Part of this program provides for the revitalization of commercial enterprises, including the renovation and reopening of the Berkeley-Carteret Hotel. Under a tax abatement agreement, Asbury Park will not realize any additional tax revenue from the Berkeley-Carteret project until 1991 (P-17). Another portion of the urban renewal program deals with the renovation and construction of housing units. Currently, there are 2,000 condominium units proposed; however, it is the opinion of Dr. Emanuel Averbach, one of the Asbury Board's consultants, that this construction will be resort-oriented and will not have any significant impact on school enrollment (R-37 at 1, 6; 19T80-81).

Asbury Park is considerably poorer than Belmar and Bradley Beach. The average equalized property valuation per resident student in Asbury Park was $81,610 for the 1986-87 school year (R-42 at 3). For the same period, the average equalized property valuation per resident student in Bradley Beach was $342,200, and in Belmar it was $550,541 (R-42 at 3). Correspondingly, the equalized school tax rate is higher in Asbury Park. For the 1986-87 school year, the rate in Asbury Park was $1.38 per $100 in equalized valuation, while Belmar's rate was $.70 and Bradley Beach's rate was $1.21, and the average rate in the county was $1.16 (R-43 at 3; R-44 at 3).

C - ASBURY PARK HIGH SCHOOL

1 - STUDENT POPULATION

As of October 28, 1987, 741 students were enrolled in the APHS (R-49, Table I). Of these, approximately 83 percent resided in Asbury Park and the remaining 17 percent resided in the sending districts (R-49, Table I). As of that date, 24 Belmar students were enrolled at the APHS and these students represented 3.2 percent of the student population. Also as of that date, there were 68 Bradley Beach students enrolled at the APHS, a figure which represents 9.2 percent of the student population.

As of October 28, 1987, the racial composition of the student population at APHS was 74.5 percent black, 17 percent white and 8.5 percent other (Hispanic, Asian,

Haitian, etc.) (R-49, Table I). More than half of the white students attending the APHS resided in one of the sending districts. As of October 28, 1987, the racial composition of the Belmar students at the APHS was 11 white, 11 black and two other. These 11 white students represented 8.7 percent of the total white students at the APHS (R-49, Table I). If the Belmar students are withdrawn from the APHS, it is estimated that the percentage of white students in the school would be reduced from 17 percent to 16 percent. Also as of October 28, 1987, the racial composition of the Bradley Beach students at the APHS was 51 white, four black and 13 other. These 51 white students represent 40.4 percent of the total white students at the APHS (R-49, Table I). If the Bradley Beach students were withdrawn from the APHS, it is estimated that the number of white students in the school would be reduced from 17 percent to 11 percent.

Dr. Averbach prepared school population projections on behalf of the Asbury Board and calculated that the student population at the APHS will decline through 1997, even if none of the existing sending-receiving relationships is terminated (R-37 at 11). The Belmar Board does not dispute this projection; however, John R. Flynn of the Kiernan Corporation, a consultant for the Bradley Board, projected that there will be a gradual increase in the Asbury Park resident enrollment at the high school between the 1987-88 school year and the 1991-92 school year (C-1, Table III). Having heard the testimony of both experts, I FIND Dr. Averbach's projections to be based on a thorough review of all relevant factors and therefore more reliable.

For the purposes of this decision, the Asbury Board and the Belmar Board agreed to use the student population projections prepared by Dr. Averbach (R-37; R-38). Dr. Averbach projected the loss of Belmar students using two methods. The first was based on 44.3 percent of the Belmar students attending the APHS and the second was based on the actual number of Belmar students attending the APHS in 1987 (R-38 at 1). According to Dr. Averbach, the average loss of Belmar students would range from 26 to 49 students using the first method and from 16 to 24 students using the second method (R-38 at 1).

Dr. Averbach made similar projections regarding the Bradley Beach students. He concluded that the average loss of Bradley Beach students would range from 50 to 85 students, using the first method, and from 45 to 76 pupils, using the second method (R-38 at 1). Mr. Flynn, on behalf of the Bradley Board, projected a loss of between 52 and 70 students based on the attendance record of Bradley Beach students at the APHS (C-1 as

modified by C-24). In view of the detailed analysis made by Dr. Averbach, I FIND that his projections as to the Bradley Beach student population at the APHS are more reliable.

In the past several years, an increasing number of students assigned to the APHS by the Belmar Board and the Bradley Board do not attend that school (P-10, Table I; C-1 at 3; R-154). It is recognized by the parties that there will always be a difference between the number of students assigned to a particular school and the number who actually attend. This can be due to a number of factors, including families moving out of the school district and the decision to attend private or other public schools with special programs, such as the Marine Academy of Service Technology (MAST). However, both the Belmar Board and the Bradley Board represented that the increase in percentage of students who are assigned and do not attend the APHS from Belmar and Bradley Beach is attributable to the dissatisfaction with the educational program offered by the APHS and concerns regarding the safety of the students.

Gavin DeCapua, the Superintendent of the Bradley Beach School, testified that he has been told by parents and students of their concerns about the APHS and has seen that students assigned to the APHS often do not go there or do not stay there for the full four-year program (C-28; C-29; 16T43-44, 47).

Dr. Lester W. Richens, the Superintendent of the Belmar Elementary School, testified that students and parents have expressed their concerns to him regarding the APHS and that they consider it unfair to divide the Belmar students between the two high schools (9CT33). Dr. Richens stated that the number of Belmar students assigned to the APHS who do not go to the APHS has increased since the Asbury District failed to obtain the State certification. Prior to that time, the Belmar Board was able to maintain an average student attendance at the APHS close to the statutory requirement of 44.3 percent (P-27). Since the Level III report on the Asbury District was issued, Dr. Richens stated that attendance by Belmar students at the APHS has dropped. It was 39.6 percent as of September 30, 1985, and 21.7 percent as of September 30, 1987, notwithstanding the fact that the Belmar Board has assigned between 46.3 percent and 63.6 percent of its students to the APHS in an effort to comply with the statutory percentage (P-27; P-29; 9CT39-40; 10T13-21).

The Asbury Board represented that the decrease in the number of students who actually attend the APHS is due to the reluctance of white parents to send their children

to a predominantly black high school, and that this is similar to the "white flight phenomenon" seen in school busing cases. Dr. David J. Armor, one of the Belmar Board's consultants, stated that the "white flight phenomenon" occurs when parents arrange to have their children sent to other schools, since they perceive that a school with a high minority population does not have a good educational program even where there is no basis for that assumption (43T37). Both the Belmar Board and the Bradley Board denied that the racial composition of the APHS is a major factor in the parental decision not to send the students to the APHS and represented that the increased reluctance to send the students to the APHS is directly related to the Asbury District's failure to obtain certification.

Also, the Asbury Board represented that the other reasons for the decrease in the number of students who attend the APHS are the failure of the Belmar Board and the Bradley Board to take adequate steps to make sure that the statutory percentages of their students actually attend the APHS and to correct the public misconceptions regarding the APHS. Neither the Belmar Board nor the Bradley Board denied that their communities' negative perceptions regarding the quality of education and safety of students at the APHS are in part based on misconceptions and hearsay.

In addition, the Asbury Board represented that the method used by the Belmar Board to assign students to the APHS encourages parents and students to make other arrangements.

The Belmar Board has had a variety of assignment policies. After it closed its high school in 1912, the Belmar Board entered into sending-receiving relationships with the Asbury Board and the Neptune Board. In the early 1930s, the Belmar Board also entered into a sending-receiving relationship with the Manasquan Board. The Belmar Board initially allowed its high school students to choose a school operated by one of these three districts. In 1936, the Neptune Board discontinued its sending-receiving relationship with the Belmar Board. From that time until the 1968-69 school year, the Belmar Board continued its policy of free choice and allowed high school students to choose either the APHS or the MHS (10T71). Thereafter, the Belmar Board instituted a lottery system (10T72). This system was designed to assign pupils to the APHS or the MHS on a random basis while still complying with the statutory percentages. This system created a perception that the students chosen to attend the APHS were "losers" and that those chosen to attend the MHS were "winners" (10T73).

In 1979, the Belmar Board ended the lottery system, based on the recommendation of Dr. Richens, and initiated the present sibling-seniority system (R-20). Pursuant to this system, the first choice for assignment to either APHS or the MHS is given to students who have either a brother or sister assigned to the school (R-20). After the sibling selection has been completed, the remaining students are allowed to choose either the APHS or the MHS in the order of their residential seniority in Belmar (R-20). When the statutory percentage of students to be assigned to one high school is reached, all other students are assigned to the other high school (R-20).

The Belmar Board makes its high school assignments in October or November of the students' eighth grade school year (10T87-89). The Asbury Board represented that the assignments are made early so that Belmar parents will know to which high school their children have been assigned prior to the cutoff dates for application to private and parochial high schools (10T92-94). Dr. Richens represented that the high school assignments are done in the early fall since the Belmar Board must notify both the Asbury Board and the Manasquan Board in December as to the number of students to be sent to their high schools and must sign tuition contracts for those students in January.

In contrast, the Bradley Board makes the high school assignments to the Neptune Schools in March of the students' eighth grade by a drawing from the names of the students who expressed an interest in going there. The other students are assigned to the APHS. The Bradley Board bases its notification and tuition contracts on estimates calculated on prior years' statistics (16T24, 45-46).

As a result of the Belmar Board's assignment policy, the Asbury Board represents that a higher percentage of white students are assigned to the MHS while a higher percentage of minority students and students with educational problems are assigned to the APHS (10T116-17, 131, 133). Belmar students from transient families are consistently assigned to APHS (10T108), and the Asbury Board represented that these students often have academic difficulties, since they have had no continuity in their educational programs (10T79). Also, the Asbury Board cited as an example the fact that, until recently, all high-school-aged students placed in the Marion House, a group home located in Belmar for girls with emotional or family problems, were assigned to the APHS (10T120). Dr. Richens disputed the Asbury Board's position that the Belmar assignment system has resulted in a higher number of black students or students with educational problems being assigned to the APHS, and he noted that most transient students are white and that the black population in Belmar is stable (10T73).

I **FIND** that there was insufficient documentary evidence presented at the hearing to make a determination as to the merits of the Asbury Board's allegation that the Belmar Board's assignment policy results in more black students and students with educational problems being assigned to the APHS.

2 - EDUCATIONAL PROGRAM

The building housing the APHS was built in 1926. The Asbury Board has maintained and refurbished the building and it meets all codes and State education requirements (30T45-46). The APHS professional staff is ethnically and racially diverse and is appropriately certified (R-73; 30T42-43). The APHS offers a comprehensive program, with classes for students at all levels of ability from special education to college preparation (R-53), and its courses are as comprehensive as those offered in the MHS or any other area high school (9AT5-6; 27T25-26).

The guidance office at the APHS has a sufficient number of trained counselors who work with students on an individual basis, and the counselors use the G.I.S. System in assisting students (P-6 at 34; 27T38). The G.I.S. System is a computerized program offering information on educational and occupational opportunity throughout the United States (27T41). The average daily attendance at the APHS is 89 to 90 percent (42T106). The APHS is fully accredited by the Middle States Association of Colleges and Schools (R-64), and this accreditation indicates to colleges and universities that the APHS program prepares the students academically for college (28T23-24).

The APHS graduates apply and are accepted at a wide variety of colleges and universities (27T23; R-149; R-150). Of the graduating class of 1986, 55 percent went on to four-year or two-year colleges (27T43). The APHS is the only school in its area to have developed a special college admissions program with Rutgers University (27T39).

There are a variety of student activities at the APHS and student participation in these activities is generally high (P-6 at 24; 27T76). All student activities are offered to sending district students; however, the participation rate of those students is lower than the overall school participation rate (P-25; P-26).

Neither Dr. Ramsay nor Dr. Robert F. Savitt of Guidelines, Inc., both of whom are consultants for the Belmar Board, was critical of the qualifications of the APHS's

teachers or educational program; however, both of them were critical of the educational climate in the APHS (P-10; 8T88; P-6). The Level III monitoring report was also critical of the educational climate at the APHS. Greta Shepherd, at the time, the Mercer County Superintendent of Schools, who headed the Level III monitoring team and wrote the report, recommended that the Asbury Board conduct a school climate inventory (P-11). Although the Asbury Park administrators appeared to question the need for such an inventory and were critical of the negative comments made about the school climate in the APHS, including comments regarding low expectations by teachers and the lack of adequate learning motivation, the results of the inventory support these criticisms (R-33 at 33-35; 22T37-38).

Although there was testimony regarding concerns about the safety of students at the APHS, there was no proof presented at the hearing that the APHS has a student safety problem that is more extensive than that of any other high school in the area. None of the witnesses who testified at the hearing presented any documented information regarding the nature or extent of safety-related problems at the APHS; they were only able to relate that there was a community concern regarding safety (26T9, 13-14). Dr. Savitt, one of the Belmar Board's consultants, saw no safety problems at the school and stated in his report:

> Despite the impression of some outsiders, there were no observable incidents over a two day period of rowdiness or unacceptable behavior on the part of several hundred students observed. This included observation not only in halls, but also in cafeterias, gym and other locations where students congregated. Similarly, there were no observable incidents of students being harassed by others or of demonstrative conflict between students . . . . In summary, Asbury Park High School as observed did not live up to the dire perception that some outsiders hold of the building. [P-6 at 29-31]

There was mention during the hearing of alleged gang activities at the APHS. During the Level III monitoring team's visit, Ms. Shepherd was informed at a meeting with parents that there were teenage-gang-related problems in the Asbury schools (P-11; 2T124-26; 3T27-30). Specifically, she was told about two rival groups: the "Five Percenters" and the "HBO (Home Boys Only)" (P-11 at 8). During his visit to the APHS, Dr. Ramsay stated that some students mentioned concerns regarding the HBO gang (P-10).

The Asbury Board administrators denied that there are any gang-related problems in the APHS, and they represented that the "Five Percenters" and "HBO" gangs

exist in the community but not in the APHS (27T86; 30T115). They represented that the APHS has a safe and orderly environment. In view of the lack of any substantive evidence, I cannot make any findings relating to the nature and extent of any student safety problems in the APHS.

During the hearing, the Asbury Board presented three witnesses who reside outside of Asbury Park and whose children attended or are attending the APHS. All three witnesses were complimentary of the educational program at the APHS (27T4, 12, 15).

3 - LEVEL III DESIGNATION

The main reason given by both the Belmar Board and the Bradley Board for the termination of their respective sending-receiving relationships with the Asbury Board is the fact that the Asbury District was not certified at Level III of the State monitoring process. Before considering the significance of this fact, it is appropriate to look briefly at the State monitoring process.

By law, each school district must obtain certification, which signifies that its program and facilities meet the State standards and criteria established by the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq.; N.J.A.C. 6:8-1.1 et seq. This certification is good for five years, then the school district must again go through the monitoring process.

In order to achieve certification, a school district must get acceptable ratings as to certain mandatory criteria, including acceptable test scores as to basic skills achievements. In addition to the mandatory criteria, a school district must also obtain acceptable ratings as to other criteria; however, these other criteria are not required for certification and, if a school district does not get acceptable ratings regarding some of these other criteria, it will be given a conditional certification.

The monitoring process is initiated by the county superintendent of schools, who appoints a Level I monitoring team consisting of in-county staff personnel. After visiting the school district, the Level I monitoring team determines whether the school district has achieved acceptable ratings as to the established criteria.

If the school district fails to get a satisfactory rating as to all of the mandatory criteria, it is not certified at Level I and is required to develop an improvement plan to correct the deficiencies. This plan is subject to approval and monitoring by the county superintendent of schools. After a period of time for the implementation of the improvement plan, the school district is evaluated by a Level II monitoring team, which is appointed by the county superintendent of schools and which consists of in-county staff personnel. If the Level II monitoring team does not find that the school district has achieved acceptable ratings as to all of the mandatory criteria, the school district is again required to prepare an improvement plan, which is subject to approval and monitoring by the county superintendent of schools.

After a period of time for the implementation of this improvement plan, a Level III monitoring team is appointed by the county superintendent of schools. This team consists of personnel from the State Department of Education and personnel from outside of the county. This Level III monitoring team is to determine whether the school district has complied with the mandatory criteria and, if not, the team prepares a report which identifies the deficiencies and assesses the reasons for the district's inability to correct them. If the school district does not achieve certification at Level III, it is again required to develop an improvement plan which is subject to approval and monitoring by a county superintendent of schools, who in turn must submit progress reports to the Division of County and Regional Services of the State Department of Education. If the school district fails to comply with this improvement plan and fails to achieve certification, it is subject to further intervention by the State Department of Education, which includes the possibility of State takeover.

In 1980, prior to the evaluation by the Level I monitoring team, the Asbury District was visited by a basic skills review team of county educators who reviewed its basic skills programs, since a substantial number of its students were falling below the minimum level of acceptable proficiency. This team made a number of recommendations and the Asbury District prepared a remedial plan (C-8; R-95; R-97).

The Asbury District was monitored at Level I in January 1984 and did not achieve certification at that time (C-5; R-73). The district was rated unacceptable as to a number of mandatory criteria, some of which applied to the high school. As to the APHS, the main deficiency was the poor passage rate of the ninth grade students on the MBS (Minimum Basic Skills) test (R-73). The Asbury District prepared responses to the Level I report along with a corrective action plan (C-6; R-88; R-91).

After a period of time for improvements (R-92), the Asbury District was monitored at Level II in November 1985 (C-7; R-99). The Level II monitoring team reviewed all of the criteria used for the Level I review, found some improvement as to a number of indicators, and also gave the district unacceptable ratings as to some indicators that had previously been rated as acceptable (R-100). The Asbury District was found deficient as to a number of mandatory criteria, including the failure of the ninth grade students to achieve the mandated passing rate in the MBS test. The Asbury Board developed an improvement plan (R-93; R-96), which was reviewed and approved by Milton G. Hughes, the Monmouth County Superintendent of Schools (R-94; R-98).

After another period of time for improvements (C-35), in February 1986, the Asbury District was monitored by a Level III monitoring team (R-101; R-102). According to Ms. Shepherd, the Asbury District was the first district to have a Level III monitoring review (2T95). The State Department of Education did not have a format for this review; however, Ms. Shepherd stated that the members of the Level III monitoring team were given all of the reports relating to the prior evaluations of the Asbury District and she formulated a number of questions to be used by the team members when they visited the Asbury District schools. Ms. Shepherd testified that the team was divided into groups of two and each group was given certain specific assignments. The monitoring team was in the Asbury District for a period of three days, and Ms. Shepherd felt that this was sufficient time for them to make the necessary observations. Thereafter, the monitoring team met as a group and, based on the reports she received at that time, Ms. Shepherd prepared the Level III monitoring report (P-11).

The Asbury District failed to obtain certification at Level III because of problems in two areas: the basic skills program and the elementary school facilities (2T196-99). For its evaluation of the basic skills program at the APHS, the Level III monitoring team used the High School Proficiency Test (HSPT) results (R-108) rather than the MBS test results which had been the standard for the Level I and II monitoring of the Asbury District. The HSPT is more difficult than the MBS test, and it had been adopted to replace the MBS test as the standard for the basic skills criteria. It was noted at the hearing that, in general, school districts had been given until July 1988 to comply with the HSPT standard (R-105), and that a number of certified school districts in Monmouth County would not have been certified if they had been monitored in 1986 using the HSPT results as the standard (34T44-46).

According to Ms. Shepherd, when the Level III monitoring team members visited the APHS, their sole purpose was to review the basic skills program. However, the Level III report goes beyond the basic skills program and includes general criticisms of the schools, including:

1. lack of a clear understanding by teachers of their responsibilities relating to the basic skills program, and the lack of adequate instructional supervision (2T115-16; P-11 at 7, 9-10);

2. low expectation by staff of student achievement due to the students' socio-economic status and lack of motivation for learning (P-11 at 7; 2T117, 119);

3. negative comments regarding the classrooms: "not dressed for success" and failure to highlight Black History Month (2T14, 118, 121; P-11 at 7-8);

4. failure to start classes on time and homework not expected of all students (2T120, 130-31);

5. failure of teachers to maximize the use of test information and to teach the skills needed to pass the HSPT and MBS test (2T127-28; P-11 at 9-10);

6. no regularly-scheduled APHS departmental meetings, the administrators were not viewed as instructional leaders, and there were insufficient in-service programs for staff development (2T135, 139-40); and

7. inadequacy of school functions for parents and the community (P-11 at 7).

There was no documentation in the Level III report to support all of these conclusions, and the team did not have an "exit" conference with the high school administrators.

There were exhibits and extensive testimony at the hearing by Patricia E. Abernethy, a vice-principal at the APHS, in disagreement with the negative comments regarding the APHS educational program in the Level III report, as well as in the reports of the consultants for the Belmar Board and Bradley Board (R-50 to R-62; R-101 to R-103; R-110 to R-115; R-120); however, no formal objection to the Level III report was submitted by the Asbury Board. The board decided instead to engage a consultant, Thomas R. Cocoran, to help develop an extensive improvement plan, intended to correct the shortcomings identified by the Level III team and to further improve the educational program.

The improvement plan, after several amendments, was approved by Mr. Hughes (R-104; R-131; R-134). There was extensive testimony at the hearing by Mr. Jannarone regarding the implementation of the plan as annually updated and the periodic reviews by the office of the county superintendent of schools (C-12; C-18; C-19; R-132; R-136; R-137; R-143; R-144A and B; R-145; R-153). The Asbury Board is generally ahead of the schedule in the implementation plan, although some of the projects have been delayed for reasons deemed acceptable by Mr. Hughes. For example, there was a delay in conducting the school climate inventory that was one of the recommendations of the Level III monitoring team (P-11 at 16; R-33).

As to the basic skills program at the APHS, the Asbury Board introduced evidence to show that the scores in the MBS test and the HSPT have improved since the start of the improvement plan. The ninth grade students at the APHS have now achieved the mandated passing rate for the MBS test (R-104; R-105; R-106; R-108); however, they have yet to achieve the acceptable passing rate for all portions of the HSPT (39T65, 92; R-144B, Table I at 53).

The improvement plan was reviewed by the consultants for the Belmar Board and they were generally complimentary of the plan. The only question raised about the plan was whether the Asbury Board has the money and staff to implement the plan and whether the effort to implement the plan will have any negative impacts on the day-to-day teaching activities. Dr. Savitt, a consultant for the Belmar Board, stated that the Asbury District "is faced with the herculean task of attempting to accomplish the directives essential for eventual certification. While diligent efforts are being made by administrative leadership and the teaching staff, this time committment appears to be detracting from attention to daily operation . . ." (P-6 at 52; 5T90).

Mr. Flynn, the Bradley Board's consultant, noted that the basic skills program at the APHS involves a substantial number of students. Based on the information contained in the Asbury Board's applications for State aid for the 1987-88 and 1988-89 school years, Mr. Flynn estimated that more than 50 percent of the students in the APHS were in the basic skills program (C-10; C-11; 11T107, 138). Mr. Jannarone testified that Mr. Flynn's calculation was inaccurate, since counting the number of students in each of the basic skills courses could result in counting a single student three times (39T150-51). Ms. Abernethy stated that approximately 25-30 percent of the students at the APHS are in one or more basic skills courses (28T114). I FIND that Ms. Abernethy's estimate to be more credible as to the number of students in the basic skills courses.

Mr. Flynn noted that a number of the criticisms of the Asbury District's basic skills program contained in the 1980 report (C-8) had not been addressed before the Level III monitoring review. Although Mr. Flynn recognized that the office of the county superintendent of schools has been generally complimentary of the progress of the Asbury District in implementing its improvement plan, it was his opinion that the accomplishments were "paper gains" and that there has been little improvement to the educational program at the APHS or to remedy the problems identified in the Level III report (C-13; C-20; C-21; 13T15-16).

Mr. Flynn did not visit the APHS, and his reports regarding the educational program at the APHS were based solely on his review of the various reports, plans and correspondence relating to the monitoring of the Asbury District.

Both Mr. Jannarone and Ms. Abernethy disagreed with Mr. Flynn conclusion that there has been no actual improvements at the APHS. In addition, Mr. McOmber argued that Mr. Flynn's conclusions should be given little weight in view of his lack of high-school experience and the number of corrections he had to make to his reports.

Also, the Asbury Board argued that the Level III designation is irrelevant in this case because of the alleged incorrect and misleading statements in the Level III report, and also because it is over two and one-half years old and does not reflect the current status of the educational program and activities in the APHS.

D - MANASQUAN HIGH SCHOOL

Since the early 1930s, the Belmar Board has been sending some of its students to the MHS. As of September 30, 1987, 94 Belmar students attended the MHS.

At the hearing, Carol M. Morris, the Manasquan Superintendent of Education, stated that the Manasquan Board has agreed to accept all of Belmar's high school students (P-12) and that the MHS has the space capacity for the additional students (P-19; P-20; P-21). Ms. Morris noted that the acceptance of the additional Belmar students will improve the racial balance at the MHS, which now has a 3.5 percent minority student population (2T14-15, 39; 32T196). It was noted at the hearing that the tuition charged by the Manasquan Board is lower than that of the Asbury Board (P-6).

Ms. Morris stated that there is good articulation between Belmar and Manasquan. The boards of education keep in touch with each other and meet once a year. Ms. Morris meets with the Belmar Board once a year and there are joint meetings of the Belmar and Manasquan teachers. Additionally, the students from both communities participate together in certain educational and athletic activities.

When Belmar had a "free choice" policy regarding high school selection, a substantial number of students selected the MHS over the APHS, and Dr. Richens stated that this preference has existed since the 1940s, which is before the composition of the APHS student population changed from a white majority to a black majority. Dr. Richens stressed that the current racial composition of the APHS is not a basis for Belmar's preference for the MHS.

During the hearing, the Belmar Board showed that there is an overwhelming community preference for the MHS as well as parental resistance to follow assignments to the APHS. Douglas A. Deicke and Grace L. Roper (members of the Belmar Board) (3T102; 3T171), Maria G. Hernandez (the mayor of Belmar) (3T154) and four parents from Belmar (9AT94; 9AT114; 9BT1; 10T154) testified at the hearing regarding this preference. The overwhelming preference for the MHS was also shown by the Belmar community survey taken by Dr. Lawrence Kaplan of University Consultants on Education, Inc. (P-8).

The most visible indication of this preference is that a substantial number of students assigned to the APHS do not attend that school, while a high percentage of the students assigned to the MHS do attend that school (P-27).

During his testimony, Dr. Richens indicated that there were a number of reasons why the Belmar parents prefer the MHS. Two of the reasons given for this preference, namely, the safety of students and the failure to achieve certification at the Level III monitoring, have already been discussed. The other basis given for the preference is the perception that the MHS has a preferable educational program. The Manasquan District was certified in 1985 at its Level I monitoring (2T16; P-6). At the request of the Belmar Board, two experts, Dr. Ramsay and Dr. Savitt, compared the educational programs offered by the APHS and the MHS.

Although Dr. Ramsay did not find any significant differences in the educational programs of the schools, he concluded that the MHS program was preferable for the Belmar students since they did better and were more motivated at the MHS, and since the students felt safer and participated more extensively in extracurricular activities at the MHS. Also, Dr. Ramsay stated that there is a closer community tie between Belmar and Manasquan, and the Manasquan Board has established a better relationship with the Belmar Board and the Belmar community.

Mr. McOmber, on behalf of the Asbury Board, was critical of Dr. Ramsay's conclusions on the basis that Dr. Ramsay has had very little high school experience. He argued that Dr. Ramsay's report reflects the Belmar Board's positions rather than his independent conclusions even though Dr. Ramsay stated that the conclusions in his report were his own (8T49).

In his report, Dr. Savitt concluded that the MHS "represents a more compatible secondary school experience for children coming from the type of educational program provided at Belmar Elementary school" (P-6 at 54). Dr. Savitt stated that the classes in the APHS have relatively sterile atmospheres and that the overriding concern about discipline at the APHS can restrain and frustrate self-motivated and creative students (P-6 at 30). In addition to his study, Dr. Savitt conducted a survey of Belmar students who were attending the MHS and APHS. The MHS students rated their school very highly in all categories, while the APHS students gave mixed ratings to their school (P-6 at 40). Also, Dr. Savitt surveyed parents of students assigned to the APHS and

concluded, based on the responses, that the parents who are not sending their children to the APHS have a "negative perception" of the APHS as to the "quality of school program and school climate" (P-6 at 46).

Mr. McOmber conducted an extensive cross-examination of Dr. Savitt as to the method used for his study and the objectivity of his conclusions. Additionally, Mr. McOmber pointed out that many of the observations in a later report prepared by Dr. Savitt about another school district are identical to those in the report prepared for this matter (24T87-94), and Mr. McOmber argued that it is not believable that Dr. Savitt would reach so many identical conclusions about two different school districts.

Dr. Richens acknowledged that, in part, the preference for the MHS was based on some misconceptions regarding the APHS; however, he indicated that he did not know how to correct these misconceptions. It appears clear from the testimony of both Dr. Richens and Mr. Jannarone that any misconceptions regarding the APHS are due, in part, to the current lack of adequate contacts between the Asbury Board and the APHS administrators and teachers and the Belmar Board members, teachers, students, parents and community. Apparently, there was a better relationship between the two communities in the past; however, the relationship has deteriorated and has become adversarial with the current effort to terminate the sending-receiving relationship (9CT26-33; 40T75-76; 40T160-63). Although Dr. Richens and Mr. Jannarone have a good personal working relationship, the interaction at the school board, school and community levels between Asbury Park and Belmar is now sporadic (9CT18-20), and meetings and functions now initiated by the Asbury Board are not well-attended by Belmar's school board members, parents or students (40T80, 162).

In comparison, Dr. Richens stated that at the instigation of the Manasquan Board, there is a good ongoing interaction between the Manasquan Board and the MHS administrators and teachers and the Belmar Board and Belmar's school board members, teachers, students, parents and community (9CT18-20).

E - NEPTUNE HIGH SCHOOLS

In the feasibility study that accompanied the Bradley Board's petition to terminate its sending-receiving relationship with the Asbury Board, Mr. Flynn concluded that it was in the "educational best interest" of the Bradley Beach students that the

relationship with the Asbury Board be terminated due to the deficiencies at the APHS noted in the Level III report (C-1 at 18).

Although the Bradley Board did not make any formal arrangements for the education of its high school students if the termination of its relationship with the Asbury Board is approved, Mr. Flynn prepared a report regarding the feasibility of using the Neptune schools.

Based on his study, Mr. Flynn projected that the Neptune schools have the capacity to accept all of the Bradley Beach students (C-16 at 3; C-25). He also noted that the Neptune District tuition is lower than that charged by the Asbury District (C-16 at 6).

Although Mr. Flynn did not conduct a comparison of the high school educational programs offered by the Neptune Board and the Asbury Board, he did note that the Neptune District was certified at the Level I monitoring (C-16; C-20).

In addition, Mr. Flynn stated that as of September 30, 1987, the racial composition of the Neptune District Schools was 51 percent black, 42.3 percent white and 6.7 percent other (C-16 at 3). The addition of the Bradley Beach students would change this composition to 49.4 percent black, 43.5 percent white and 7.1 percent other (C-16 at 4).

F - NEGATIVE IMPACT - RACIAL COMPOSITION

1 - BELMAR

The Belmar Board presented the testimony of four expert witnesses regarding the racial impact of its withdrawal from the APHS: Dr. Ramsay, Dr. Kaplan, Dr. William A.V. Clark and Dr. Armor.

Dr. Ramsay stated that the increase in the percentage of black students at the APHS that would result if the Belmar Board were allowed to terminate its relationship would be minimal and therefore, would not have any significant impact upon the racial composition of the APHS (P-10 at 28; 8T37-38; 9AT65). In support of his conclusion, Dr. Ramsay cited the testimony in another case of Dr. Nieda Thomas, the Director of the Office of Equal Educational Opportunity of the State Department of Education (P-10 at

28). In her testimony, Dr. Thomas stated: ". . . that a difference of approximately four percentage points might not be significant in forestalling such undesirable effects as white flight." Asbury Park Bd. of Ed. v. Bds. of Ed. of Belmar and Manasquan, 1979 S.L.D. 308, 311.

Also, based on the number of students involved, Dr. Kaplan concluded that the loss of the white Belmar students would make a minimal change in the racial composition of the APHS and would not have a significant adverse impact (6T155).

In his report, Dr. Clark stated that the increasing number of Belmar students who do not attend the APHS is due to concerns regarding the educational program. He stated that ". . . recent research from the Los Angeles School District shows that white losses are related more to issues of academic achievement in the receiving schools than to the percent minority per se. The achievement level of the minority school is a critical variable in the decision of white parents to send their children to predominantly minority schools (Rossell, 1988)" (P-36 at 2). Dr. Clark noted that the APHS has increasingly become a minority school in the past five years and that the percentage of white students has declined by almost 50 percent during that period (P-36 at 7). Since the APHS is now predominantly a minority school, Dr. Clark stated that the withdrawal of the Belmar students would have a statistically insignificant impact on it (P-36; 32T188, 194-95). Dr. Clark concluded that "while removing white students from a minority school could be considered at first sight to have a racial impact, in the case being analyzed here not only is this not correct (because the numbers are so small) but in fact allowing both the minority and the white students to attend the Manasquan School System would in fact increase the racial contact at Manasquan while having little impact on the Asbury Park High School" (P-36 at 9). He also concluded and that there is no reason to continue requiring the Belmar Board to send students to the APHS in view of the large number of white and minority students who make other arrangements in order to avoid going to the APHS (P-36 at 10).

In his report (P-40), Dr. Armor was critical of the reports regarding the racial impact that were prepared for the Asbury Board by Joseph T. Murray of the Metropolitan Center for Education Research, Development and Training (R-48; R-49). Dr. Armor concluded that there would be "no segregative effect" on the APHS if the Belmar students were withdrawn and that the APHS is now a racially segregated high school and would remain so with or without the Belmar students (P-40 at 3). Dr. Armor stated that ". . . there is no consensus among major experts on whether desegregated schools have any

significant effect on academic achievement of minority students" (P-40 at 4), and that the most positive effects of contact between the races are in the earliest primary grades (P-40 at 4).

Dr. Armor recognized that pre-1960s research tended to support the thesis that segregation harms black self-esteem; however, he stated that "more recent research either fails to confirm the thesis or presents a far more complex picture of the relationship between segregation and self-concept" (P-40 at 6) and that "there is much more consensus that desegregation per se has not affected black self-concept (P-40 at 6). Dr. Armor noted that Mr. Murray recognized that the Asbury Park students enjoyed high positive self-concept ratings, notwithstanding the fact that the APHS is identified as a predominantly minority school. It is Dr. Armor's position that school desegregation has not been shown to have significant impact on black self-esteem (P-40 at 7).

In addition, Dr. Armor disagreed with Mr. Murray's conclusion that the withdrawal of the small number of Belmar students would be viewed by the remaining APHS students as a rejection of the school (P-40 at 8-9). Dr. Armor concluded that ". . . a negative reaction of students or faculty to Belmar's withdrawal—even if true—would have little or no impact on academic achievement compared to the powerful socioeconomic and programmatic forces that shape student outcomes" (P-40 at 9). Based on the small number of Belmar students at the APHS, Dr. Armor stated that "[I] t is hard to imagine a behavioral model that on the one hand permits high self-esteem to develop in a highly segregated environment and at the same time creates a loss to that self-esteem by the withdrawal of 26 students (or 15 white students)" (P-40 at 10). Dr. Armour recognized that some students or faculty might consider the withdrawal to have a racial impact but stated that "it is hard to see a permanent negative effect on race relations from the loss of about 15 white students" (P-40 at 10).

In its presentation, the Asbury Board relied on the testimony of Mr. Murray and Asbury District administrators to support its position that the withdrawal of the white Belmar students would have a substantial negative impact on the racial composition of the APHS.

Mr. Murray stated that any reduction in the number of white students would be significant since it reduces the opportunity for interaction between students of different races (R-49 at 2-3; 25T103-06). Mr. Murray concluded that the removal of the white

Belmar students would have a substantial detrimental effect since it would lower the self-esteem of the black students in the APHS and thus affect their motivation and achievement (25T97-99).

During their testimony, Robert H. Mann, the APHS principal, Ms. Abernethy and Mr. Jannarone agreed with Mr. Murray. They felt that if the Belmar Board were allowed to terminate its relationship there would be a substantial negative racial impact, and that the remaining students would feel that the quality of education at the APHS was inferior and that it should only be relegated to the minority race (29T131-32; 40T62-63, 73; 42T91-92).

The Asbury Board disputed the conclusions of both Dr. Clark and Dr. Armor and argued that they have no familiarity with high schools, that their positions are inconsistent with the decisions in landmark desegregation cases, and that their testimony has not been persuasive in a number of cases. Mr. Fitzsimmons acknowledged that Dr. Clark and Dr. Armor have not always testified for winning parties; however, he noted that their expertise has been recognized in a number of cases.

2 - BRADLEY BEACH

In its presentation, the Bradley Board relied on the testimony of its expert witness, Mr. Flynn, who concluded that the withdrawal of the Bradley Beach students would not significantly affect the racial composition of the APHS (C-1 at 11; C-14 at 3).

After he prepared the feasibility study, Mr. Flynn obtained from the State Department of Education a draft proposal relating to acceptable percentages of deviation for desegregation plans (C-21). Applying the formula contained therein, Mr. Flynn concluded that if the removal of the Bradley Beach students were approved, the racial composition of the APHS would fall into the acceptable deviation, except that the white enrollment would be slightly (0.7 percent) out of the acceptable range of deviation (C-22; C-23).

The Asbury Board relied on the same witnesses as in its presentation regarding the withdrawal of the Belmar students. In general, these witnesses concluded that the withdrawal of the Bradley Beach students would have an even more significant negative impact, since more white students would be removed from the APHS.

Mr. Murray stated that the removal of the Bradley Beach students would have a "devastating effect" on the racial composition of the APHS (25T112). In his report, Mr. Murray stated: "The withdrawal of Bradley Beach students would result in a psychological blow to students and faculty alike who remain at Asbury Park High School. Students left behind would feel inferior, their self-esteem would be diminished. Faculty perception of those students would be equally diminished" (R-49 at 6, section (3)).

3 - BELMAR AND BRADLEY BEACH

If both school districts were allowed to terminate their respective sending-receiving relationships, the Asbury Board witnesses concluded that there would be an even greater substantial negative racial impact, because of the large number of white students who would be removed from the APHS.

G - NEGATIVE IMPACT - QUALITY OF EDUCATION

1 - BELMAR

If the Belmar Board is allowed to terminate its sending-receiving relationship, it is estimated that there will be an annual loss of 26 to 49 students,[9] or 16 to 24 students[10] over a four-year period. Assuming that these Belmar students are equally spread through the four grades of the APHS, there will be a loss of between four and 12 students per grade. According to Dr. Ramsay, the small reduction in student population will have only a minimal impact on the APHS's educational program (P-10 at 21).

The Asbury Board witnesses admitted that the withdrawal of the Belmar students would not necessitate any changes in the APHS educational program since there would be a sufficient number of students to justify all of the courses now offered (R-40 at 31). However, they stated that the withdrawal would not result in any savings at the APHS (R-43 at 15), and if the money lost from the Belmar tutition were not replaced, there would have to be program changes and an elimination of four staff positions (R-40

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9 Projection based on 44.3 percent of the Belmar students attending the APHS; prepared by Averbach and Associates (R-38 at 1).

10 Projection based on the actual number of Belmar students who attended the APHS in 1987; prepared by Averbach and Associates (R-38 at 1).

at 27-28). It is the Asbury Board's position that there would be a substantial negative impact on the quality of education at the APHS, and that any reduction in staff (RIF) would cause faculty anxieties, which would not only adversely affect the educational program at the APHS, but which would also adversely effect the implementation of the Level III improvement plan.

Further, it is the Asbury Board's position that if the Belmar Board were permitted to terminate its relationship, there would be a substantial negative symbolic educational impact on the APHS's students and staff. As already stated, Mr. Murray, a consultant for the Asbury Board, testified that the reduction in the number of white students in the APHS would diminish the learning experience realized by having students of different races in school together (25T103-06) Mr. Murray stated that the remaining students at the APHS would perceive themselves and their school as inferior, and that this would lower their self-concept and self-esteem and negatively affect their educational achievements. In addition, Mr. Corcoran, another consultant for the Asbury Board, stated that the withdrawal would be viewed by the administrators and teachers as a public repudiation of the educational program, that it would discourage them and affect their morale, and that it would lower teachers' expectations, which in turn would lower the actual achievement of the students (25T106-08; R-48; R-49). Mr. Corcoran stated that this negative effect on staff would be greater if the withdrawal resulted in any RIFs.

2 - BRADLEY BEACH

If the Bradley Board is allowed to terminate its sending-receiving relationship, it is estimated that there will be a loss of more than 70 students over a four-year period (C-1 at 12; R-38). Mr. Flynn, on behalf of the Bradley Board, concluded that the termination would have no effect on the educational program because the decrease in the number of Bradley Beach students over the four-year period would be offset by the increased enrollment from Asbury Park (C-1 at 12). As stated, I concur with Dr. Averbach, who disagrees with Mr. Flynn's projection regarding the number of Asbury Park students (R-37).

Based on the decrease in students, it is the Asbury Board's position that there would have to be a substantial reduction in the number of elective courses at the APHS in the areas of foreign language, business, industrial arts and fine arts and an elimination of five staff positions (R-40 at 32-33, 45). Even though the withdrawal would result in some

savings (R-44 at 1), if the net money lost from the Bradley Beach tuition were not replaced, there would have to be additional program changes and an additional elimination of nine staff positions (R-40 at 32-36).

Additionally, it is the Asbury Board's position that the termination of the relationship with the Bradley Board would have the same type of a substantial negative symbolic educational impact on the APHS's students and staff as that previously described regarding the withdrawal of the Belmar students. This impact, as described by Mr. Murray and Mr. Corcoran, would be greater if the Bradley Beach students were withdrawn because of the large number of students involved.

3 - BELMAR AND BRADLEY BEACH

The Asbury Board witnesses testified that the program changes and RIFs that would result from the withdrawal of the Bradley Beach students would be even greater if both school districts were allowed to terminate their relationships. Based on the number of students involved, the Asbury Board's witnesses concluded that there would be an even greater substantial negative impact on the educational program, as well as a substantial negative symbolic educational impact, if both school districts were allowed to withdraw their students.

H - NEGATIVE IMPACT - FINANCIAL

1 - BELMAR

For the purposes of this decision, the Asbury Board and the Belmar Board agreed to use the financial impact calculations prepared by Dr. Margaret E. Goertz, the Asbury Board's consultant. Dr. Goertz made the following projections (R-43, Tables 8A and 8B):

Scenario #1: Projections Using Assignment Ratios[11]

Year	Estimated Tuition Revenues with S/R Relationship Maintained	Estimated Tuition Revenues with S/R Relationship Severed	Estimated Loss to Asbury Park School District
1988-89	$341,064	$121,068	$219,996
1989-90	323,561	84,681	238,880
1990-91	309,128	65,882	243,246
1991-92	351,274	0	351,274

Scenario #2: Projections Using Enrollment Ratios[12]

Year	Estimated Tuition Revenues with S/R Relationship Maintained	Estimated Tuition Revenues with S/R Relationship Severed	Estimated Loss to Asbury Park School District
1988-89	$167,076	$121,068	$ 46,008
1989-90	158,048	84,681	73,367
1990-91	154,564	65,882	88,682
1991-92	166,930	0	166,930

11 Student projections based on 44.3 percent of Belmar's students attending the APHS; prepared by Averbach and Associates (R-38 at 1).

12 Student projections based on the actual number of Belmar students who attended the APHS in 1987; prepared by Averbach and Associates (R-38 at 1).

According to Dr. Goertz, there would be no savings to the Asbury District from the withdrawal of the Belmar students, and so the entire amount of the tuition loss would be a financial loss to the district. The current expense portion of the Asbury District budget for the 1987-88 school year is $18,819,000. If all of the Belmar students had been removed in that school year, the loss in revenue would have been less than two percent of the total (33T73-75). It is projected that the Asbury District's budget will increase each year by eight percent. Therefore, based on Dr. Goertz's projections, in the 1991-92 school year, if all of the Belmar students were out of the APHS, the loss of tuition would represent a reduction equal to approximately either 0.7 percent or 1.5 percent of the current expense portion of the budget (23T75-76, 79).

In his report for the Belmar Board, Marshall W. Errickson of Campione Associates stated that the financial loss that would result from the withdrawal of the Belmar students would be mitigated by the increase in tax money from Asbury Park's revitalization program (P-17 at 1-2), the infusion of additional State and Federal monies (P-17 at 4), the possible increase of tuition rates (P-17 at 6, 20), and savings resulting from the reduction in the number of students (P-17 at 20). Therefore, Mr. Errickson concluded that only a portion of the reduction, if any, would have to be raised by additional tax money.

If it were decided to increase the equalized school tax rate to make up for the entire amount of the tuition losses resulting from the phased withdrawal of the Belmar students, Dr. Goertz estimated that the increase would be:

Year	Scenario #1[13]	Scenario #2[14]
1988-89	$ .07	$ .02
1989-90	.03	.01
1990-91	.02	.01
1991-92	.04	.02

[Based on figures in R-43, Tables 9A and 9B]

The Belmar Board's consultants, Dr. Ramsay and Mr. Errickson, estimated the financial impact based on student projections using the actual number of Belmar students who have been going to the APHS. Dr. Ramsay's estimates were lower and Mr. Errickson's

13 Student projections based on 44.3 percent of Belmar's students attending the APHS; prepared by Averbach and Associates (R-38 at 1).

14 Student projections based on the actual number of Belmar stduents who attended the APHS in 1987; prepared by Averbach and Associates (R-38 at 1).

estimates were higher than Dr. Goertz's estimates. Both Dr. Ramsay and Mr. Errickson concluded that there would not be a substantial negative financial impact if the Belmar students were withdrawn (P-10 at 29; P-17 at 6). In her report, Dr. Goertz stated that the loss of revenues from the withdrawal of the Belmar students would have a negative fiscal impact, but she did not characterize it as a substantial negative impact (R-43 at 23).

2 - BRADLEY BEACH

As to the financial impact of the withdrawal of the Bradley students, Dr. Goertz made the following projections (R-44, Tables 8A and 8B):

Scenario #1: Projections Using Assignment Ratios[15]

Year	Estimated Tuition Revenues with S/R Relationship Maintained	Estimated Tuition Revenues with S/R Relationship Severed	Estimated Loss to Asbury Park School District
1988-89	$463,536	$383,940	$ 79,596
1989-90	384,797	262,508	123,289
1990-91	465,332	165,398	299,934
1991-92	637,658	0	637,658

Scenario #2: Projections Using Enrollment Ratios[16]

Year	Estimated Tuition Revenues with S/R Relationship Maintained	Estimated Tuition Revenues with S/R Relationship Severed	Estimated Loss to Asbury Park School District
1988-89	$405,864	$383,940	$ 21,924
1989-90	346,189	262,508	84,681
1990-91	431,698	165,398	266,300
1991-92	565,008	0	565,008

15 Student projections based on 93 percent of the Bradley students attending the APHS; prepared by Averbach and Associates (R-38 at 1-2).

16 Projections based on the actual number of Bradley students who attended the APHS in 1987; prepared by Averbach and Associates (R-38 at 1-2).

Dr. Goertz recognized that there would be savings to the Asbury District from the withdrawal of the Bradley Beach students. Her estimates of these savings are:

1988-89	$ 40,249
1989-90	51,928
1990-91	102,248
1991-92	110,428

[Based on figures in R-44, Tables 9A and 9B]

The current expense portion of the Asbury District budget for the 1987-88 school year is $18,819,000. If all of the Bradley Beach students had been removed in that school year, the loss in revenue would have been about 3.5 percent of the total. It is projected that the Asbury District's budget will increase each year by eight percent. Therefore, based on Dr. Goertz's projections, in the 1991-92 school year, if all of the Bradley Beach students were out of the APHS, the loss of tuition would represent an approximate 2.5 percent reduction in the current expense portion of the budget.

If it were decided to increase the equalized school tax rate in order to make up for the entire amount of the tuition loss, less the savings resulting from the phased withdrawal of the Bradley Beach students, Dr. Goertz estimated that the increase would be:

Year	Scenario #1[17]	Scenario #2[18]
1988-89	$ .01	$ (.01)
1989-90	.01	.01
1990-91	.04	.04
1991-92	.09	.08

[Based on figures in R-44, Tables 9A and 9B]

Based on the statistics in his report as revised (C-1; C-24), Mr. Flynn projected the following losses in revenue from a staggered withdrawal of the Bradley Beach students:

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17 Student projections based on 93 percent of the Bradley students attending the APHS; prepared by Averbach and Associates (R-38 at 1-2).

18 Projections based on the actual number of Bradley students who attended the APHS in 1987; prepared by Averbach and Associates (R-38 at 1-2).

School Year	Students in APHS	Students Phased-Out	Tuition[19] Rate	Decrease in Tuition Payments
1989-90	35	15	5974	$ 89,610
1990-91	18	37	6252	231,324
1991-92	8	55	6565	361,075
1992-93	0	70	6893	482,510

In comparison, Mr. Flynn's financial projections are higher than those of Dr. Goertz. Since Dr. Goertz was in a better position to judge the financial loss to the Asbury District, I FIND her estimates to be more reliable.

Also on behalf of the Bradley Board, Catherine M. Pluchino of Curchin and Company reviewed the financial impact of the withdrawal of the Bradley Beach students.[20] Ms. Pluchino concluded that the withdrawal of the Bradley Beach students would result in a savings of approximately $125,000, which would mitigate the impact of the loss of tuition (C-2; C-27). Also, Ms. Pluchino stated that the Asbury Board could use existing surplus money to help make up for the loss of revenue (C-2; C-27).

Mr. Flynn concluded that there would be no substantial financial impact on the Asbury District, since he felt that there would be an increase in taxable values in Asbury Park due to the urban renewal project and other construction as well as possible increases in State and Federal monies. Mr. Flynn did recognize that there could be a tax-rate increase, but he estimated that it would not be substantial (C-1).

As to the withdrawal of the Bradley Beach students, Dr. Goertz concluded that it would cause a substantial negative financial impact (R-44 at 23).

3 - BELMAR AND BRADLEY BEACH

In brief, it is the Asbury Board's position that the estimated loss of tuition that would result from the withdrawal of the Belmar students and the Bradley Beach students, as heretofore described, added together, would result in a substantial negative financial impact.

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19 Mr. Flynn estimated that there will be an annual increase in the tuition rate of five percent per year.

20 Ms. Pluchino's reports (C-2; C-27) only considered the initial financial impact of the withdrawal of the Bradley Beach students; they did not consider the effect of the reduction of tuition from the loss of the Bradley Beach students on future school budgets or on the school tax rate (16T10-11).

V - CONCLUSIONS OF LAW
A - THE BELMAR BOARD POSITION

In his brief, Mr. Fitzsimmons, on behalf of the Belmar Board, recognized that N.J.S.A. 18A:38-13, as amended, no longer requires the petitioning school district to show "good and sufficient reason" for the termination of a sending-receiving relationship. However, he represented that the Belmar Board has clearly established that it has good and sufficient educational reasons to support its request to send all of its students to the MHS, based on the fact that the Asbury District has been unable to qualify for State certification within the six years it has been subject to the State monitoring procedure.

In addition, Mr. Fitzsimmons argued that there is a strong community preference for the MHS, based on the fact that the MHS's educational program is more compatible to Belmar's educational goals and the fact that there are closer ties between the Manasquan and Belmar school personnel, parents, students and community. Mr. Fitzsimmons argued that this community preference is a factor to be considered by the Commissioner, since the statute requires the Commissioner to make an "equitable determination based upon consideration of all the circumstances" (N.J.S.A. 18A:38-13). Although community preference is not a controlling factor, Mr. Fitzsimmons argued that it is a significant factor, since a sending district's prime educational decision is to determine where its students should be educated (Cranbury, State Bd. decision at 10).

As to statutory requirement of no "substantial negative impacts," Mr. Fitzsimmons argued that:

> Belmar has clearly and convincingly established, via the testimony, studies and exhibits of a host of recognized experts that the impact of its withdrawal will not nearly be of sufficient magnitude to deprive it of its fundamental right to determine where its students will be educated. [Nov. 18, 1988 brief at 83]

Mr. Fitzsimmons argued that a one-percent reduction in the number of white students at the APHS would not have a substantial negative racial impact on the school and that the Asbury Board has not presented any persuasive authority to support its position that there would be such a substantial negative racial impact. Additionally, Mr. Fitzsimmons noted that the withdrawal of the Belmar students from the APHS is within the acceptable percentage for deviation in desegregation plans that is contained in the draft proposal prepared by the State Department of Education (C-21).

As to the quality of education at the APHS, Mr. Fitzsimmons argued that there was no persuasive proof of any substantial negative impact. He pointed out that the Asbury Board's consultant, Mr. Corcoran, stated that the withdrawal of the Belmar students would have "no significant direct effects" on the educational program at the APHS (R-40 at 31). Further, Mr. Fitzsimmons argued that Mr. Corcoran's conclusion that the withdrawal would pose a threat to the ongoing effects to revitalize the APHS does not constitute a substantial negative impact.

Mr. Fitzsimmons also argued that, pursuant to N.J.S.A. 18A:38-13, the "negative impacts" must be measured in quantitative terms rather than abstract terms such as "symbolic losses," and that the Commissioner in the Englewood Cliffs and Absecon cases incorrectly concluded that such abstract and symbolic concepts could constitute a substantial negative impact. Even if the statute is construed to recognize symbolic negative impacts, Mr. Fitzsimmons argued that Dr. Armor's testimony is persuasive and that the withdrawal of the Belmar students would not have any negative impacts on the remaining students' morale or self-esteem.

As to the financial impact of the withdrawal of the Belmar students, Mr. Fitzsimmons argued that even the Asbury Board's consultant, Dr. Goertz, classified the financial impact as a "negative impact" and not as a "substantial negative impact" (R-43 at 23). Mr. Fitzsimmons noted that in the Cranbury case, the State Board stated:

> The statutory scheme was not intended to create a revenue source for districts, to subsidize the expansion of facilities and programs for the benefit of the receiving district, or to protect the receiving district's citizens from tax increases. Thus, we conclude that where educationally based reasons for withdrawal are substantiated, approval for withdrawal will be granted unless the receiving district can show that withdrawal will result in negative impact beyond the fact of the loss of tuition. [Cranbury, State Bd. decision at 14]

B - THE BRADLEY BOARD POSITION

Both in the presentation of the case and in his briefs, Mr. Boglioli stressed the fact that the Asbury District has not yet been certified. This fact is given as the reason why there is a reluctance on the part of Bradley Beach parents to send their children to the APHS, and it is also the reason for the request to terminate the sending-receiving relationship with the Asbury Board. Mr. Boglioli argued that the lack of certification constitutes a good educational reason for requesting the termination of the relationship

with the Asbury Board, and that this case is factually distinguishable from the Englewood Cliffs case. In Englewood Cliffs, both the current and proposed receiving districts were certified and had adequate educational programs.

Mr. Boglioli stated that many of the problems regarding the basic skills program at the APHS noted by the Level III monitoring team existed as far back as 1980, as shown by the basic skills program review conducted in that year (C-8). He also pointed out that a substantial number of students at the APHS are in the basic skills program, and that some of the basic skills deficiencies noted in the Level III report have an impact on all of the students in the APHS.

Mr. Boglioli concurred with the Belmar Board's argument that a sending district's prime educational decision is to determine where its students are to be educated, and he noted that the State Board has recognized that the policy in favor of stability in sending-receiving relationships does not create a statutory right, on behalf of the receiving district to continue in that capacity indefinitely or in perpetuity (Cranbury, State Bd. decision at 9).

Although Mr. Boglioli recognized that the withdrawal of the Bradley Beach students will have an impact on both the educational program at the APHS and the revenues of the Asbury District, he argued that these impacts are not substantial and that it is in the control of the Asbury Board to decide what educational cuts have to be made and what lost revenue has to be replaced by increases in the school taxes and/or higher tuition rates. Mr. Boglioli argued that in the Cranbury case, the State Board clearly recognized that a termination of a sending-receiving relationship should not be denied just because there will be a tuition loss that may require the receiving district to increase its school taxes. In that case, the State Board stated that the loss of tuition money should not prevent a termination unless there was a showing that the "loss of tuition revenue would impair the receiving district's ability to provide a thorough and efficient education to its students or to meet its educational goals and objectives" (Cranbury, State Bd. decision at 19-20).

As to the racial composition of the APHS, Mr. Boglioli argued that the withdrawal of the Bradley Beach students would not cause a substantial negative impact and that the effects of the withdrawal are almost within the proposed standard for deviation in desegregation plans (C-21). Mr. Boglioli argued that the Asbury Board's position as expressed by Mr. Murray is unrealistic since it would mean that even the loss

of one white student would be unacceptable. Mr. Boglioli stated:

> If the present statute were to be read that the mere ratio of black to white in a given school district can defeat an application, then Bradley Beach would be totally deprived of the privileges to be accorded under the Revised Statute. Furthermore, such a requirement would obviously impede the ability of potential receiving districts with available space from entering into contracts with sending districts if the result thereof will be a chain that can never be broken regardless of how poor the educational qualities of the institution might become. This does not accord with either the Statute or the State Board decision in the Cranbury case. It is obvious that with the development of the State of New Jersey, those political subdivisions which do not presently have high schools, especially in urban areas, are not likely to get high schools and that, therefore, Boards of Education in those districts should have some say as to where their students are educated. Additionally, in this case, no one can claim any "white flight" by Bradley Beach since it is seeking to send its students to Neptune High School which also has a high black student population. (See C-16 in evidence 3/8/88) It is submitted that the tenor of the present Statute is to require very little proof on the district seeking to sever its relationship. [Nov. 28, 1988 brief at 12-13]

As to the racial impact issue, both Mr. Fitzsimmons and Mr. Boglioli challenged the position of the Asbury Board on the basis of the alleged racial disparity in student assignments to the Asbury elementary schools (C-30A). I CONCLUDE that the question of whether or not there is an existing racial disparity on the elementary school level is not relevant to the issue before me, and that it has no bearing on the credibility of the Asbury Board's witnesses regarding the racial impact issue.

C - THE ASBURY BOARD POSITION

It is the Asbury Board's position that the requests of both the Belmar Board and the Bradley Board must be denied, since either (and both) would have substantial negative impacts on the quality of education, the finances and the racial composition of the APHS.

Mr. McOmber argued that the Commissioner's decisions in Englewood Cliffs and Absecon, which were decided pursuant to the revised provisions of N.J.S.A. 18A:38-13, have established that if a high school is racially imbalanced, the withdrawal of even a few white students constitutes a substantial negative impact. Mr. McOmber argued that the Commissioner's decisions in these cases are well-reasoned and persuasive, and that they are controlling since the facts in those cases are similar to the facts in this matter.

In order to show the factual similarity as to the racial issue, Mr. McOmber's brief contains the following chart (at 59):

Racial Composition of Receiving High Schools Without Severance

	Total # of Students	% Minority Students	% White Students
Asbury Park H.S.	741	83	17
Englewood H.S.	799	88	12
Pleasantville H.S.	700	89	11

Racial Composition of Receiving High Schools if Severance is Granted

	Total # of Students	% Minority Students	% White Students
Asbury Park H.S. (w/o Belmar students)	717	84	16
Asbury Park H.S. (w/o Bradley Beach students)	673	89	11
Englewood H.S.	778	89*	11*
Pleasantville H.S.	670-680*	92*	8*

*approximately

Decrease in Percentage of White Students if Severance is Granted

Asbury Park H.S. (w/o Belmar students)	8.73%
Asbury Park H.S. (w/o Bradley Beach students)	40.4%
Englewood H.S.	16%
Pleasantville H.S.	33% - 50%

Further, Mr. McOmber argued that the decisions in both Englewood Cliffs and Absecon are binding in this matter since they follow and reaffirm the strong public policy, case law, statutes and regulations of this State against racial imbalance in the public schools. Also, he argued that the importance of the racial issue in the consideration of a request to terminate a sending-receiving relationship, was recognized by the Commissioner in his Englewood Cliffs decision. The Commissioner stated:

> However, what is key in this matter is that even when positive educational benefits may accrue from granting withdrawal in a sending-receiving relationship, those benefits can be outweighed by serious and compelling reasons such as racial imbalance for that issue is of utmost importance to the State. Branchburg, supra
>
> It is clearly established in law that the Commissioner has a heavy responsibility to vigorously and aggressively combat threats to racial balance in our schools. The message of the New Jersey Supreme Court is quite evident in Booker, supra, that the Commissioner must not be misled by unduly restrictive views as to the scope of his own functions in reviewing and supervising local board of education actions and as to his own responsibility in the correction of substantial racial imbalance which may be educationally harmful even though a school has not reached the point of being all or nearly all black (at 181). That he has responsibility to combat "flight" from a racially imbalanced school is likewise clear in that decision when the Supreme Court states that "trends towards withdrawal from the school community by members of the majority must be viewed and combatted" (at 180). It is likewise clear from the Booker decision, that even when segregation is not de jure but de facto, action must be taken to safeguard New Jersey's strong State policy against segregation/imbalance in the public schools. That DMHS has a serious racial imbalance problem is obvious from the record with white enrollment being barely 12% in 1987-88. Thus, any local board action jeopardizing a racial balance which is already precarious must be scrupulously examined by the Commissioner in order that the State's interests are appropriately guarded. [at 99-100]

In both the Englewood Cliffs and Absecon cases, the Commissioner stated that if the receiving school district has a racial imbalance, even the withdrawal of a small number of white students would have a substantial negative impact. See also, Asbury Park Bd. of Ed. v. Bds. of Ed. of Shore Regional High School District, Deal and Interlaken, 1971 S.L.D. 221, aff'd, State Bd. of Ed., 1971 S.L.D. 228; Branchburg Bd. of Ed. v. Somerville Bd. of Ed., 1977 S.L.D. 662, aff'd, State Bd. of Ed., 1978 S.L.D. 993, aff'd, N.J. App. Div., 173 N.J. Super. 268 (App. Div. 1980).

Also, Mr. McOmber noted that in both the Englewood Cliffs and Absecon cases, the Commissioner stated that in reviewing the racial impact issue, it is necessary to look at both the number of white students attending the receiving district and the total number of white students in the sending district. Specifically, the Commissioner stated:

> . . . the Commissioner is at this juncture compelled to put to rest once and for all the belief that because painfully few white students remain in a school due to a pattern of withdrawal by members of the majority of the school community (Booker, supra), there can be no significant negative impact on racial composition. Thus, not just the few remaining will be considered but the pool of eligible students as well who have withdrawn for whatever reason be it to private school, parochial school or, in this particular case, to a public high school in another community as well. If the State were to limit its consideration to 3 students as the Cliffs Board would have us do, it would be for all intents and purposes rewarding, not combating the withdrawal that has occurred. Booker, supra If such were to be allowed, the sending district would merely have to wait until enrollment is so devastatingly low that it could then argue that because so few students attend the receiving district, withdrawal can't possibly make a difference. This cannot be permitted . . . For the Commissioner at this juncture to grant severance to the Englewood-Englewood Cliffs sending-receiving relationship as a matter of public policy would place an imprimatur of acceptance by the State to this flight. [Englewood Cliffs at 103-04]

Also, the Commisisoner has stated that:

> Moreover, the Commissioner finds the true issue in this matter is not what number of whites actually attend the public high school, but rather is what number are eligible to attend . . . Thus, if white residents of Absecon choose to send their children to private schools rather than to the school which is legally designated as the receiving district, their choice of non-attendance should not be expected to result in a state-endorsed policy which would result in total or almost total racial isolation of the school officially designated as the receiving district. Permission to terminate the sending-receiving relationship between these two communities, then, would be tantamount to state action in furtherance of racial segregation, which is prohibited by the Fourteenth Amendment of the Federal Constitution, the New Jersey Constitution . . . [Absecon at 39]

Based on these cases, Mr. McOmber argued that there is no question that the termination of the sending-receiving relationship with either or both the Belmar Board and the Bradley Board would have a substantive negative racial impact.

Also, Mr. McOmber argued that the proposal relating to acceptable deviations in desegregation plans (C-21), which was used by the Belmar Board and the Bradley Board in their arguments as to the racial impact issue, has no legal validity since the proposal has not been officially adopted by the State Department of Education in accordance with N.J.S.A. 52:14B-4(d). Further, Mr. McOmber argued that even if this proposal had been adopted, there is no indication that the standards contained therein are applicable to the termination of sending-receiving relationships. I agree with Mr. McOmber, and I **CONCLUDE** that the proposal is not relevant in this matter since it has not been formally adopted by the State Department of Education.

In addition, Mr. McOmber argued that because of the substantial negative racial impact, the withdrawal of either or both school districts would constitute de jure segregation and would be in violation of the Federal and State constitutions. As to this argument, I **CONCLUDE** that this matter will be decided on other grounds without the need to consider the constitutional issue.

As to the quality of education, Mr. McOmber argued that the termination by either the Belmar Board or the Bradley Board or both would have a substantial negative material and symbolic impact on the quality of education in the APHS. Mr. McOmber noted that the administrative law judge and the Commissioner in the Englewood Cliffs case recognized that "symbolic impacts" could be the basis for a determination that there was a substantial negative impact on the quality of education. In his initial decision, Judge Ken R. Springer stated that the premise of a symbolic impact covers both the psychological and emotional effects of a termination on the remaining students and staff, and he gave the following description of a symbolic impact:

> These losses are concrete, and demonstrable rather than speculative. They are detectable by reputable academic studies, such as the qualitative research performed by Dr. Fine, and are verifiable by the informed opinion of experienced school administrators, like Dr. Fleischer and Mr. Segall. Moreover, they are "definite," in the dictionary sense that they are "marked by the absence of the ambiguous, obscure, doubtful or tentative." Webster's Unabridged New International Dictionary, 592 (3rd ed. 1976). Similarly, they are "tangible," in the sense that they are "able to be perceived as materially existent" and are "substantially real." Webster's at 2337. (But see also, Brown, 347 U.S. at 493, holding that even "intangible" losses are relevant and must be considered when determining the adverse effects of segregation in

the public schools.) [Initial Decision at 70, OAL DKT. EDU 1086-86 (April 18, 1988)]

Mr. McOmber argued that the substantive symbolic negative impacts if either or both the Belmar or Bradley Beach students were removed include:

(1) the perception that the APHS program is not good enough for white students but is acceptable for minority students;

(2) the perception that the remaining students at the APHS are losers and that the APHS is an inferior school;

(3) the perception of isolation and inferiority which affects self-confidence and achievement;

(4) the deprivation of the educational benefits realized from the interaction between students of different races in school;

(5) the perception that the APHS was publicly reprimanded and that there is something wrong with its educational program;

(6) the staff perception that the remaining students at the APHS are inferior which will lower staff expectations of the students and, in turn, will lower student achievement; and

(7) the negative effect on staff morale which will affect teaching performance as well as the efforts to improve the educational program at the APHS.

Mr. McOmber argued that the removal of the Belmar students would have a significant negative material impact on the quality of education at the APHS, since some teaching positions would have to be eliminated. He argued that this negative impact would be even more substantial if the Bradley Beach students were withdrawn, since this would result in significant reductions in staff and courses, and that it would have an even greater substantial impact if both school districts were allowed to withdraw their students.

As to the financial impact, Mr. McOmber argued that the withdrawal of the Belmar students would result in a substantial loss of tuition without any measurable savings, and that it would require the Asbury Board to request an increase in the school tax rate if it wished to avoid cuts in the educational program and RIFs. Mr. McOmber argued that the school taxes in Asbury Park are already high and a burden on the residents, and that the school tax rate is already higher than the school tax rates in the area. If the Bradley Beach students were withdrawn, Mr. McOmber argued that the negative financial impact would be greater because of the large number of students involved, and that the impact would be even more substantial if both districts were allowed to terminate their relationships.

Lastly, Mr. McOmber argued that neither the Level III status of the Asbury District nor the preference of the residents of Belmar and Bradley Beach should be given any weight in deciding whether or not to terminate the sending-receiving relationships. Mr. McOmber argued that neither the language in N.J.S.A. 18A:38-13 nor the legislative history of the amendment to this statute indicates that the Legislature ever intended that the Level III status of a school district would be an acceptable reason for the termination of a sending-receiving relationship. Mr. McOmber noted that the Level III status of the Pleasantville School District was not considered by the Commissioner in the Absecon decision. Also, Mr. McOmber argued that the Level III status should be given little or no weight because the Asbury Board has made positive changes and improvements since the Level III monitoring team made its evaluation in 1986.

As to the school preference of the residents of Belmar and Bradley Beach, Mr. McOmber argued that such a preference should not be a determining factor in this matter. The State Board has stated that:

> We emphasize that where a district seeks to terminate a sending-receiving relationship, community preference does not outweigh racial, financial or educational objections to severing the relationship. [Brielle Bd. of Ed. v. Manasquan Bd. of Ed., State Bd. decision on remand, March 5, 1986, at 5]

A similar finding was made by the State Board in the Branchburg case.

Although both the Brielle and Branchburg cases were decided before the statute was amended, Mr. McOmber argued that these decisions are still binding and that they are consistent with the intent of the amendment to N.J.S.A. 18A:38-13. See, the State Board decision in Cranbury.

In addition, Mr. McOmber argued that the community preference alleged by both the Belmar Board and the Bradley Board does not have a legitimate educational basis but is due to the resistance of white parents to sending their children to a primarily minority school.

D - CONCLUSIONS

Having reviewed the facts and arguments of the parties, I **CONCLUDE** that the Belmar Board has established that it has a good educational reason for its request to terminate its sending-receiving relationship with the Asbury Board. I am persuaded that the educational program at the MHS is more compatible with the educational goals of the Belmar Board and that there is a legitimate community preference for the MHS. However, I **CONCLUDE** that the request of the Belmar Board must be denied because of the substantive negative educational and racial impacts that would result if the termination were approved.

Although the removal of the Belmar students is statistically insignificant when compared to the total number of students at the APHS, it would have a substantial impact on the racial composition of the APHS because the Belmar students represent a substantial number of the remaining white students at the school. Further, I recognize that the number of students involved would be larger if the required statutory percentage of all Belmar students actually attended the APHS. The fact that the Belmar students would help improve the racial composition of the MHS does not mitigate the substantial negative impact on the APHS and therefore is not relevant to this issue.

I accept the Asbury Board's argument as to the substantial negative symbolic impact that the removal of the Belmar students would have on the quality of education at the APHS. Both the students and staff at the APHS have had to cope with a substantial number of negative comments regarding the educational program as a result of the Level I, II and III monitoring. I have been convinced by the testimony of the Asbury Park administrators and consultants that there has been an improvement in the educational program, and I accept their conclusion that the termination of the Belmar Board's relationship with the Asbury Board at this time would be seen as a repudiation of both the educational program at the APHS and the ongoing improvement plan. Although the removal of the Belmar students probably would not have any visible effect on the educational program at the APHS, it would have a substantial negative impact on the

morale of the staff and remaining students at the APHS, and it would impede the effectiveness of the educational program.

As to the financial impact of the withdrawal of the Belmar students, I agree with the argument of the Belmar Board and I **CONCLUDE** that its withdrawal would not have a substantial negative financial impact. The loss of tuition from the removal of the Belmar students, phased over a four-year period, is not a substantial portion of the Asbury District budget, and the Asbury Board would have a number of options as to how to handle this decrease in revenue.

Also, I **CONCLUDE** that the Bradley Board has established that it has a good educational reason for its request to terminate its sending-receiving relationship with the Asbury Board, based on the Asbury Board's three unsuccessful attempts to obtain certification from the State Department of Education. However, I **CONCLUDE** that the request for termination must be denied because of substantial negative educational and racial impacts that would result if the termination were approved, for the same reasons as stated above regarding the Belmar Board's request to terminate its relationship. I recognize that the removal of the Bradley Beach students would have a greater substantial racial impact on the APHS because more students would be removed. The fact that the Bradley Beach students would probably be sent to the Neptune schools, which have a predominantly black student population, is a convincing argument that the Bradley Board did not make its decision based on the racial composition at the APHS; however, it does not mitigate the substantial negative impact on the APHS and therefore, is not relevant to the issue.

Also because of the number of students involved, the removal of the Bradley Beach students would have a greater substantial negative symbolic impact on the educational program at the APHS. The negative psychological impacts would be compounded by the program changes and RIFs that would result if the Bradley Beach students were removed.

As to the financial impact of the withdrawal of the Bradley Beach students, I agree with the argument of the Bradley Board, and I **CONCLUDE** that its withdrawal would not have a substantial negative financial impact. The loss of tuition, less savings to be realized, phased over a four-year period, is not a substantial portion of the Asbury District budget. Although the withdrawal of the Bradley Beach students would result in

some changes at the APHS, there was no convincing proof presented that these changes would be of the magnitude to impair the ability of the Asbury Board to provide a thorough and efficient educational program to the students at the APHS and, further, the Asbury Board would have a number of options as to how to handle the decrease in its revenue.

VI - OTHER REMEDIES

In addition to the denial of the requests of the Belmar Board and the Bradley Board to terminate their respective sending-receiving relationships, the Asbury Board seeks the following reliefs[21] in this matter:

(1) that the Belmar Board and the Bradley Board have on roll at the APHS on September 30 of each year the statutory percentages of students;

(2) that the Belmar Board and the Bradley Board develop and implement programs to ensure that the students assigned to the APHS attend that school;

(3) that the Belmar Board and the Bradley Board cooperate with the Asbury Board to develop and implement meaningful programs involving elementary pupils, parents, teaching staff, administrators and residents, to overcome inaccurate negative perceptions concerning the APHS;

(4) that the Belmar Board and the Bradley Board make high school assignments no earlier than March 1 of each school year; and

(5) that the Commissioner order such other and further relief to the Asbury Board as he may deem fair and equitable under all circumstances.

As to the first and fourth relief requests, it is the apparent intent of the Asbury Board to have the Commissioner order the establishment of an assignment procedure which will guarantee that both the Belmar Board and the Bradley Board fully comply with their respective statutory percentages.

It was represented at the hearing that most of the private and parochial high schools in the area require attendance applications to be filed before March 1 of each school year. By requiring that the assignment of students to the APHS be made after March 1, the Asbury Board argued that the alternatives available to the parents

21 Relief requests as amended by order of June 2, 1988 (Appendix IV, H).

would be limited and that the Asbury Board would receive a more accurate list of assigned students. The Asbury Board noted that the Bradley Board, which currently makes the high school assignments in March, has a much higher attendance ratio than the Belmar Board.

Further, by its first relief request, the Asbury Board is requesting that both the Belmar Board and the Bradley Board make the final allocations of high school students after the beginning of the school year so that the correct percentage of students will be sent to the APHS.

Both the Belmar Board and the Bradley Board are opposed to both of these requested reliefs. Mr. Boglioli argued that the Bradley Board's current assignment procedure complies with the statutory percentage requirement and that these reliefs have been requested primarily because of the Asbury Board's dissatisfaction with the Belmar Board's current assignment procedure.

Mr. Fitzsimmons argued that the timing of the high school assignments is within the discretion of the sending district, N.J.S.A. 18A:11-1. He also stated that the Belmar Board makes the assignments early in the school year so that the students and parents receive adequate notice of their high school assignments and can evaluate the educational alternatives, and so that the Belmar Board can accurately estimate the number of students it will be sending to the APHS and the MHS by the December 15 notice date as required by N.J.A.C. 6:20-3.1(d)2.

Mr. Fitzsimmons argued that the Belmar Board fulfills its statutory obligation by making the assignments in accordance with the statutory ratio and that it cannot be held responsible if a smaller number of students actually attend the APHS because families move out of the school district or make other arrangements for their children's education. In support of his argument, Mr. Fitzsimmons cited the decision in Penns Grove - Carneys Point Reg. S.D. Bd. of Ed. v. Oldmans & Woodstown Bds. of Ed., OAL DKTS. EDU 2774-87 and EDU 2775-87 (Sept. 30, 1987), remanded, Comm. of Ed. (Nov. 12, 1987), OAL DKT. NO. EDU 7594-87 (May 5, 1988), modified, Comm. of Ed. (June 17, 1988). Mr. Fitzsimmons argued that there is no statutory basis for the Asbury Board's relief requests, which would require the sending district to be a guarantor that the assigned students attend the APHS.

In reviewing the arguments regarding these two relief requests, it is obvious that a school board can control the number of students assigned to a school but cannot

control the number who actually attend that school. It is also obvious that parents make the final decision regarding their children's education, and that the length of time between the assignment and the start of school can affect the ability of the parents to make alternative arrangements if they do not like the assigned school.

As to the first relief request, I **CONCLUDE** that such a requirement is unreasonable since it would mean that the students could be assigned to a high school as late as September 30 of the school year. The parents and students have the right to know where the students are to be educated at a reasonable time before the start of the school year. Also, if this relief were granted, students assigned to the MHS could be transferred to the APHS as late as September 30 of the school year, which would mean that the Manasquan Board would not know until then the final number of students to be assigned to the MHS. This would place an unreasonable burden on the Manasquan Board to make last-minute adjustments to its classroom assignments, number of courses and staff assignments. Therefore, I **CONCLUDE** that this relief be **DENIED.**

As to the fourth relief request, I **CONCLUDE** that the Asbury Board is entitled to this relief. I recognize that the establishment of a high school assignment procedure is within the discretionary powers of the board of education of the sending district, and that the board's actions are entitled to a presumption of validity. However, the Commissioner has the right to review a local board's action and to overturn any action which is arbitrary, capricious or unreasonable. Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd, 46 N.J. 581 (1966); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). In this matter, the Belmar Board's procedure of making the high school assignments early in the students' eighth grade is unreasonable, since it gives the appearance of endorsing and encouraging the parents to make other arrangements and implies that the Belmar Board is opposed to sending students to the APHS. Also, I **CONCLUDE** that the reasons given by the Belmar Board for the early assignments are not persuasive. By requiring the high school assignments to be done in March, as is now done by the Bradley Board, the parents and students are given a reasonable notice as to the assignment, and the estimates of high school attendance to be given to the receiving districts can be based on past enrollment data, which will probably be a better gauge of attendance than the actual assignment lists.

As to the second and third relief requests, it is evident from the facts presented that many parents in both Belmar and Bradley Beach are reluctant to send their

children to the APHS, and that this situation will not improve until there is a change in the communities' attitude toward the APHS. Since at least part of the current apprehension is based on inaccurate impressions and exaggerated concerns, there is a need to set up a better system of communications between the Asbury Board, its administrators and staff, and the board members, school personnel, parents, students and residents of both Belmar and Bradley Beach. However, I agree with the arguments of both the Belmar Board and the Bradley Board that the responsibility to initiate such a system belongs to the Asbury Board. As noted by Mr. Fitzsimmons, it is the receiving district's obligation to provide an educational program that is attractive to the assigned students. Part of this responsibility is the need to make sure that the assigned students are aware of the features of the program. During the hearing, both Dr. Richens and Ms. Morris testified as to the ongoing program initiated by the Manasquan Board to assure the smooth transition of the Belmar students to the MHS and to highlight the educational program at the MHS. It was also evident at the hearing that the Asbury Board does not have a comparable program with either Belmar or Bradley Beach.

During his testimony, Mr. Jannarone indicated that the Asbury Board has been frustrated by the poor response to some of its effects to improve its relations with the Belmar Board and Bradley Board. Although I recognize that there is a need for the cooperation of the board members and residents of both Belmar and Bradley Beach, the Asbury Board cannot give up its efforts if it wishes to change public opinion about the APHS. The fact that some of its meetings and functions are not well attended does not relieve the Asbury Board of its affirmative obligation to make sure that the sending districts are fully informed about the APHS and the Asbury Board's ongoing improvement plan, nor does it shift the burden to the sending districts to take affirmative steps to improve the APHS's image.

Therefore, I **CONCLUDE** that it is the Asbury Board's responsibility to develop a program to inform the board members, school personnel, parents, students and residents of both Belmar and Bradley Beach about the APHS and to correct any misunderstandings that may exist regarding the school.

I recognize that such a program will not be successful unless the Belmar Board and the Bradley Board cooperate in its implementation. Therefore, I **CONCLUDE** that the Belmar Board and the Bradley Board are responsible for any coordination necessary in

their respective communities for the implementation of any program initiated by the Asbury Board, and that they are to encourage staff, students, parents and residents to participate in the program. It might be appropriate, as suggested by Mr. Jannarone (40T79-80), for the Asbury Board to engage a consultant or request the assistance of the State Department of Education to help develop such a program. Also, it might be appropriate for the Asbury Board to create a high school advisory committee composed of school administrators and residents of the sending districts and to give this committee a role in the review of the educational needs of the communities, the educational program at the APHS and the ongoing improvement plan for the APHS.

Lastly, at the hearing the Asbury Board presented testimony regarding the current system used by the Belmar Board to assign its students to the two high schools. Based on the testimony presented, I found that there was no persuasive proof presented to show that the current system was intended to assign more black students and students with educational problems to the APHS. Based on the facts presented, I **CONCLUDE** that the current system used by the Belmar Board is not unreasonable or discriminatory, and that it is a legitimate exercise of the Belmar Board's discretionary powers. It is also obvious that, as long as there is a strong community preference in favor of the MHS, any system used by the Belmar Board will be seen by the Belmar residents, parents and students as resulting in "winners" and "losers." The perception of being a "loser" is further enhanced by the fact that so many parents of students assigned to the APHS make other arrangements for the education of their children. This "loser" image that attaches to the Belmar students who actually go to the APHS, in all likelihood, has a psychological effect on the students and negatively affects their perception of the educational program at the APHS as well as their chances of success. Further, it would appear that even if the public perception of the APHS improves, there will still be a degree of dissatisfaction, which will continue as long as the Belmar Board is required to split its students between two high schools. Therefore, I would recommend that the Asbury Board and the Belmar Board initiate discussions as to how to handle this matter, and that consideration should be given to the creation of a regional school district or the creation of a regional magnet school system.[22] At the hearing, it was noted that, for a short period in the early 1980s, the

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22 A magnet school system allows a student to select a subject for concentrated study and then to attend the participating school that has the courses relating to that subject (28T146-47).

Asbury Board initiated a magnet school system on the elementary school level with its sending districts, pursuant to a federal grant (10T140-44; 40T77-78, 163). The Asbury Board's magnet program was successful; however, it ended when the federal grant was terminated. It was noted by the consultants for both the Belmar Board and the Asbury Board that the magnet approach on the high school level has been successful in a number of high school districts in the United States.

This recommendation is specifically addressed to the Belmar Board, since it is required by statute to split its students approximately in half for their high school education, and since such a required separation is always going to create some degree of dissatisfaction. The situation is different in Bradley Beach, since almost all of its high school students are assigned to the APHS. However, it might be advantageous to Bradley Beach to also consider the possibility of participating in a regional school district or a regional magnet school system.

VII - ORDER

Therefore, I **ORDER** that:

1. the Belmar Board's request to terminate its sending-receiving relationship with the Asbury Board be denied;

2. the Bradley Board's request to terminate its sending-receiving relationship with the Asbury Board be denied;

3. the Asbury Board's request that the Belmar Board and the Bradley Board have on roll at the APHS on September 30 of each school year the statutory percentage of students be denied;

4. the Asbury Board's request that the Belmar Board and the Bradley Board develop and implement programs to ensure that the students assigned to the APHS attend that school be denied;

5. the Asbury Board's request that the Belmar Board and the Bradley Board cooperate with the Asbury Board in the implementation of programs to

overcome any inaccurate perceptions concerning the APHS be granted; and

6. the Asbury Board's request that the Belmar Board and the Bradley Board make their high school assignments no earlier then March 1 of each school year be granted.

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.

April 14, 1989
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

APR 21 [redacted]
DATE

Seymour Weiss/K.S.
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 21 [redacted]
DATE

James A. Vaughn/K.S.
OFFICE OF ADMINISTRATIVE LAW

caj

BOARD OF EDUCATION OF THE BOROUGH of BELMAR,		
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,	:	
RESPONDENT, COUNTER-PETITIONER, AND THIRD-PARTY PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BELMAR,	:	
THIRD-PARTY RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,	:	
THIRD-PARTY RESPONDENT AND COUNTER-PETITIONER.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Timely exceptions were received from the Board of Education of the City of Asbury Park, hereinafter Asbury Park, from the Board of Education of the Borough of Belmar, hereinafter Belmar, and from the Board of Education of the Borough of Bradley Beach, hereinafter Bradley Beach, pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Belmar objects to the ALJ's deferring to the authority of Board of Education of the City of Absecon v. Board of Education of the City of Pleasantville, Atlantic County, decided by the Commissioner June 1, 1988, aff'd State Bd. October 5, 1988 and Board of Education of the Borough of Englewood Cliffs v. Board of Education of the City of Englewood v. Board of Education of the Borough of Tenafly, Bergen County, decided by the Commissioner July 11, 1988 when Board of Education of the Township of Cranbury, Middlesex County v. Board of Education of the Township of Lawrence, Mercer County, decided by the Commissioner September 30, 1985, rev'd State Board of Education April 1, 1987, appeal dismissed N.J. Superior Court, Appellate Division April 22, 1988 is "a head of agency decision." (Belmar's Exceptions, at p. 1) To date, Belmar contends, Absecon and Englewood Cliffs have not been reviewed by the New Jersey State Board of Education and, thus, Belmar avers that Cranbury is the controlling case authority.

Belmar cites the following exceptions in addition to its statement that Cranbury controls the disposition of this case. Such exceptions are recited verbatim below:

***

2. The finding at page 14 that "...there is a pattern of attempts by sending school districts to terminate or modify their relationships with the Asbury Board..." is overly broad. There is no showing that any other district (other than Bradley Beach) filed legal proceedings to sever the relationship with Asbury Park in the past ten years.

3. At page 18, the Administrative Law Judge cites Dr. David J. Armor, one of the Belmar Board's consultants, with respect to the issue of "White Flight Phenomenon". The reference to Dr. Armor's statement is taken out of context and is at variance with the major premises stated in his written report to the Court.

4. At page 22, the Administrative Law Judge finds that "The main reason given by both the Belmar Board and the Bradley Board for the termination of their respective sending-receiving relationships with the Asbury Board is the fact that the Asbury District was not certified at Level III of the State Monitoring Process." Of course, Asbury's failure to achieve certification was a motivating factor in Belmar's determination to file a petition to sever its relationship with Asbury Park; however, the Cranberry (sic) decision of the State Board of Education and N.J.S.A. 18A:38-13, as amended, form the matrix of Belmar's decision to sever its relationship with Asbury Park.

5. The Administrative Law Judge's Opinion accepts the concept of "symbolic loss". First, the concept of symbolic loss has not been legislated within the context of N.J.S.A. 18A:38-13. Secondly, the shallow basis of "symbolic loss" offered by Joseph T. Murray was rebutted by the persuasive testimony of Drs. Armor and Clark. The weight accorded by the Administrative Law Judge to Mr. Murray's opinion is inappropriate based upon the record before the Court. Drs. Armor and Clark, both of whom have been qualified to

testify before Federal District Courts of the United States, have outstanding credentials which pale Mr. Murray's limited vita.

6. At page 53, the Administrative Law Judge accepts the argument of the Asbury Park Board that Belmar's withdrawal will have a "substantial negative symbolic impact" upon its district. Simply put, this concept is emotional and has no foundation in fact. Nor does the concept have any foundation in the controlling statute. The conclusions stated in the expert reports of Drs. Armor and Clark (P-36 and P-40) overwhelm the emotional notion of "symbolic loss".

7. At page 54, the Court correctly concludes that "...the removal of the Belmar students is statistically insignificant..." and then proceeds to determine that Belmar's withdrawal would have a "...substantial impact on the racial composition of the APHS because the Belmar students represent a substantial number of the remaining white students at the school." The second conclusion contradicts the first. This constitutes a fatal defect in the Court's reasoning.

8. The Court correctly concluded that Belmar's withdrawal will have no negative substantial financial impact and that its motivation is based for good educational reasons. Unfortunately, the emotional abstraction of "symbolic loss" is used as the litmus test, thus, ignoring the factual strength of Belmar's case.

9. The Administrative Law Judge, at page 57, determined that Belmar should be required to make its high school assignments no earlier than March 1. This conclusion is an unfounded deprivation of Belmar's discretionary powers. The remedy will frustrate the relationship of the Belmar community with Asbury Park. The finding at page 57 that "In this matter, the Belmar Board's procedure of making the high school assignments early in the students' eighth grade is unreasonable, since it gives the appearance of endorsing and encouraging the parents to make other arrangements and implies that the Belmar Board is opposed to sending students to the APHS" is not supported by factual testimony before the

Court. The conclusion is unfounded and inaccurate. More importantly, the remedy will act to deprive parents and students of a constitutional right to make plans for alternative educational programs.

10. Belmar objects to the Court's speculation regarding the creation of a regional magnet school system or a regional school district. This issue was not before the Court. The mention of this constitutes reversible error. It demonstrates that emotions prevailed over the facts.

(Belmar's Exceptions, at pp. 2-3)

Bradley Beach posits three exceptions which are summarized in pertinent part below.

EXCEPTION I

THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE ISSUE OF "SUBSTANTIAL NEGATIVE IMPACT"

Averring that the ALJ correctly identified the three factors on which she was to make findings, that is

1. the quality of education received by the affected students;

2. the finances of the affected school district; and

3. the racial composition of the student population of the affected schools,

Bradley Beach avers the ALJ incorrectly perceived her duties in finding "that '...the Commissioner [must] grant the request unless the termination would have a substantial negative impact as to one or more of the following factors: [as mentioned above in]...'. This is contrary to the provisions of N.J.S.A. 18A:38-13 which has no such provision." (emphasis in text) (Bradley Beach's Exceptions, at p. 2) Bradley Beach also opines that the ALJ erred in failing to find that N.J.S.A. 18A:38-13 provides for a balancing of the three factors cited therein, and it cites the statute's reference to "...consideration of all circumstances...." (emphasis in text) (Id., quoting N.J.S.A. 18A:38-13.) Bradley Beach cites Englewood Cliffs, supra, in support of this proposition. Bradley Beach claims that the Englewood Cliffs case establishes that there would be a weighing process and that no one factor alone could defeat the entire application.

Bradley Beach further claims the ALJ erred in stating that it rested its proposition on showing an educationally based reason for seeking withdrawal. Bradley Beach claims that the revision of N.J.S.A. 18A:38-13 obviates the need for such proof and, instead,

"***switches the issue to the question of negative impact to be determined on a balanced and equitable basis***." (Id., at p. 3) Bradley Beach contends:

> ***If the avowed purpose of the revision of the Statute is to give sending districts who have no hope of ever having a high school some participation in the education of their students, then there must be a balancing and there should have been a finding that the quality of education received by Bradley Beach youngsters was not even close to par and certainly not comparable to what it should have received. It is this factor which is the essential finding and which must be balanced against the racial composition impact. However, this was totally ignored by the Court in this case. (Id., at p. 4)

Bradley Beach further claims that the ALJ,

> ***rather than make a collective determination as to the impact of the three critical factors, made a single determination as to educational impact by introducing a symbolic and emotional component into an already statutorially (sic) clear identification of the factor of "Educational impact." (Id., at p. 5)

It further contends that the ALJ made no factual findings as to the issue of racial composition, averring that the Asbury Park Board's own experts admitted that the mere ratios alone are not the sole critera in determining the racial question and that the educational experience must be a consideration. It cites 26T86-87 in this regard. Bradley Beach again stresses that there must be a weighing of all factors involved. "When measured against the educational disadvantage to the students of Asbury Park High School, the finding must be made that Asbury Park has not refuted the evidence and the balancing required under the applicable Statute." (Id.)

Moreover, Bradley Beach avows that the ALJ wrongfully rejected C21, a packet it introduced, which showed that a desegregation plan policy was in existence, claiming it was irrelevant to the issue at hand. Bradley Beach avers "it is relevant and that it would require an even stricter standard than that of racial composition, which is nothing more than a composition of the recognized population of the City of Asbury Park. Removal of all sending district students would not alter that factor." (emphasis in text) (Id., at p. 6)

EXCEPTION II

> THE COURT ERRED IN ITS FINDING ON PAGE 14 "THERE IS A PATTERN OF ATTEMPTS BY SENDING SCHOOL DISTRICTS TO TERMINATE OR MODIFY THEIR RELATIONSHIP WITH THE ASBURY BOARD...."

Bradley Beach finds this statement is inconsistent with the facts enumerated by the Court. It claims the last application filed by Bradley Beach on this subject was in the mid 1970s. Claiming that N.J.S.A. 18A:38-13.1 now imposes a five-year sending-receiving relationship, except under specific circumstances, Bradley Beach contends that the Court erred in its approach to this problem.

EXCEPTION III

THE COURT ERRED IN CERTAIN OF ITS FINDINGS UNDER VI - OTHER REMEDIES AND PORTIONS OF VII - ORDER

As to item 3 of VI (Other Remedies) of the Initial Decision, Bradley Beach argues that the Court made no adverse findings of fact as to Bradley Beach. It claims the proofs were to the contrary in that it has attended all of the functions to which it has been invited by Asbury Park. It also claims there was testimony that Bradley Beach has tried to work with Asbury Park in this way. Moreover, Bradley Beach avows that "the implementation of such an Order is so fanciful and elusive that it makes the order absolutely inoperative." (Id., at p. 8)

Thus, Bradley Beach submits that the Commissioner should reject the Court's recommendation to deny the counter-petition of Bradley Beach in that it made an affirmative finding that there was an adverse educational impact on the students of Asbury Park High School including Bradley Beach students, based upon the Level III report. It avows that when weighing all of the factors of impact, including racial composition in its proper context, Bradley Beach should prevail on its application.

Asbury Park submitted extensive exceptions, which are summarized in pertinent part below.

POINT I

THE RECORD IN THIS MATTER DOES NOT SUPPORT THE FACTUAL CONCLUSION THAT THERE IS "GOOD EDUCATIONAL REASON" FOR BELMAR AND BRADLEY BEACH TO REQUEST TO TERMINATE THEIR SENDING-RECEIVING RELATIONSHIPS WITH THE ASBURY BOARD.

Asbury Park contends that the only issue before the ALJ concerning the requested severance of the sending-receiving relationships was whether there would be a substantial negative impact on Asbury Park. It claims the withdrawals were submitted, it was incumbent upon the Commissioner to grant the withdrawal(s) "...if no substantial negative impact will result therefrom." (Asbury Park's Exceptions, at p. 2, quoting N.J.S.A. 18A:38-18) Asbury Park urges that the ALJ should have considered only whether there would be a substantial negative impact on the Asbury Park Board if the severances were granted. Asbury Park submits that the ALJ decided whether there existed good educational reason for the requested withdrawals. Asbury Park argues that the last sentence of N.J.S.A. 18A:38-18 renders such conclusion to be dicta.

Asbury Park avers further that neither Belmar nor Bradley Beach established that either had a good educational reason to terminate their sending-receiving relationships with Asbury Park. Relative to Belmar, Asbury Park disputes the ALJ's conclusions that the educational program at Manasquan High School (hereinafter MHS) is more compatible with Belmar's educational goals and, further, that there is legitimate community preference for MHS. As to the latter, Asbury Park submits that

> [c]ommunity preference has nothing to do with education. Community preference may be based on the racial makeup of the receiving school, mistaken perceptions about the receiving school and the like. Assuredly, community preference should not be a supporting fact for the conclusion that Belmar established "good educational reason" for its request. (Id. at 3)

Asbury would also distinguish Dr. Kaplan's testimony submitted on the issue of community preferences, as having "involved 'community perceptions,' as opposed to 'community preferences.'" (Id., at p. 4)

> By and large, his questions [polling Belmar taxpayers] concerning safety and comfort, curriculum offerings, adequate guidance, the adequacy of the teaching staff, etc. called for the respondent to answer yes or no. ***The reason Dr. Kaplan structured his survey instrument in such a manner was that Dr. Kaplan did not want to deal with the reality, only perceptions. (Id., at pp. 4-5)

Asbury Park submits that "the Commissioner should not rely on perceptions about community preference that are solicited through a system of 'forced choices,' and which are not facts." (Id., at p. 7)

As to the ALJ's conclusion at page 54 of the initial decision that Bradley Beach established good educational reason for its request to terminate its sending-receiving relationship with Asbury Park, based on Asbury Park's three unsuccessful attempts to obtain certification from the State Board of Education, Asbury Park contends it has made significant progress in attaining certification. It further argues that if the State Board had intended Level III status to serve as a good educational reason for the termination of sending-receiving relationships, it would have adopted a regulation to that effect. It also cites Absecon, supra, as a case in point where the uncertified status of Pleasantville was not grounds for the termination of its sending-receiving relationship. It claims the Commissioner made no finding with regard to the Level III status of Pleasantville. Asbury Park also queries that if Level III status were to require removal of sending district students from Asbury Park High School (hereinafter APHS), whether it would not also require removal of all students from APHS

and a closure of the school. Asbury Park does grant in exceptions, however, that

> [I]t is probably correct to assume that Level III status may be considered in any determination. N.J.S.A. 18A:38-13 as amended, does state that the Commissioner is to consider "all circumstances" of which Level III status is one. Of course, if the Level III status of Asbury Park School District is to be considered, its relevance and weight also must be considered.*** (Id., at p. 15)

Asbury Park claims that its Level III status is not relevant to the case at hand and should have been given very little, if any, weight particularly because of "the age of the Level III Report, the undisputed changes and improvements at APHS since the date of the Report and the fact that the Report is limited to a critique of only one program at APHS" and that it "is entitled to little, if any, weight when compared to the evaluation of APHS by Middle States Association of Colleges and Schools." (Id,. at pp. 18-19)

POINT II

THE "EXPERTS" PRESENTED BY THE BELMAR AND BRADLEY BOARDS DID NOT PROVIDE ANY BASIS FOR THE ADMINISTRATIVE LAW JUDGE TO DETERMINE THAT "GOOD EDUCATIONAL" REASON EXISTS FOR THE TERMINATION OF THE BELMAR-ASBURY PARK OR BRADLEY BEACH-ASBURY PARK SENDING-RECEIVING RELATIONSHIPS.

Asbury Park avers that the experts presented by Belmar and Bradley Beach were not creditable. Asbury Park claims that a review of the testimony and report of Dr. Robert F. Savitt "***reveals a significant number of weaknesses, lapses of memory, losses of notes and outright plagiarism. His testimony and report should not have been used as a basis for any finding of fact in this matter." (Id., at p. 20)

Asbury Park further claims that Dr. William W. Ramsay, who authored the Feasibility Report offered by Belmar, "mistook his obligation to be that of spokesperson of the Belmar Board." (Id., at p. 21) It further avers that Mr. John R. Flynn of the firm of Kiernan Corporation, the expert presented by the Bradley Beach Board responsible for that Board's feasibility study, completed his study "to support a petition of his client, the Board of Education of Bradley Beach for approval to withdrawal from its sending-receiving relationship with Asbury Park. ***Mr. Flynn parrots outdated, inaccurate and erroneous allegations contained in the Level III Report." (Id., at p. 25) Asbury Park submits that "a review of the preliminary report (C-4) and various memos from Mr. Flynn to the Bradley Beach Board demonstrate the fact that Mr. Flynn set about [to] prove a case rather than making an independent study and arriving at (sic) with his own conclusions." (Id., at p. 29)

Finally, Asbury Park challenges the qualifications of Catherine Pluchino, C.P.A., expert presented by Bradley Beach. Relying on its brief at page 138, Asbury Park states that Ms. Pluchino, "***barely qualified as an 'expert,' and had very little grasp of school finances and whether the termination of the sending-receiving relationship by Bradley Beach would have any significant adverse financial impact on the Asbury Park Board of Education." (Id., at p. 29) Based on the above, Asbury Park submits "that any factual findings based on the various experts of Belmar and Bradley Beach" [should] be severely questioned by the Commissioner." (Id., at p. 30)

POINT III

THE ADMINISTRATIVE LAW JUDGE ERRONEOUSLY CONCLUDED THAT THE WITHDRAWAL OF THE STUDENTS FROM BELMAR AND BRADLEY BEACH WOULD NOT INDIVIDUALLY OR COLLECTIVELY HAVE A SUBSTANTIAL NEGATIVE IMPACT ON THE FINANCIAL CONDITION OF THE ASBURY PARK BOARD OF EDUCATION.

Asbury Park claims that Belmar and Bradley Beach should have been required to submit evidence justifying the position that there would be no substantial adverse negative impact occasioned by the withdrawal of their high school students on the budget of the Asbury Park High School budget. Asbury Park avers that neither district undertook this statutory obligation and that both Belmar and Bradley Beach failed to meet their burden of proving that Asbury Park would not suffer substantial financial impact in the event that either or both districts were permitted to withdraw.

Relying on 6T23, Asbury Park claims that Marshall W. Errickson, expert on school finances called by Belmar, stated that he did not determine in his report the effect of the loss of $600,000 on the budget of the Asbury Park High School, the amount estimated in his report as the lost tuition revenues over a four-year phase out. As to the Bradley Beach financial experts, Asbury Park contends that Mr. John R. Flynn did not do an analysis of the financial impact on the high school budget on the proposed withdrawal. It relies on 14T19-20 in this regard.

Further, Asbury Park avers that Catherine M. Pluchino, C.P.A. and financial expert for Bradley Beach, also acknowledged "that the percentage of 3.42% was a percentage of the Bradley Beach revenue against the entire Asbury Park revenues." (Id., at p. 35) Asbury Park also claims Ms. Pluchino did not project beyond two years the financial effect withdrawal might have on Asbury Park. It cites 16T10 in this regard, and claims that based on the above "***neither Belmar nor Bradley Beach took into consideration the adverse financial impact that their individual or collective withdrawals would have on the Asbury Park High School budget." (Id., at p. 36) It claims that withdrawal of either or both districts would have a significant adverse financial impact upon the high school budget. Moreover, the Asbury Park Board avers that even if the Commissioner considers that financial impact must be viewed as affecting the district as a whole, it claims that withdrawal of

either Belmar or Bradley Beach will have a significant adverse financial impact upon the Asbury Park School District. It relies upon the statistical interpretation of its financial expert, Dr. Margaret E. Goertz in this regard, as well as the financial impact calculations stipulated to by both Asbury Park and Belmar, at page 39 of the initial decision. It claims, inter alia, that "a loss of 0.7% or 1.5% of the current expense portion of the budget and the resulting increase in school taxes of $.16 or $.06 per $100.00 of assessed valuation would cause a substantial negative financial impact to the District." (Id., at pp. 38-39) Asbury Park urges the rejection of the Bradley Beach expert and the acceptance of the testimony of Dr. Goertz in favor of that of Mr. Flynn relative to the financial impact of withdrawal of Belmar and/or Bradley Beach from the sending-receiving relationship extant with Asbury Park.

POINT IV

THE COMMISSIONER OF EDUCATION SHOULD ORDER THAT THE BELMAR BOARD AND THE BRADLEY BEACH BOARD DEVELOP AND IMPLEMENT PROGRAMS TO ENSURE THAT THE STUDENTS ASSIGNED TO ASBURY PARK HIGH SCHOOL ACTUALLY ATTEND THE ASBURY PARK HIGH SCHOOL.

Asbury Park avers that the ALJ denied the above-stated relief. It submits that if such plans are not directed by the Commissioner, "it is feared that the racial imbalance and segregation at the Asbury Park High School will continue and will increase." (Id., at p. 43) It further claims that failure to order such a plan would constitute state action, thus, continuing the separation of most whites from most blacks which is forbidden by the federal constitution and cites Armstrong v. O'Connell, 451 F. Supp. 817, 866 (E.D.Wis. 1978).

While Asbury Park acknowledges that the ALJ did conclude that the Belmar and Bradley Beach Boards are responsible for coordinating implementation of any program initiated by Asbury Park, it claims this is not enough. "Bradley Beach to a certain extent and assuredly Belmar should be compelled to develop and implement their own programs to ensure that students assigned to the Asbury Park High School actually attend that school." (Id., at pp. 44-45) Asbury Park seeks in this way to reverse the trend which it claims has resulted in an increasing minority percentage at its high school.

COMMISSIONER'S DETERMINATION

Upon his careful and independent review of the voluminous record of this matter, the Commissioner adopts with clarification the initial decision rendered by the Office of Administrative Law.

In considering the instant sending-receiving matter, the Commissioner would first attend to the procedural matters extant in the case.

Initially, the Commissioner would recite, verbatim, the statute under which disposition of this matter is to be resolved, N.J.S.A. 18A:38-13.

18A:38-13. Change of designation or allocation and apportionment of pupils to high schools

No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law, shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

The second full sentence of N.J.S.A. 18A:38-13 makes it plain that no application for a change of designation in a sending-receiving relationship will be considered by the Commissioner absent a feasibility study submitted by the applicant district, considering the educational, financial and racial implications for the sending and receiving districts. In her Order dated March 25, 1988, designated Appendix IV, F, at page 4, the ALJ below determined that Bradley Beach "***is not required by law to designate where it wants to send its students if and when its current sending-receiving relationship with the Asbury Board is terminated. The Commissioner rejects such conclusion and finds that consistent with Absecon, supra, Bradley Beach's failure to name a new receiving district in its feasibility study is fatal to its application to sever its relationship with Asbury Park. As noted by the State Board:

> We agree, and find that Absecon's failure in this case fatal to its application. The language of N.J.S.A. 18A:38-13 clearly contemplates that a sending district provide its proposed alternative for educating its students when it seeks withdrawal or change in designation. Furthermore, at minimum, it is the obligation of the State Board of Education to insure that the students of the sending district will have an

> educational alternative, and to permit withdrawal in the absence of a demonstrated alternative would contravene that responsibility. Accordingly, the State Board of Education will not direct termination without knowing where the senders' children are to be educated. See Board of Education of the Township of Cranbury v. Board of Education of the Township of Lawrence, decided by the State Board, April 1, 1987, appeal dismissed by the Appellate Division, April 22, 1988.
>
> Moreover, as found by the ALJ and the Commissioner, Absecon's failure to provide a potential receiving district makes it impossible to evaluate the racial impact on all districts that would be effected were Absecon to terminate its relationship with Pleasantville. While not essential to our decision, and while our disposition of this matter does not require us to address Pleasantville's allegations concerning racial impact, we note that Absecon's failure to fulfill its statutory obligation to prepare and submit a feasibility study is related to its failure to provide an alternative receiver in that the absence of a feasibility study would make it extremely difficult to evaluate such impact. The complete absence of an alternative makes this assessment impossible so as to warrant dismissal of the petition.
>
> (Slip Opinion, at pp. 2-3)

Similarly, the Commissioner finds that without a designated alternative for educating the students of Bradley Beach, the Commissioner is placed in the untenable position of second-guessing racial, educational and financial impact, as between Bradley Beach and Asbury Park. Accordingly, the Commissioner is compelled to dismiss Bradley Beach's application for severance from its sending-receiving relationship with Asbury Park, and the ALJ's Order dated March 25, 1988, Exhibit F, is reversed in this regard even though her decision was issued before the State Board decision in Absecon. Notwithstanding this finding, the Commissioner will address the application for severance filed by Belmar, and will decide the issue of sending-receiving severance between the Belmar and Asbury Park Boards, Further, to whatever extent is appropriate, he will also address Bradley Beach's arguments pertaining to sending-receiving severance pursuant to N.J.S.A. 18A:38-13.

In so doing he rejects out of hand Belmar's exception claiming that Cranbury, supra, controls disposition of this matter not Englewood Cliffs, supra, or Absecon, supra. The Commissioner finds the notion that neither of the latter two decisions are "head of agency decisions" is devoid of merit. First, Absecon was affirmed by the State Board on October 5, 1988. Second, the Commissioner's decision is the State of the Law unless and until the

State Board renders a determination on the appeal currently before it (N.J.S.A. 18A:6-25).

The Commissioner would next consider the argument raised again by Bradley Beach in exceptions that N.J.S.A. 18A:38-13 requires a balancing of the three factors enumerated in the statute for gauging substantial negative impact. The Commissioner rejects the Bradley Beach position in favor of that explicated by the ALJ on pages 9-10 of the initial decision. He agrees with the ALJ that termination of a sending-receiving relationship must be denied if even one such factor negatively impacts substantially on the districts in question. The Commissioner so finds. See, for example, Absecon, supra. He thus rejects as being without merit the contention of Bradley Beach raised in its exceptions that all circumstances must be considered before a sending-receiving relationship may be severed. While it is true that the statute requires that the Commissioner consider all circumstances in weighing all equitable factors that may have bearing on the three factors delineated in statute, he concurs with the ALJ that the presence of any one such factor, if found to be significantly negative, constitutes cause for denial of the application.

However, in carrying out his responsibility to weigh all the circumstances affecting the three factors articulated in N.J.S.A. 18A:38-13, the Commissioner finds and determines that the fact that a district is in Level III monitoring is not dispositive, necessarily, of the issue of significant negative impact on either the sending or receiving district. See Absecon, supra, wherein a sending-receiving relationship was preserved notwithstanding the fact that Pleasantville also was in Level III monitoring. If a district is in Level III, the burden falls upon petitioner to establish that such condition creates such substantial negative impact as to require severance. The Commissioner's decision as to whether Bradley Beach met this burden follows under the section dealing with educational impact.

Concerning the ALJ's finding of fact, the Commissioner agrees with the ALJ at page 14 that "***there is a pattern of attempts by sending school districts to terminate or modify their relationships with the Asbury Board***." He rejects the exception posed by Belmar that such conclusion is overly broad, suggesting instead that no other district except Bradley Beach has filed legal proceedings to sever the relationship with Asbury Park in the last ten years. The ALJ's recitation looks at the history of the districts involved over the course of the last 40 or more years, which indicates a clear "***pattern of attempts by sending school districts to terminate or modify their relationships with the Asbury Board***" (Initial Decision, ante), and the Commissioner adopts such findings as his own.

Having resolved the procedural issues before him, the Commissioner will next consider the merits of the petition before him. In reviewing the three factors set forth in statute for considering the severance of a sending-receiving relationship, the Commissioner will review the considerations in the order the ALJ reviewed them.

Negative Impact -- Racial Composition

The Commissioner is in accord with Asbury Park's recitation of both Englewood Cliffs, supra, and Absecon, supra, for the proposition that "if a high school is racially imbalanced, the withdrawal of even a few white students constitutes a substantial negative impact." (Id., at p. 46) He further agrees with the argument advanced by Asbury Park made in reliance upon Englewood Cliffs and Absecon that "***in reviewing the racial impact issue, it is necessary to look at both the number of white students attending the receiving district and the total number of white students in the sending district." (Id., at p. 49)

Having carefully reviewed the data and the testimony submitted on this issue, the Commissioner is in accord with the ALJ's conclusions that to grant severance of the sending-receiving relationship between Asbury Park and Belmar or between Bradley Beach and Asbury Park would exacerbate racial imbalance at APHS. See Initial Decision, ante. The Commissioner agrees with the ALJ that whether the removal of the Belmar students is statistically insignificant when compared to the total number of students at APHS, severance "***would have a substantial impact on the racial composition of the APHS because the Belmar students represent a substantial number of the remaining white students at the school." (Id., at p. 53) See also Absecon and Englewood Cliffs. The Commissioner rejects as being entirely without merit the testimony of Dr. Armor, a Belmar expert who suggested that "there would be 'no segregative effect' on the APHS if the Belmar students were withdrawn and that APHS is now a racially segregated high school and would remain so with or without the Belmar students (P-40 at p. 3)." (Id., at p. 32) In rejecting such logic, the Commissioner notes another of the Belmar expert's testimony, that of Dr. Clark, who submitted data that "APHS has increasingly become a minority school in the past five years and that the percentage of white students has declined by almost 50 percent during that period (P-36 at 7)." (Id.) The Commissioner and the State of New Jersey have established a strong public policy to assiduously combat "white flights" from a racially imbalanced school, and to promote integration in our schools. See Branchburg Bd. of Ed. v. Somerville Bd. of Ed., 1977 S.L.D. 662, aff'd State Bd. 1978 S.L.D. 993, aff'd N.J. Superior Court, Appellate Division 173 N.J. Super. 268 (App. Div. 1980). See also Englewood Cliffs, supra and Absecon, supra.

It is uncontested that in 1987, 741 students attended APHS. As of October 1987, 11 white students, 11 black and two other attended APHS from Belmar. The 11 white students represented 8.7 percent of the total white population. (See initial decision, ante) As of October 1987, Bradley Beach's racial composition was 51 white, 4 black, 13 other which represented 40.4 percent of the white population at APHS. (Initial Decision, ante) Based on projections submitted by Averbach and Associates (R-38 at 1), which both Asbury Park and Belmar agreed to use as student population projections, such percentages can be translated into an annual loss of 16 to 24 Belmar students over a four-year period. If Belmar is permitted to withdraw, it is estimated that the percentage of white students

would be reduced from 17 percent to 16 percent, (Initial Decision, ante) If Bradley Beach terminates, it is estimated that more than 70 students over a four-year period will be lost (C-1 at 12, R-3s), with the percentage of white students thus decreasing from 17 percent to 11 percent. (Initial Decision, ante) Concerning the Bradley Beach figures, the Commissioner notes for the record that Asbury Park mentions in its Response Brief received by OAL December 21, 1988 that "[t]his ratio is identical to the ratio that existed in Englewood Cliffs." (Reply Brief, at p. 26) The Commissioner will not countenance such racially imbalanced ratio as such percentages represent a substantial negative racial impact on APHS, notwithstanding that Manasquan High School, the proposed alternative receiving district for Belmar, is willing to accept all Belmar students, and notwithstanding that Bradley Beach failed to supply data concerning its alternative receiving district. N.J.S.A. 18A:38-13 See also Englewood Cliffs, supra.

Although substantial negative racial impact can be established on evidence related to numbers of students affecting the racial balance and can be established even when only a small number of students is involved, see generally, Absecon, supra, the Commissioner would also comment on the negative racial impact that Asbury Park avers would result if severance of either or both petitioning districts were permitted to withdraw on factors other than sheer numbers. See Englewood Cliffs, supra, at p. 99:

> ***what is key in this matter is that even when positive educational benefits may accrue from granting withdrawal in a sending-receiving relationship, those benefits can be outweighed by serious and compelling reasons such as racial imbalance for that issue is of utmost importance to the State. Branchburg, supra.

Thus for the reasons expressed by the ALJ as amplified herein, the Commissioner finds and determines that there would exist substantial racial negative impact if either Belmar or Bradley Beach were permitted to withdraw.

Negative Impact -- Quality of Education

The Commissioner would first address what he perceives is a misnomer or a misconception that has evolved from the arguments raised in the Englewood Cliffs case. Therein at page 104 the Commissioner addressed the ALJ's use of the term "symbolic loss." What the ALJ in Englewood Cliffs dubbed "symbolic loss" is more properly termed the psycho-social dimension of education, an aspect of equally significant import as any evidence pertaining to educational impact concerning reduction in course offering, effect on curriculum, loss of teaching staff, etc., or sheer numbers of students affecting racial balance. The question arises in evaluating psycho-social impact as to whether such dimension in education relates more to racial impact or quality of education impact. The ALJ in the instant matter considers testimony educed in

regard to the "psychological blow to students and faculty alike who remain at Asbury Park High School" (initial decision, ante) first under the section dealing with negative racial impact, but she then incorporates Asbury Park's arguments relative to these factors under the section dealing with negative educational impact. Contrary to the exception posited by Belmar, which would relegate such data to the realm of nothing more than, "an emotional abstraction" (Belmar's Exceptions, at p. 3), the Commissioner concurs with the ALJ that substantial negative impact would result from the removal of the Belmar students in the quality of education at APHS relative to the morale of the staff and remaining students at the APHS. Such psycho-social impact would impede the effectiveness of the educational program as well as the racial balance at APHS. Such factors contributing to negative psycho-social dimensions include those listed in the initial decision, ante. See also page 50 of the initial decision for a description of the psycho-social domain. Accordingly, the Commissioner adopts as his own the ALJ's conclusion assigning great weight to the substantial negative impact such withdrawal would visit upon those remaining at APHS and, thus, that the effectiveness of the educational program would be substantially impeded if withdrawal were permitted. See also the initial decision, ante, concerning the detriment to APHS if either or both petitioning districts were permitted to withdraw based on psycho-social factors.

As to the exceptions relative to the supposed "good educational reason" rationale advanced by petitioners for severance, the Commissioner would emphasize that the good and sufficient reason standard is no longer required for terminating a sending-receiving relationship. See N.J.S.A. 18A:38-13, as amended, Senate Education Committee Statement Assembly No. 2072, L. 1986, C. 156. However, given that the ALJ drew conclusions on that issue, the Commissioner is compelled to take grave exception to the conclusion of the ALJ that "***Bradley Board has established that it has a good educational reason for its request for terminating its sending-receiving relationship with the Asbury Board, based on the Asbury Board's three unsuccessful attempts to obtain certification from the State Department Of Education." (Initial Decision, ante).

The Commissioner would first note his accord with the ALJ's conclusion regarding the effects of Level III Monitoring on Asbury Park that:

> [T]here has been an improvement in the educational program, and I accept [Asbury Park's] conclusion that the termination of the Belmar Board's relationship with the Asbury Board at this time would be seen as a repudiation of both the educational program at the APHS and the ongoing improvement plan. (Id.)

Moreover, the Commissioner is persuaded by Asbury Park's argument concerning its Level III status, as embodied in its exceptions. Therein Asbury Park states, citing Belmar's own expert:

Dr. Ramsay, the author of Belmar's "Feasibility Report," observed the teaching staff at APHS and concluded: "I like what the teachers were doing in the classrooms that I saw." (8T88). Dr. Ramsay further testified, "I have to say that the course offerings by Asbury Park High School are not too different from most high schools at the moment." (9T5). Dr. Ramsay also found that the course offerings at APHS meet the needs of APHS students. (9T6). He concluded that the curriculum and course offerings at APHS would not provide a basis for the termination of the sending-receiving relationship. (9T186). Indeed, Dr. Ramsay testified that if a Belmar child goes to the Asbury Park High School, that child can obtain a quality education (8T183) and a thorough education. (8T184).

At 8T110, Dr. Ramsay was asked the following:

> Q. Did you find anything in your review of Asbury Park that would lead you to conclude as an expert that Asbury Park is not providing an educational opportunity which will prepare its students to function politically, economically and socially in a democratic society?
>
> A. I haven't in the area in which I observed and the teachers I worked with. (8T110).

With respect to Bradley Beach, Judge Tylutki concludes at page 54 of the Decision that the Bradley Board, "has established that it has a good educational reason for its request to terminate its sending-receiving relationship with the Asbury Board, based on the Asbury Board's three unsuccessful attempts to obtain certification from the State Department of Education."

It is true that the Asbury Park Board of Education is in "Level III". It is also true that the Asbury Board has made significant progress in attaining certification. As the first school district in the State of New Jersey to go through the Level I, Level II and Level III processes, it is also the first school in the district in the State of New Jersey to implement a comprehensive plan to attain certification. In correspondence from Milton G. Hughes, Monmouth County Superintendent of Schools, to

Dr. Walter J. McCarroll, Assistant Commissioner of Education, Mr. Hughes states:

> I can assure you that each activity is being addressed in a timely manner, and we were once again impressed by the commitment the Asbury Park School District has displayed in the implementation of their plan. (letter dated June 9, 1988, R-143 p1).
>
> Through visits to the district and many lengthy conversations with the staff, I can safely say that the energy and feeling of the unity is endemic to the district. There is a lot of evidence to support this statement: acceptance by the faculty for the extended school day in the middle and high school; the professional way documentation is presented, i.e., special education; increased parental support; and even the way the schools are maintained. *** I think that the Asbury Park School District doesn't warrant as close a surveillance as in the first two years . . . . (letter dated July 28, 1988, R-153, p2).

The Department of Education has found concrete improvement in all areas in the Asbury Park School District. (R-143, R-153). The Department has noticed that the increase in HSPT scores has been particularly impressive. (R-153).

(Asbury Park's Exceptions, at pp. 9-11)

Thus, the Commissioner concludes, contrary to the finding of the ALJ, that the Bradley Beach Board has not established that it has a "good educational reason" for its request for terminating its sending-receiving relationship based on Asbury Park's Level III status, albeit that no such showing is required under the statute.

Concerning educational quality impact, the Commissioner concludes in carefully reviewing this matter that Belmar's request must be denied because of the substantive negative psycho-social and racial impacts that would result if the termination were approved. See Initial Decision, ante. Moreover he finds the "good educational reason" conclusion of the ALJ concerning Bradley Beach's request to terminate because of Asbury Park's Level III status is rejected.

Negative Impact -- Financial

As to substantial negative financial impact, the Commissioner first expresses his accord with the ALJ that the review of the impact of Belmar's and Bradley Beach's termination applications will be considered on the basis of a four-year phase-out of students and, thus, that consideration of the financial impact upon Asbury Park should be reviewed on the basis of potential four-year gains and/or losses. (See initial decision, ante)

The Commissioner finds no merit in Asbury Park's argument that the experts on finances in this case should have been required to analyze the financial impact withdrawal would have upon the high school budget as compared to the district budget. As noted by Mr. Errickson, expert on school finances for Belmar, "***the budget is a total budget." (6T23, 24) Revenues, including tuition, are not dedicated funds. Moreover, N.J.S.A. 18A:38-13 specifically states that "the commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, *** (emphasis supplied) Thus, the Commissioner finds no basis for separating out whether high school budgets would be affected by withdrawal of a school district from a sending-receiving relationship, as compared to the district budget.

Asbury Park also objects to the ALJ's finding no substantial financial impact will befall Asbury Park should either Belmar or Bradley Beach be permitted to withdraw. The Commissioner agrees with the ALJ's position for the reasons expressed in the initial decision at page 54. He finds that Dr. Goertz's estimates are more reliable in estimating financial loss to the Asbury District, as did the ALJ. He further agrees that with a current expense budget for the 1987-88 school year well in excess of eighteen million dollars, the loss in revenue, if all Belmar students were removed by the 1991-92 school year, would represent an insubstantial financial loss to Asbury Park. He further finds that were Bradley Beach to be removed by the 1991-92 school year, the loss of tuition would likewise not represent a substantial negative financial impact on Asbury Park. The Commissioner finds no merit in Asbury Park's exception contending that such percentage losses, which would create an increase in school taxes of $.16 or $.06 per $100.00 of assessed valuation would cause a substantial negative financial impact to the district. As the State Board stated in Cranbury, supra,:

> We recognize that such tax increase may be required, but, as stated, sending-receiving relationships are not intended to insulate receiving districts from financial constraints or its citizens from tax increases.
>
> (Slip Opinion, at p. 18)

The Commissioner finds no argument raised that such tuition losses as noted above would "impair the receiving district's ability to

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 31-89
AGENCY DKT. NO. 391-12/88

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JAMES ROGERS, JR., SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY

Robert Muccilli, Esq., for petitioner, Board of Education (Capehart & Scatchard, attorneys)

James Rogers, Jr., respondent, pro se

Record Closed: April 12, 1989 Decided: May 16, 1989

BEFORE **NAOMI DOWER-LABASTILLE**, ALJ:

On October 27, 1988, the Board of Education of Pemberton (Board) complained to the Commissioner that James Rogers, Jr., was under contract to teach for school year 1988-89, and gave notice on August 30, 1988, that he would not be reporting to work on September 1, 1988. On November 15, 1988, the Commissioner issued to respondent an order to show cause why his teaching certificate should not be suspended. The Commissioner transmitted the matter to the Office of Administrative Law on January 4, 1989, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on March 1, 1989. On April 12, 1989, the record closed when an executed stipulation of fact was filed and the hearing scheduled for April 17, 1989 was adjourned. In addition to the stipulation (J-1), the following exhibits were introduced into evidence:

R-1 Letter of James Rogers, dated August 30, 1988
R-2 Letter of James Rogers, dated December 5, 1988
R-3 Letter of James Rogers, dated October 12, 1988

P-1 Letter of Dr. Kirschling, dated September 2, 1988

The issue in this case arises from two statutes.

N.J.S.A. 18A:28-8. Notice of intention to resign required

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

Respondent admits that he did not give the Board the requisite notice. The Board filed this complaint for suspension of respondent's certification based on N.J.S.A. 18A:28-10.

N.J.S.A. 18A:28-10. Suspension of certificate for wrongful cessation of performance of duties

> Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

The sole issue is whether or not respondent's certificate should be suspended and the length of the suspension, since the statute is discretionary rather than mandatory.

The facts are either stipulated or uncontroverted.

FINDINGS OF FACT

James Rogers, Jr., is a nontenured elementary teacher of the handicapped who signed a contract on July 12, 1988, to teach in the Pemberton schools from September 1, 1988 to June 30, 1989. On August 30, 1988, Rogers called Dr. Kirschling, the Board's personnel director, and advised him he would not be reporting to work in September. The contract had a 60-day notice provision but Rogers believed that it was only effective after he began serving under it. Kirschling advised him his resignation was required to be in writing and that less than 60 days notice was a violation of law and contract. Rogers immediately sent Kirschling a certified letter stating that he would not be accepting the Pemberton position. He stated, "My plans are to work with the severely and multiply handicapped. Through much introspection, I believe I can best serve this type of population. Please accept my apology for any inconvenience this decision may have caused." Rogers did not report to work on September 1, but instead took a position at the New Lisbon Developmental Center as a teacher of the handicapped, where he had been employed in 1985 prior to his return to college to obtain certification for that position.

The Board was able to obtain a replacement for Rogers on September 6, 1988. On September 13, the Board voted to pursue sanctions against Rogers for wrongful cessation of the performance of his duties. On October 12, 1988, Rogers wrote to the Pemberton Superintendent expressing his sincere apology for failure to give adequate notice. He stated, "It has been my life long ambition to teach the severely and multiply disabled. In the event Pemberton should require any services I could provide, I will gladly assist without compensation." On October 31, 1988, the Board filed a petition for license suspension and the Commissioner issued his order to show cause on November 15, 1988.

On December 5, Rogers wrote to the Commissioner explaining that he believed the contract would not be fully executed until September 1, 1988, and that he now understood that his action left the Pemberton Board in a precarious position. He related that he had left New Lisbon in January 1986 to go back to college and obtain certification. He stated, "Through diligence and discipline I completed my certification

with honors and my dream became a reality . . . . My first year of teaching [in Manchester Township] was very successful and rewarding. Due to a pending move I sought employment in Burlington County. . . . In retrospect, I realize my decision [not to work in Pemberton] was naive, but I never meant to hurt anyone in the process. The irony that the accomplishment I value most remains in jeopardy, has been very trying but a lesson well learned." Rogers went on to say that he would gladly assist Pemberton without compensation and he would compensate Pemberton for days they had to pay a substitute until a permanent teacher was hired. "I can only hope that Pemberton Township accepts my sincerest apology relative to this matter."

CONCLUSION AND DISPOSITION

The Board seeks Rogers' suspension for one full year, while it recognizes N.J.S.A. 18A:26-10 is discretionary. The Board cites Black Horse Pike Regional S.D. Bd. of Ed. v. Michael Fox, 1983 S.L.D. Nov. 23, 1983 and Dumont Bd. of Ed. v. Andrew Zweig, 1988 S.L.D. March 30, 1988. Fox "knowingly and willfully" violated the 60-day notice requirement, made no attempt to negotiate a mutually agreed termination date and was subsequently suspended for one year. The Board argues that, like Fox, Rogers has not shown any mitigating factors.

I consider three factors to have some weight in making a determination. One is purely fortuitous for respondent: the Board was able to obtain a replacement within one week. That it was able to do so was an extraordinary bit of good fortune. It is true, however, that we are here concerned with unprofessional conduct, not the measure of damage for it.

The second factor is respondent's erroneous belief that he could back out of the contract because it would not go into effect until September 1, 1988. The Board argues that respondent's belief was not reasonable or credible. Rogers had worked only one prior year as a teaching staff member, however. Prior to that, he was employed by the State at New Lisbon Developmental Center. State employees in the classified service ordinarily are not "under contract." Essentially their employment begins the first day of work, not at some earlier time. Notice of resignation requirements do not attach until

the employee has begun work. Thus I can understand that respondent honestly believed he was not subject to the 60-day notice requirement until he had actually begun work for the Board.

The most weighty factor in reviewing an appropriate length of suspension for respondent is his motivation. At the last minute he had questions about what work he was best suited to. He had worked in another school district for a year as well as worked with the severely and multiply handicapped at New Lisbon. The children served by the Board are much less and differently handicapped than the New Lisbon population. Different teaching qualities, techniques and temperaments are required in serving these very different groups. Notwithstanding the burdens of New Lisbon's work, school districts almost invariably pay better than does the State and the State has considerable difficulty obtaining sufficient dependable staff for that work. Civil service decisions out of the State developmental centers demonstrate a continuing theme of inability to obtain and hold staff due to the pay and working conditions there. Thus I am persuaded that it was not to feather his own nest that Rogers failed to fulfill his contract with the Board, but rather from honest and more noble motivations. He feels more fulfilled and thinks he has more aptitude for service to the profoundly and multiply handicapped.

The fact that the State rehired respondent at New Lisbon indicates his work was well regarded. Loss of his license would render him unable to continue in his position with the State although the employer may be able to permit him to take a non-license-holder position for the period of his suspension. The three factors which I have discussed as well as respondent's relative youth and inexperience in working for school districts are mitigatory.

I **CONCLUDE** that it would be inappropriate to suspend respondent's license for a full year and that three months would be a sufficient sanction in all the circumstances.

It is therefore **ORDERED** that the teaching certification of James Rogers, Jr., be suspended for three months.

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.

May 16, 1989
DATE

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

May 16 1989
DATE

MAY 17 1989
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JAMES ROGERS, JR., SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner is guilty of unprofessional conduct for failing to provide sixty days written notice of his intention to relinquish his position. The Commissioner further concludes, for substantially the same reasons expressed by the ALJ below, that sufficient sanction under the circumstances of this case shall be three months suspension of petitioner's teaching certificate pursuant to N.J.S.A. 18A:26-10.

The Commissioner therefore accepts the recommendation of the Office of Administrative Law and directs that the teaching certificate of James Rogers, Jr. be suspended for a period of three months commencing not earlier than the date of this decision.

IT IS SO ORDERED.

JUNE 21, 1989
DATE OF MAILING - JUNE 21, 1989

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6956-88
AGENCY DKT. NO. 276-8/88

P.W.M., FATHER OF W.B.M.,
Petitioner,
v.
BOARD OF EDUCATION, TOWNSHIP OF MONTCLAIR,
ESSEX COUNTY AND
KURT L. WEINHEIMER, PRINCIPAL,
Respondent.

P.W.M., pro se

Patti E. Russell, Esq. for respondent
(Mc Carter & English, attorneys)

Record Closed: March 27, 1989 Decided: May 11, 1989

BEFORE OLIVER B. QUINN, ALJ:

Petitioner, the parent of a Montclair High School student, filed a petition of appeal on August 22, 1988 challenging the legality of the high school's use of marks and grades for "disciplinary purposes." Specifically, petitioner sought the following relief:

1. That the Commissioner determine whether Montclair High School has engaged in improper grading procedures through the use of grade deductions for disciplinary purposes;

2. That an investigation be undertaken and proper action taken against those teachers/administrators who have willfully violated the New Jersey school law prohibiting use of marks or grades for disciplinary purposes;

3. That the Board of education take such action as is necessary to prevent such further violations; and

4. Such other relief as is due and proper.

Respondent avers that its grading policies are legal.

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on September 22, 1988 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 telephone prehearing conference was held on November 21, 1988 and a prehearing order was entered. On February 1, 1989, respondent filed a motion to dismiss or in the alternative for summary decision for reasons of res judicata, lack of standing, and the absence of a justiciable controversy. Both parties submitted briefs and response briefs.

LEGAL DISCUSSION

Prior to reaching the merits of a case, a determination must be made on whether the petitioner has come forward with a justiciable controversy and whether petitioner has stated a claim upon which relief can be granted. A justiciable controversy is a "real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character. Black's Law Dictionary (rev. 5th ed. 1979)

N.J.S.A. 18A:6-9 provides:

> The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the Commissioner. (Emphasis added).

Generally, courts do not render advisory opinions. In Moss Estate, Inc. v. Metal & Thermit Corp., 73 N.J. Super. 56, 67 (Ch.Div. 1962), the court stated:

> It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and to decide only concrete contested issues conclusively affecting adversary parties in interest. [citations omitted]

The restrictions and principles applicable to courts are also applicable to agencies with quasi-judicial or adjudicative functions. In In the Matter of Tenure Hearing of Onorevole,

103 N.J. 548, 554 (1986), the court stated:

> Although an administrative agency, such as the OAL, is not a "court" in the true or literal sense of the term, many principles and rules that govern judicial proceedings and determinations can be applied to an agency's quasi-judicial or adjudicative functions.

Respondent cites Fazan v. Board of Ed. of Manville, OAL DKT. EDU 3359-84 (Sept. 7, 1984), modified, Comm. of Ed. (Oct. 24, 1984) in support of its motion to dismiss. In Fazan, a tenured teaching staff member alleged that the board failed to recognize his seniority as a teacher of computer-related courses when it advised him that his position might be abolished in the next school year. The board moved to dismiss the teacher's petition, contending that in the absence of a reduction in force it had the right to assign petitioner to teach within the scope of his certificate and endorsements regardless of seniority status. The ALJ denied the board's motion to dismiss, finding the matter ripe for adjudication because a determination of seniority had been made. The Commissioner, however, found that "inasmuch as petitioner's position of employment was not affected by the reduction in force," he "failed to state a cause of action upon which relief is to be granted. . . "id. at 9. The Commissioner modified the initial decision and granted the board's motion to dismiss.

Respondent also relies upon Hershkowitz v. Board of Ed. of Essex County Vocational School, OAL DKT. EDU 2565-82 (Oct. 7, 1982), adopted, Comm. of Ed. (Nov. 17, 1982). In Hershkowitz, a tenured school nurse on extended unpaid leave sought a judgment that a board could not declare her ineligible for further service or deny her tenure status. The nurse had been admonished in a letter from the Superintendent to return to work or risk "formal action or your permanent discharge from employment." She alleged the letter was evidence of the board's intent to terminate her services

pursuant to N.J.S.A. 18A:16-4. The ALJ found no justiciable controversy and dismissed the petition. Even though the nurse's petition was by way of declaratory judgment and sought interpretation of a state statute, the ALJ refused to engage in premature interventions or advisory opinions. The ALJ at page 5 stated,". . . justiciability is a necessary prerequisite for invocation of . . . adjudicatory powers in administrative agency practice. . ."

In Kenwood v. Montclair Board of Ed., OAL DKT. EDU 8858-81 (April 23, 1982), adopted, Comm. of Ed. (June 14, 1982), the petitioner, a concerned citizen and taxpayer, sought an order directing the board to rewrite its attendance policy to conform to alleged statutory requirements. He did not allege that he was the parent of any child attending the public schools in Montclair, nor that he or any of his children had been adversely affected by the student attendance policy. Rather, he brought the case solely in the capacity of a concerned citizen and taxpayer of the district. Respondent board of education moved to dismiss the petition for lack of standing and nonjusticiability. Although the ALJ in Kenwood dismissed the petition for lack of standing, he significantly noted at page 4 that:

> Those cases in which the Commissioner has adjudicated the validity of a student attendance policy involve definite claims made by or on behalf of currently enrolled students disciplined for specific infractions of the local rules. E.G., Rubertone v. Bd. of Ed. of Lyndhurst, OAL DKT. NO. EDU 807-79 (May 17, 1979), adopted, Comm. of Ed. (July 11, 1979); Wetherell v. Bd. of Ed. of Burlington Twp., 1978 S.L.D. 794; E.H. v. Bd. of Ed. of Boonton, 1975 S.L.D. 455; Wheatley v. Bd. of Ed. of Burlington City, 1974 S.L.D. 851.

The ALJ continued at page 5:

> [Kenwood's] suit amounts to nothing more than a theoretical disagreement with the duly appointed local board on matters of educational policy. Kenwood prefers one approach, whereas the representative body entrusted with making such decisions has chosen another.

Petitioner in the instant matter cites the early case of Minorics v. Board of Ed. of Phillipburg, 1972 S.L.D. 86 as support for his position. In Minorics, grading policies were also at issue. Although the petitioner asserted no harm to herself or anyone else from the board's actions, the hearing examiner held that the petitioner's children and all others similarly situated would continue to be controlled by such policies unless altered, and thus approved the bringing of that action. The hearing examiner specifically stated, "In this respect, it would appear that the petition is viable and does present a possibility for relief which the Commissioner can give." Id. at 88 [Emphasis added]. The following issues were presented for consideration by the Commissioner:

(a) Is the assignment and use of the mark zero, as detailed ante, a legal and proper action by the Phillipsburg school system?

(b) Is the petitioner entitled to receive a clearly defined set of Board policies with respect to the grading practices of Phillipsburg Schools?

(c) May a school properly assign students to in-school suspension as an action of punishment? Id. at 88.

As to the first issue, the only one relevant to the instant case, the Commissioner held that:

> Conscious of the fact that. . . it is the local board that must by law make rules and regulations for the government and management of the public schools (N.J.S.A. 18A:11-1) the Commissioner refrains, at this juncture, from any direction to the Board that would change grading policies for the present school year. Such existent policies, while they may be faulty in part, are not in any sense oppressive, and there is no demanding immediate need for this revision other than as

part of an overall review and coherent change. Id. at 91.

The Commissioner rejected the petitioner's complaint, afforded her no relief and remanded to the Phillipsburg Board of Education the obligation to review its grading policies. Thus, while there is dicta in Minorics which might be interpreted as supportive of petitioner's position herein, the decision in that case is clearly not.

I **FIND** that there is no genuine dispute in the instant matter. The petition asks the Commissioner to conduct an investigation to determine whether Montclair High School has engaged in improper grading procedures through the use of grade deductions for disciplinary purposes. No facts are alleged which would establish a cause of action in which petitioner has any interest. In fact, no cause of action is presented whatsoever. Petitioner, by means of an abstract petition, seeks to have the Commissioner assume the role and responsibilities of the Montclair Board of Education.

CONCLUSION AND ORDERS

After having considered all papers submitted and having reviewed the applicable law and regulations, I **CONCLUDE** that petitioner has failed to present a justiciable controversy or to state a claim upon which relief can be granted as required by N.J.S.A. 18A:6-9. I therefore **ORDER** that the petition in this matter be dismissed.

I **FIND** no compelling reason to address respondent's res judicata or standing arguments for dismissal.

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** this Initial Decision with **Saul Cooperman** for consideration.

May 11, 1989
DATE

Oliver Quinn
OLIVER B. QUINN, ALJ

May 15, 1989
DATE

Receipt Acknowledged:

Seymour Lieberman
DEPARTMENT OF EDUCATION

May 16, 1989
DATE

Mailed To Parties:

for Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

vcb/e

P.W.M., FATHER OF W.B.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR AND KURT L. WEINHEIMER, PRINCIPAL, ESSEX 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 noted that no timely exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of the record, the Commissioner concurs with the findings and conclusion set forth in the initial decision and hereby adopts them as his own.

Accordingly, the Commissioner finds and determines that the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

June 21, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3848-89
AGENCY DKT. NO. 159-5/89

AMITABH SHANKAR,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY, ET AL.,

Respondent.

Martin Perez, Esq., for petitioner

Ralph F. Stanzione, Jr., Esq. for respondent

Record Closed: June 5, 1989 Decided: June 8, 1989

BEFORE **STEVEN L. LEFELT**, ALJ:

In this matter, the New Brunswick Board of Education asserts that it has a valid and reasonable procedure which requires the high school valedictorian to be that graduating senior who has the highest grade point average (GPA) and who has attended New Brunswick High School for three consecutive years. Amitabh Shankar, a New Brunswick High School graduating senior with the highest GPA, has attended New Brunswick High School for only two years. Amitabh Shankar claims the procedure is invalid and unreasonable. He seeks an order directing the board of education to name him valedictorian. He also seeks various other remedies for

alleged discrimination against aliens and violations of constitutional rights. Dawn Richards, a New Brunswick High School graduating senior, has the highest GPA among all graduating seniors who attended New Brunswick High School for three years or more. She claims it would be unfair not to name her valedictorian.

In the decision which follows, I have concluded that New Brunswick's valedictorian/salutatorian residency requirement is reasonable but unenforceable before the summer of 1988. The residency requirement became effective and enforceable sometime during the 1988-89 school year. I have decided that Mr. Shankar has not proved any violations of the Law Against Discrimination or his constitutional rights. Nevertheless, for notice inadequacies and fairness concerns, I have also concluded that the residency requirement should not be applied against Mr. Shankar and that he should share the 1989 valedictorian honor with Dawn Richards.

Procedural History

The Department of Education transmitted Amitabh Shankar's verified petition for emergent relief to the OAL without respondent's answer on May 25, 1989. At a May 26, 1989 telephone conference, arrangements were made for petitioner to receive some discovery from respondent and for petitioner, under *N.J.A.C.* 1:1-16.4, to notify those students with the highest and second highest averages who have been New Brunswick High School students for three or more years. Given that petitioner sought a directive requiring that he be named valedictorian and that the high school graduation was not to be held until June 23, 1989, it was agreed to by-pass emergent relief and schedule an expedited plenary hearing for June 5, 1989 at the Old Bridge Municipal Building at 1:30 p.m. Respondent filed his answer with the OAL on June 1, 1989 and the hearing was conducted until 7:30 p.m. on June 5, 1989. The record closed on June 5, 1989.

Uncontested Facts

After carefully considering all of the credible testimony and documents entered into evidence, I have concluded that the following facts are uncontested and believable. I, therefore, **FIND** the following:

Amitabh Shankar is a resident alien who was born in India on March 10, 1971. After coming to the United States, he registered with the New Brunswick High School on September 17, 1987. He is scheduled to graduate on June 23, 1989 after having been in the high school for two years. Mr. Shankar's GPA as of June 5, 1989 is 4.006. Besides achieving this high GPA, Mr. Shankar has also been quite active in extracurricular activities and has also been employed as a bank teller part-time during the school year.

On February 10, 1989 Fred Brown, Jr., the New Brunswick High School Principal, advised Mr. Shankar that a "careful review of his official school records indicates that he will in all likelihood, attain the rank of #1 for the 1989 graduating class." (J-4Ev.) This letter went on to state, however, that he would not be eligible "to receive certain scholarship funds" because "Board of Education policy" required that the valedictorian be the highest ranked graduating senior who has attended the high school "for three consecutive years." After receiving this letter, Mr. Shankar tried to obtain a copy of the official policy. He met with and wrote the New Brunswick District Superintendent, Dr. Larkin, and appeared before the board of education. As the result of these communications, Mr. Shankar concluded that this "policy" was to be effective for the Fall 1988 and was unknown to him when he entered the high school in 1987. This "policy" was not written and not adopted by the board of education and therefore in his opinion was not applicable to him. Mr. Shankar claimed that had he been informed of the "policy" it "could have very well influenced [his] decision to attend N.B.H.S." (P-1Ev.)

Sometime around 1984, New Brunswick obtained a grant which enables the district to award monies derived from the grant interest to the top four ranked (by GPA) graduating seniors in New Brunswick High School. The valedictorian usually receives approximately $2,500.

Dawn Richards has been enrolled in New Brunswick High School for four years. Her GPA is 3.98. Like Mr. Shankar, she also has been quite active in school extracurricular activities. She believes she should be the valedictorian because she has worked hard and has met all New Brunswick requirements. She does not want this honor to be taken away from her. (The next ranked graduating senior was also provided notice of the hearing but did not appear.)

Is There a Valedictorian Residency Policy?

Much of the actual dispute in this case revolves around whether this "policy" exists. Mr. Shankar's counsel argues that there is in fact no policy. The evidence in my opinion raises a serious question concerning whether any enforceable residence procedure was in effect before the summer of 1988. I make the following **FINDINGS**:

The board points to its record of valedictorian and salutatorian awards since 1970 (J-1Ev.) and the explanation by Robert J. Boyler (J-2Ev.) as evidence of its procedures prior to 1988.

Robert J. Boyler who was a prior principal of New Brunswick High School explained in an April 24, 1989 memo to Dr. Larkin (J-2Ev.) that the "time constraint was in effect during [his] tenure as high school principal and was inherited from previous administrations. The basis for the time constraint was a direct result of the high school originally being a 3-year institution."

The list of valedictorians and salutatorians (J-1Ev.) demonstrates that since 1970 all except the 1982 salutatorian met the three year residency requirement.

Nevertheless, according to the Dr. Larkin, there was a "mistake" made in 1982 when a student with two years in the high school was awarded salutatorian. Testimony indicates that no monies were awarded that year for salutatorian, but the details of this "mistake" were not provided. The record is unclear as to precisely why this "mistake" was made, but it is clear that if the residency requirement were applied to this student, she should not have received salutatorian honors. The principal during that period was Robert J. Boyler, the same individual who explained the long standing nature of the practice in J-2Ev. Dr. Larkin countered this apparent anomaly with information that Mr. Boyler was ill in 1982. But Dr. Larkin was the superintendent during that time.

It is also relatively clear and I specifically **FIND** that neither Mr. Shankar nor Ms. Richards knew the precise residency requirement in 1987. Ms. Richards testified that she had heard that Mr. Shankar was coming to the high school and that he was quite smart. While discussing Mr. Shankar's arrival, one of her teachers informed her that there was a residency requirement for valedictorian. However, until the summer of 1988 neither Mr. Shankar nor Ms. Richards knew the length of any residency period.

I **FIND** that Mr. Shankar was not advised in any way about the residency requirement upon his arrival at New Brunswick High School in September 1987. The students learned in the summer of 1988 that a three year residency requirement for a school award was applied to a third of fourth ranked (by GPA) student who had graduated that year. The details and implications of the requirement and whether it was intended to be applied to the valedictorian and salutatorian were not fully understood by the students until the second half of the 1988 - 89 school year. I also **FIND** that Mr. Shankar was not officially informed that the requirement would be applied to him until February 1989. (J-4Ev.)

There is according to Board counsel no case law which supports the process Dr. Larkin followed in having the Board "receive" his residency requirements.

While I am troubled by the absence of board minutes confirming the event, the documents are supportive and I have no reason to disbelieve Dr. Larkin's testimony. I therefore **FIND** that the operating procedure was "received" by the board of education in August 1988. At that point, the procedure was at least recorded in writing (though ambiguously presented in J-3 Ev.) and during the following school year (1988-89) became fully known to the students concerned.

Additionally, on May 5, 1989 the board supported "the decision of the Principal and Superintendent of Schools in [Mr. Shankar's case]". At that point, the board in effect specifically and clearly ratified or affirmed the six semester residency requirement for valedictorian as "both reasonable and practicable." P-2Ev.

Mr. Shankar's counsel argues that the residency requirement should be invalidated because boards of education are subject to the Administrative Procedure Act (APA) [*N.J.S.A.* 52:14B-1 *et seq.*] and therefore must adopt policies by following the rulemaking requirements of State agencies. I cannot accept this argument as properly reflecting legislative intent. Local boards of education in this State were not considered by the Legislature to be included within the Department of Education. Long standing agency practice and concepts of home rule belie such an assertion. Additionally, it would be impractical to have all boards of education propose their rules in the *New Jersey Register* in the formal manner required by the APA. The use of the term "agency" in *N.J.S.A.* 52:14B-2(a) was intended to refer exclusively to State agencies. That is the meaning of "agency" throughout the APA. Local boards of education are not State agencies.

There appears to be no regulation or statute establishing a required procedure for superintendents to adopt operating procedures, or for that matter

rules and regulations. There is general recognition, however, that rules and regulations adopted by superintendents are valid so long as they do not conflict with board policies and are not arbitrary, capricious or unreasonable.

It seems to me that there must be some operating procedures that may be informally adopted by superintendents. There will always be some need for superintendents to implement board policies. Boards of education cannot be expected to adopt formally all policies necessary to run an entire school system. There are also some operating procedures that probably need not be written. These procedures, however, should be clearly inferable from written board policies.

In this case, the valedictorian residency requirement is not an attempt by the Superintendent to implement any board policy. This operating procedure is regulatory rather than implementory. It has a direct impact upon some high school students and probably also is of interest to some parents. Proper notice to those affected by superintendent procedures must be one of the keys to effectiveness.

I have **CONCLUDED** that in the absence of any formal adoption requirements, the Superintendent's operating procedure in this case was sufficiently recorded and publicized to become effective sometime between August 1988 and May 1989.

The record confirms that the district intended to apply this requirement during the 1988-89 school year. Dr. Larkin's March 8, 1989 letter to Mr. Shankar (J-3Ev.), for example, indicated that the Board had "adopted procedures regarding class rank that became effective in the fall of 1988." The attachment to J-3, which is the only written record of this "procedure" also carries the legend "Effective Fall 1988." I therefore can also **FIND** that the New Brunswick High School believed this residency requirement was effective in September 1988 and that is why the procedure was later that school year applied to Mr. Shankar.

I further **FIND** that this requirement was completely unwritten until 1988 and is to date not incorporated into the School Handbook. There is not one reference in board of education minutes to either this requirement generally or to any application of the residency requirement including the salutatorian award in 1982, which was claimed a "mistake."

Dr. Larkin knows of no instance since 1970 when any student was denied valedictorian or salutatorian status because of the residency requirement. Besides Mr. Shankar, the only application of this requirement pointed to by the school board was the June 1988 application, which involved neither a valedictorian nor a salutatorian.

Dr. Larkin explained that the enclosure to J-3 was a speaking document prepared to assist him when he explained his procedures to the school board. The text of the speaking document reads as if no prior practice existed. It states "A statement **is needed** that stipulates how a student becomes eligible to be named valedictorian and salutatorian of a given class. For example, **is a 'residency' requirement necessary?"** (emphasis added).

The only witnesses in this matter were Mr. Shankar, Ms. Richards and Dr. Larkin. No testimony was provided by any other administrator, board member, principal, teacher, or any other person who could provide further confirmation of this requirement and its prior applications, if any.

On the basis of this record, I **CANNOT FIND** that New Brunswick applied any residency requirement for school awards until June of 1988. Also on the basis of this record, I **FIND** that New Brunswick never applied any residency requirement to any valedictorian until Mr. Shankar. Operating procedures like this one cannot exist solely in administrators' heads, to paraphrase Mr. Shankar's lawyer.

On the basis of this record, I have **CONCLUDED** that Mr. Shankar has proved by a preponderance of the believable evidence that before August 1988

whatever long standing practice certain administrators or teachers may have believed existed with regard to a valedictorian residency requirement was unwritten; unknown to the Board, students and parents; and was never applied. Such a practice cannot be enforced.

Given the nebulous, unwritten history of this requirement, it is not unreasonable for Mr. Shankar to wonder why this procedure is being applied to him and to suspect the worst.

The Residency Requirement After Aug. 1988

Dr. Larkin explained in his testimony that the residency requirement is not written policy but is "procedure." He contended that as Superintendent he has the right to adopt various rules and regulations or operating procedures without board of education approval. In this case, the residency requirement, according to Dr. Larkin, was in fact discussed with the board of education at an open meeting in August 1988.

Dr. Larkin raised the residency issue with the board because a few months before, in June 1988, a student who was ranked in the top four of the graduating class was found ineligible for certain awards [not valedictorian or salutatorian] because of the three year residency requirement. By apprising the board of his procedure, Dr. Larkin wanted to avoid the "problems" that were created by this prior incident. These problems were not fully explained by Dr. Larkin in his testimony but the impression conveyed was that there was some acrimony and there may have been litigation or threatened litigation.

Dr. Larkin further explained that the board of education "received" his residency procedure in August, 1988. The board did not vote and did not formally adopt these procedures. The Superintendent also recalled some discussion from the floor on the residency requirement, but could not explain why the board minutes did not reflect these occurrences.

To be valid, however, the requirement must be reasonable and not in conflict with board policy. There is no question that this requirement is not in conflict with any board policy. Mr. Shankar's lawyer argues, however, that the procedure is not rationally related to any legitimate board of education objective and is therefore unreasonable.

Dr. Larkin testified the residency requirement is necessary to validate that the highest ranking students have met New Brunswick's standards. There was testimony demonstrating the great difficulty in transposing grades and credits earned not only from other high schools but also in this case from another country into New Brunswick's grading system. Considering Dawn Richards' testimony, it is also understandable for New Brunswick to try and equalize as much as possible the standards and conditions under which potential valedictorians and salutatorians compete.

However, transfer students should not be unfairly handicapped by a residency requirement. If the requirement, for example, were four years it could be considered unreasonable because no transfer student could ever qualify as valedictorian. While Mr. Shankar came to New Brunswick in search of a better education, most transfer students arrive at high schools solely because their parents have moved into the district. No residency requirement would allow a student to transfer in during the last quarter of his/her senior year and "bump" another student from valedictorian honors. (*See* J-3Ev.) A one year requirement could result in a valedictorian who has earned 3/4 of his/her grades at another high school. This seems wrong also. Therefore, districts seeking reasonable compromises between equalizing GPA competition standards, rewarding local academic achievement and not unfairly handicapping transfer students are left with a choice between two or three year residency provisions.

Mr. Shankar's lawyer argues that two years is an adequate time to assess student capabilities. In Mr. Shankar's case, for example, his GPA is 4.006. During his two years in the high school, he obviously did not earn many grades under "A". However, I **CANNOT CONCLUDE**, on this record, that because New Brunswick selected a three year residency, its requirement is unreasonable.

New Brunswick has heavily weighted its desire to reward local academic achievement and equalize GPA competition, but I **DO NOT FIND** this unreasonable. I can understand New Brunswick's interest in having a valedictorian represent the best that its school can produce.

"A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose." *Angell v. Newark Board of Education*, 1959 *S.L.D.* 141, 143. In this instance, I **FIND** that the requirement is reasonable because it is rationally related to the Board's legitimate concerns about equalizing GPA competition, rewarding local academic achievement and the difficulty with transposing grades earned elsewhere into New Brunswick's system. Because of this finding I **CONCLUDE** that Mr. Shankar has not established a violation of his due process rights.

Mr. Shankar's lawyer argues that the residency requirement discriminates against aliens, especially Mr. Shankar. Except for Mr. Shankar, there was no testimony demonstrating that any aliens transferred to New Brunswick High School after their Sophomore years or later. Additionally, J-2Ev indicates that the three year period initially was derived historically. There was hardly any testimony concerning the impact of this procedure upon any individuals other than Mr. Shankar. The testimony provided concerning the 1988 "problem" and the 1982 "mistake" was inconclusive on alien status.

I further **FIND** the board's involvement in this question was initially sought to prevent the "problems" that had occurred in June of 1988. This bespeaks

an intent to clarify its practices and not to discriminate against Mr. Shankar because of his alien status. I **FIND** that the board seeks to deprive Mr. Shankar of the valedictorian honor solely because he was a third year transfer student and not because of his national origin.

I therefore **CONCLUDE** that Mr. Shankar has not established any violation of the Law Against Discrimination (*N.J.S.A.* 10:5-3) or any violation of his equal protection rights. Consequently, there can be no attorney fees awarded. *Balsley v. North Hunterdon Reg. High Sch.*, 225 *N.J. Super.* 221 (App. Div. 1988). The Commissioner has no power to reimburse litigants for self-incurred expenses relevant to disputes arising under the school laws. *Delanco Board of Education v. K.M.*, 1980 *S.L.D.* 927, 928. Therefore, I can award no costs in this matter.

I also **FIND** that the Board did not engage in any intentional, malicious, wanton, or reckless wrongdoing. Therefore punitive damages are inappropriate and cannot be awarded. *Jackson v. Consolidated Rail Corp.*, 223 *N.J. Super.* 467 (App. Div. 1988)

Conclusions and Order

I have **CONCLUDED** that the New Brunswick High School valedictorian residency requirement is not enforceable prior to the 1988-89 school year. However, the requirement became valid and effective sometime during the 1988-89 school year.

Rules are usually applied prospectively. In this matter, Mr. Shankar was unaware of this requirement when he enrolled in New Brunswick High School. The Board of Education, Superintendent and the entire High School administration apparently took no steps to provide proper notice. It was not until February 1989 that Mr. Shankar was officially advised that the requirement was to be applied to him. It was not until May 5, 1989 that the Board of Education affirmed the residency requirement as reasonable and practicable. During his two years in New Brunswick,

Mr. Shankar has obviously worked hard toward the valedictorian goal. He has earned the award by distinguishing himself academically at the New Brunswick High School. It should be too late to deprive him of this reward.

I therefore **CONCLUDE** that he should not be deprived of this award. Administrative due process requires adequate notice. See *High Horizons Development Co. v. Dept. of Transportation*, 231 *N.J.Super.* 399 (App. Div. 1989). To achieve fundamental fairness in this matter the residency requirement should not be applied to Mr. Shankar.

Accordingly, petitioner's request for an injunction to name him valedictorian of the 1989 graduating class is granted and the New Brunswick School Board is so **DIRECTED**.

However, Dawn Richards has also worked hard during her four years in the High School. She has also achieved an admirable record. She believes that she has earned the honor and has in fact met the residency requirement.

In considering Ms. Richards' situation, I think *Rucker v. Kinnelon Board of Education*, 1978 *S.L.D.* 541 is instructive. In that decision Kinnelon had an unwritten policy that added grades earned by students from courses taken at private summer school to those earned at the high school. The petitioner asserted that if not for this policy she would have been named salutatorian for 1978. Before the Commissioner ruled on the merits, however, the Board reconsidered its policy and changed it prospectively beginning with the next school year. The Commissioner ordered that the 1978 award be shared because "it would be unfair to pupils already selected as valedictorian and salutatorian to now be stripped of those honors." 1978 *S.L.D.* at 542.

I also believe that it would be unfair at this time to deprive Ms. Richards of the valedictorian honor. New Brunswick has in effect already designated Ms. Richards as its choice for valedictorian. In February 1989 when the school advised

Mr. Shankar that it was applying the residency requirement to him, Ms. Richards in effect became the valedictorian. There has been much confusion and too much strife associated with this situation. I therefore also **CONCLUDE** that it would be fundamentally unfair for Ms. Richards to be deprived of this award.

In accordance with *Rucker*, I **DENY** petitioner's request to enjoin New Brunswick from declaring another student valedictorian and I **DIRECT** that the Board of Education of New Brunswick designate Mr. Shankar and Ms. Richards as co-valedictorians for 1988-89. According to J-1 Ev. this is not without precedence in New Brunswick. In 1974, two students with the same GPA shared salutatorian honors.

Because money will be awarded this year to the top four students, I further **DIRECT** that whatever interest from the grant that the Board allocates for valedictorian be shared equally by Ms. Richards and Mr. Shankar.

For the reasons stated above I also **DENY** petitioner's requests for punitive damages, costs and attorney's fees.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

6/8/89
Date

STEVEN L. LEFELT, ALJ

Receipt Acknowledged:

6/8/89
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW

AMITABH SHANKAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY ET AL.,	:	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 careful and independent review of the instant matter, the Commissioner adopts in part and rejects in part the initial decision for the reasons which follow.

The Commissioner concludes that on the record before him, it cannot be demonstrated that a Board-ratified residency requirement related to selection for valedictorian existed or exists in respondent's district. The Commissioner's review of the record comports with the ALJ's that "before August 1988 whatever long standing practice certain administrators or teachers may have believed existed with regard to a valedictorian residency requirement was unwritten; unknown to the Board, students and parents; and was never applied***." (Initial Decision, ante) He also concurs with the ALJ's rejection of the testimony from the superintendent, Dr. Larkin, of the purported past practice that existed in the district before the summer of 1988 pertaining to residency requirements for school awards. The Commissioner finds that any such past practice did not constitute a Board policy, and failed to supply adequate notice to the pupils of the district concerning what requirements must be met to compete for top scholastic honors at the New Brunswick High School (NBHS). (See Initial Decision, ante.)

However, contrary to the ALJ's conclusion below, the Commissioner finds invalid the "procedure" which was purportedly in place for the 1988-89 school year. Specifically, the Commissioner disagrees with the ALJ's conclusion that "the Superintendent's operating procedure in this case was sufficiently recorded and publicized to become effective sometime between August 1988 and May 1989." (Initial Decision, ante)

Initially, the Commissioner finds and determines that a valedictorian selection process, through which the district honors its finest scholar, is of sufficient import to require more than an ad hoc administrative procedure. Such a significant scholastic

distinction requires board adoption of a formal board policy. The Commissioner rejects outright the superintendent's contention that such "procedure" as existed during the 1988-89 school year in the New Brunswick School District did not warrant Board adoption but, rather, falls among those responsibilities delegated to him as superintendent to "adopt various rules and regulations or operating procedures without board of education approval." (Id., at p. 7) The fact that Superintendent Larkin appeared before the Board to discuss with it the procedure he had in mind for such policy speaks against his own contention that the development of such policy was one which did not require Board adoption. Moreover, without formal Board adoption, it cannot be seriously argued that proper notice was provided to the entire student population, as it should have been, not merely by word of mouth to those students concerned. Thus, the Commissioner rejects the conclusion of the ALJ finding that:

> ***the operating procedure was "received" by the board of education in August 1988. At that point, the procedure was at least recorded in writing (through ambiguously presented in J-3 Ev.) and during the following school year (1988-89) became fully known to the students concerned. (Id., at p. 8)

Moreover, the Commissioner rejects as being without merit the ALJ's conclusion that:

> ***on May 5, 1989 the board supported "the decision of the Principal and Superintendent of Schools in [Mr. Shankar's case]." At that point, the board in effect specifically and clearly ratified or affirmed the six semester residency requirement for valedictorian as "both reasonable and practicable." p-2 Ev. (Id.)

The Commissioner finds that while the Board's desire to require its students to be in residence three years in order to compete for the laudable distinction of valedictorian is a reasonable one based on its interest "in having a valedictorian represent the best that its school can produce," (emphasis in text) (id., at p. 11), the Board may not retroactively apply conditions upon a pupil that will affect him without proper notice. Such notice could only have been provided following formal adoption of the requirements by the Board to all students in the high school at the time they entered NBHS, through a uniform notification device, such as the student handbook. To conclude otherwise would be to endorse after-the-fact application of a "procedure" and could result in situations like the instant matter.

Thus, it is the Commissioner's conviction that petitioner should not be deprived of the benefits inuring to him as a result of his having achieved the highest grade point average at NBHS, albeit that he has only been in the district two years. However, he recognizes, as did the ALJ, the considerable efforts of Ms. Richards and her commendable record throughout her four years at NBHS.

Accordingly, he adopts as his own for the reasons expressed in the initial decision the equitable determination of the ALJ that Mr. Shankar and Ms. Richards should share the distinction of being valedictorian of NBHS for the school year 1988-89, and that any monetary awards to be conferred as a result of this achievement shall be shared equally between Mr. Shankar and Ms. Richards.

The Commissioner further adopts that part of the initial decision that concludes petitioner has not established, by a preponderance of the credible evidence, any violation of the Law Against Discrimination or any violation of his equal protection rights, for the reasons expressed by the ALJ. Similarly, the Commissioner finds, as did the ALJ, that petitioner has failed to meet his burden of proving the Board's actions were in any way intentional, malicious, or reckless. The Commissioner notes additionally that it is not within his power to assess punitive damages. Thus, such arguments raised by petitioner's counsel are dismissed as not within the Commissioner's power to grant pursuant to N.J.S.A. 18A:6-9 et seq. Moreover, because he has failed to demonstrate his claim of discrimination based on his alien status, attorney fees are denied.

Accordingly, the Commissioner adopts in part and rejects in part the initial decision. He reverses that part of the initial decision finding that the valedictorian residency requirement was effective and enforceable during the 1988-89 school year, but accepts that part of the initial decision finding that the policy was ineffective for any prior year. He further concludes that a three-year residency requirement for the acquisition of valedictorian status is not unreasonable, per se, but that any such requirements must be promulgated through formal board resolution. Moreover, the Commissioner finds that enforcement of such policy may only be carried out after all students have been apprised of such policy in a uniform and prospective manner. He adopts as his own, for the reasons expressed in the initial decision, those conclusions of the ALJ rejecting petitioner's alien discrimination claim, as well as his equal protection argument. He rejects petitioner's prayer for attorney fees and punitive damages. He directs that Mr. Shankar and Ms. Richards share the distinction of being named valediction for the graduating class, and that they share, equally any monetary awards inuring as a result of their achievement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 22, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION
PARTIAL SUMMARY JUDGMENT
ORDER
and
INITIAL DECISION
OAL DKT. NO. EDU 9108-88
AGENCY DKT. NO. 347-11/88

PARSIPPANY-TROY HILLS
BOARD OF EDUCATION
Petitioner,

v.

GREG W. MOLINARO,
Respondent.

Henry N. Luther, III, Esq., for petitioner
(Dillon, Bitar & Luther, attorneys)

Nancy Iris Oxfeld, Esq., for respondent
(Klausner, Hunter & Oxfeld, attorneys)

Record Closed: May 1, 1989 Decided: May 5, 1989

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

The Parsippany-Troy Hills Board of Education (Board) certified charges of conduct unbecoming a teacher against Greg W. Molinaro (Molinaro), a tenured teacher in its employ since 1979, and simultaneously suspended him without pay.

Molinaro denied the charges but did admit making one harassing phone call to Jeannette Pisarchuk on August 26, 1987, and entered a plea of guilty in Mendham

Municipal Court to a violation of N.J.S.A. 2C:33-4, for which he was sentenced to a suspended 30-day jail term, fined $200, assessed a $30 Violent Crimes Penalty, placed on probation for one year, and ordered to undergo therapeutic treatment during probation under the supervision of the probation department.

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 January 30, 1989, at which the parties agreed to submit procedural issues and the applicability of N.J.S.A. 2C:51-2 (the forfeiture statute) for summary decision.

The Commissioner of Education affirmed a determination of the undersigned on April 17, 1989 that N.J.S.A. 2C:51-2 was inapplicable, procedural defects were not fatal, and ordered the matter to proceed to plenary hearing on the substantive charge of unbecoming conduct. The matter was set down for hearing on May 1 and 2, 1989.

THE CHARGES

1. Molinaro entered a plea of guilty to a violation of N.J.S.A. 2C:33-4 [harassment] which constitutes conduct unbecoming a teacher.

2. Molinaro made a number of other harassing telephone calls which constitute conduct unbecoming a teacher.

MOTION FOR PARTIAL SUMMARY DECISION TO DISMISS CHARGE #2

Molinaro filed this motion under date of April 25, 1989 to dismiss "all charges against him with the exception of the charge that the respondent pled guilty to having made a harassing phone call" [charge #1] with a supporting Brief.

Due to the inadequate time for responsive and reply papers pursuant to N.J.A.C. 1:1-12.2, the parties were directed to provide oral argument on May 1 preceding the scheduled plenary hearing.

It is noted that the tenure charge of unbecoming conduct filed by Superintendent Ruth Krawitz states "inasmuch as he [Molinaro] has made and has admitted to making criminally obscene telephone calls". Krawitz bifurcates the allegations in her Statement of Facts by distinguishing the Pisarchuk August 26 call and others.

Molinaro relies on his brief and argues there is not a scintilla of evidence in support of the charges sought to be dismissed. The Board argues that Molinaro is in possession of all the evidence to substantiate the supporting allegations.

Molinaro requested the Board to provide detail, through interrogatories, regarding the alleged calls. None was provided. Molinaro again requested detail in a subsequent letter under date of April 14, 1989. The Board stated in its response under date of April 19, 1989 to "please be advised that at the present time the precise contents of the telephone calls in question are known to your client, but not to the Board of Education. If we elicit the substance of the telephone conversations from either Ms. Pisarchuk [relative to an August 28 call] or Ms. Taylor prior to the date of the hearing, we will, of course, advise you immediately." No further information was provided.

N.J.S.A. 18A:6-11 outlines the standards that the board must follow in making charges against a tenured employee. Briefly, the employee is to be provided a copy of a written statement of evidence, under oath, to support the charge. After providing the employee with the opportunity to respond the board then determines whether there is probable cause to credit the evidence, and if so, whether the charge warrants a statutory penalty. In re Feitel, 1977 S.L.D. 471.

The Commissioner has generally held that boards must strictly adhere to the requirements of providing sufficient factual basis for supporting a tenure charge. In Manalapan - Englishtown Ed. Assn. v. Bd. of Ed., etc., 187 N.J. Super. 426, 432 (App. Div. 1982), the court held that charges which specified the gutter language used and the nature of the physical confrontation which gave rise to charges of conduct unbecoming were not sufficiently specific to determine whether there was probable cause. Even when the

tenure charges are based on the underlying facts of a criminal charge, the board must still provide supporting evidence. Ott v. Hamilton Twp. Bd. of Ed., 160 N.J. Super. 333, 336 (App. Div. 1978).

In the instant matter, the board provided only two charges: the guilty plea to one violation of N.J.S.A. 2C:33.4, a petty disorderly persons offense; and other harassing telephone calls. To be considered harassing, the call must be made anonymously or at extremely inconvenient hours; or in offensive coarse language; or in any other manner likely to cause harm or annoyance. The principal element of harassment is purposeful conduct by defendant designed to harass by subjecting a victim to a menace which produces a reasonably founded alarm on the part of the victim. State v. Berka, 211 N.J. Super. 717, 720 (Law Div. 1986).

The Board admitted it does not know the contents of the calls. As a result, the tenure charge sought to be dismissed was initially defective because it was not supported by sufficient evidence for the Board to determine whether probable cause exists. Molinaro did not initially challenge the deficiency of the tenure charge for this reason, but instead, provided opportunities for the Board to cure their failure by providing more specific information through answers to interrogatories and a subsequent letter request. The Board did not cure.

The New Jersey Administrative Code does provide sanctions for failure to answer interrogatories. N.J.A.C. 1:1-10.5 and N.J.A.C. 1:1-14.4(c). R. 4:23-5 of the New Jersey Court Rules also provides that failure to answer interrogatories shall be grounds for dismissing a complaint.

I **FIND** the Board's failure to provide the underlying facts to the charge sufficient to require partial summary decision in favor of respondent Molinaro, and thereby **CONCLUDE** the Motion shall be and is hereby **GRANTED.**

The charge of unbecoming conduct for reasons other than Molinaro's plea of guilty to a violation of N.J.S.A. 2C:33-4 is **DISMISSED.** The parties are **ORDERED** to immediately proceed to plenary hearing on the remaining charge.

INITIAL DECISION

The charge of unbecoming conduct due to Molinaro's plea of guilty to a violation of N.J.S.A. 2C:33-4 proceeded to hearing on May 1, 1989 immediately after conclusion of the oral argument and oral decision on the Motion addressed above.

The relevant facts related to this charge are undisputed and are adopted herein as **FINDINGS OF FACT:**

1. Molinaro initiated a telephone call to Jeannette Pisarchuk on August 26, 1989 and the following conversation took place:

   Molinaro said several times: "Jeannete, I know you're there." Molinaro then asked: "Do you know who this is?" and "Is Ed [Mrs. Pisarchuk's husband] there? When Mrs. Pisarchuk responded negatively, Molinaro said: "I know he is not. I'm going to call back again."

2. Mrs. Pisarchuk testified that she reported the call to Detective Gaffney of the Mendham Police Department, who then proceeded to investigate.

3. A trap which had been placed on the Pisarchuk phone traced the August 26 call as having been made from the home of one Joseph Tiscornia, who was in the Bahamas on that date. Only Tiscornia's brother Charles and Molinaro had access to the home by virtue of their independent employment by Joseph to do some painting.

4. Gaffney's investigation cleared Charles of any wrongdoing and focused on Molinaro. Five meetings were scheduled between them. Four were cancelled by Molinaro for various reasons given which are deemed here to have been less than truthful. Molinaro denied having made the call to Pisarchuk.

5. Molinaro met with Police Chief Cillo on October 20, 1987 to discuss the possible impact of the alleged harassment call to Pisarchuk on his personal life and employment.

6. Molinaro met again with Gaffney on October 27, 1987 and admitted making the call to Pisarchuk on August 26, 1987.

7. Gaffney filed a complaint against Molinaro in Mendham Municipal Court on October 27, 1987 accusing him of making the August 26 call to Pisarchuk "with purpose to harass . . . to make or cause to be made anonymous communication in a manner likely to cause annoyance and alarm, in violation of: N.J.S.A. 2C:33-4."

8. Molinaro entered a plea of guilty on April 28, 1988 and was sentenced as previously indicated.

I **FIND** the charge of unbecoming conduct to be **TRUE**, notwithstanding that I **ALSO FIND** the telephone call not to have been obscene.

DISCUSSION

It has been previously determined in the decision on Motion for Partial Summary Decision entered on March 23, 1989 that Pisarchuk "has no association whatsoever with the Parsippany-Troy Hills school district." N.J.S.A. 2C:51-2, the forfeiture statute, was determined to be inapplicable because Molinaro's conduct "did not involve dishonesty or a crime of the third degree, and did not involve or touch upon his office, position or employment."

N.J.S.A. 2C:51-2 was designed to require an automatic penalty of forfeiture of employment when certain conditions are found to fall within the four corners of the statute. It was never designed to shield an employee from dismissal when that penalty is otherwise deemed to be appropriate.

In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Twp. of Jackson, 1974 S.L.D. 97, the Commissioner said:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, . . . and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. (at 98, 99)

In the Matter of the Tenure Hearing of Orazio Tannelli, School District of the Town of Montclair, 194 N.J. Super. 492 (App. Div. 1984), Tanelli was dismissed from his tenured teaching position by the application of N.J.S.A. 2C:51-2 for a violation of N.J.S.A. 2C:33-4, even after a remand by the State Board of Education for a mitigation hearing determined that his telephone calls to his principal at odd hours resulted from his distress caused by his application for a department chairmanship having been rejected a second time. Notwithstanding that Tanelli's offense touched upon his employment, I **FIND** that Molinaro's conduct was not only no less offensive but indeed more injurious to his image as a role model for the pupils he teaches.

I **CONCLUDE** that Molinaro's dismissal from his tenured teaching position with the Parsippany-Troy Hills Board of Education is an appropriate penalty to be imposed. N.J.S.A. 18A:28-5. **IT IS SO ORDERED.**

These recommended decisions 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 these matters. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, these recommended decisions shall become final decisions in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** these Initial Decisions with Saul Cooperman for consideration.

5 May 1989
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

10 May 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 10, 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF GREG W. MOLINARO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF PARSIPPANY-TROY HILLS,	:	
MORRIS COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by respondent, pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board's reply exceptions were also timely filed although its cross-exceptions were untimely. Thus, respondent's reply to the Board's cross-exceptions was not considered. Neither was respondent's reply to the reply of the Board considered in that there is no provision in law permitting such submission.

After iterating his version of the facts and the procedural history, respondent first concurs with the ALJ's having dismissed all claims against him other than the August 26, 1987 telephone call. Noting that the Board bears the burden of proving that the tenure charges are true by a preponderance of the credible evidence, respondent alleges that the Board failed to supply any evidence that there was any proof that any telephone calls other than the August 26, 1987 call that respondent may have made were either harassing or obscene. He cites In the Matter of the Tenure Hearing of Joseph Harris, School District of the City of New Brunswick, Middlesex County, decided by the Commissioner March 18, 1987 for the proposition that a board of education is required to provide legally competent evidence to support each ultimate finding of fact. Respondent avers that while the tenure charges alleged petitioner made harassing telephone calls, as well as obscene telephone calls, the Board admitted that it did not know the content of all of the alleged telephone calls other than the August 26, 1987 call.

Further, respondent claims that the Board failed to supply any substantive material pertaining to its knowledge of the content of other calls in its answers to interrogatories, in response to his request for more specific information sought in correspondence, in oral argument before the ALJ in response to his Motion for Summary decision, or in argument in support of its attempt to have Mrs. Pisarchuk testify to an alleged obscene phone call. Respondent argues that a tenured employee is entitled to know the contents of any charges against him or her prior to the hearing and, also, that bare assertions by a board without "factual underpinnings" to support such assertions, must be dismissed. (Respondent's Exceptions, at pp. 19-20)

For these reasons, respondent agrees with the ALJ's determination to dismiss all charges against respondent of having made harassing and obscene telephone calls with the exception of the August 26, 1987 harassing telephone call.

Respondent also excepts to the ALJ's determination to dismiss him from his tenured employment. Admitting that he "is not arguing that his conduct with regard to the Pisarchuk telephone call was appropriate conduct for a tenured teaching staff member" (id., at p. 21), respondent nonetheless claims that the penalty of termination of tenure made by the ALJ is too harsh for the circumstances and that a lesser penalty must be imposed. He contends the conduct was but one single and isolated action, that "***it did not in any way touch upon the Respondent's employment, it did not affect his ability to teach or interact with members of the school community*** and has not been repeated." (Id.) He further notes that he has continued in counseling beyond the time the Court required.

Mr. Molinaro excepts to the ALJ's lack of explanation in concluding that the telephone call in question "was 'more injurious to his image as a role model for the pupils he teaches'***" (id., at p. 22) than the conduct discussed in In re Tanelli, supra. He would distinguish his situation from those in Tanelli; In re Levitt, 1977 S.L.D. 976, aff'd St. Bd. 1978 S.L.D. 1027, aff'd N.J. Superior Court Appellate Division 1979 S.L.D. 849, and In the Matter of the Tenure Hearing of Geoffrey Fulcoli, School District of the Town of Belleville, Essex County, decided by the Commissioner March 18, 1985.

Rather, respondent submits the situation in this case is similar to those in such cases as In the Matter of the Tenure Hearing of Richard Pappa, School District of the Township of Old Bridge, Middlesex County, decided by the Commissioner March 14, 1988; In the Matter of the Tenure Hearing of Jude Martin, School District of the Borough of Union Beach, Monmouth County, decided by the Commissioner July 14, 1988 and In the Matter of the Tenure Hearing of Martin Lieb, School District of the Town of West Orange, Essex County, decided by the Commissioner July 1, 1985. He claims:

> It is submitted that the situation herein is similar to the situations in Martin, Lieb, and Pappa. A teacher of many years standing commits a single isolated disorderly or petty disorderly offense which does not touch upon his employment and is not in any way shown to affect his ability to return to the classroom and teach. In each instance, a penalty was assessed against the teaching staff member, but not the loss of tenure. The same situation should apply herein.
>
> Respondent does not argue that his actions should be condoned. However, while offenses can not necessarily be rated, it is submitted that the single harassing telephone call made by the Respondent Molinaro to Pisarchuk was not more

> offensive that the action of Lieb in walking up to a stranger, reaching down and touching the stranger's penis. Similarly, it was no more offensive than Pappa's actions in sitting in a public rest area with his pants undone and unzippered, making eye contact with a stranger, reaching into his pants, removing his penis and masturbating in an area where young children had unrestricted access.
>
> In summary, it is submitted that a consideration of the relevant facts shows that Molinaro should not forfeit his tenure. Molinaro committed an isolated petty disorderly persons offense of making one harassing phone call to Jeanette Pisarchuk. There was absolutely no showing that Molinaro's conduct was part of a continuing series of incidents (while the Board of Education did so allege in the tenure charges, they were never able to adduce any supporting statement to that effect). Molinaro's conduct in no way touched upon his employment. There was absolutely no showing that Molinaro's return to the classroom would have a negative impact on the students. Certainly his return to the classroom could have no more of a negative impact on students then the return to the classroom of a teacher who masturbated in public. Molinaro admitted his guilt and compiled fully with the terms of the sentence imposed by the municipal court judge. Further, in addition to taking part in counseling mandated by the municipal court judge, Molinaro continued through this date in counseling even though it is [no] longer required by his sentence, in order to avoid any further similar conduct.
>
> For these reasons it is submitted that the administrative law judge erred in recommending that Molinaro lose his tenure. It is submitted that a lesser penalty is appropriate pursuant to Martin, Lieb, and Pappa.
>
> (Exceptions, at pp. 30-31)

The Board's reply exceptions first set forth its version of the procedural history and thereafter set forth an exception to the ALJ's Order granting respondent's Motion for Partial Summary Decision. Because this exception does not deal with respondent's exception but, instead, objects solely to the ALJ's determination contained in the initial decision concerning his Partial Summary Decision, the Commissioner does not consider such exception, due to its untimely filing.

Point II of the Board's reply brief does address respondent's exceptions, and states:

THE ADMINISTRATIVE LAW JUDGE'S DECISION DISMISSING RESPONDENT FROM HIS TENURED TEACHING POSITION WAS CORRECT AND SHOULD BE AFFIRMED.

The Board claims that even assuming arguendo that the ALJ was correct in precluding testimony concerning other allegedly unlawful calls that respondent may have made, the ALJ was correct in dismissing him from his tenured position as a teaching staff member.

Noting that in his exceptions respondent concedes for the first time that his conduct in telephoning Mrs. Pisarchuk was conduct unbecoming a teaching staff member, the Board rebuts his claim that his unlawful conduct was not sufficiently severe to warrant dismissal. Noting respondent's two contentions that 1) his act did not touch upon his employment and 2) that a single act should not be sufficient to warrant dismissal, the Board contends in response to the first claim, that "[t]he cold and calculating harassment of a total stranger bespeaks a far more unstable individual and is a more offensive and injurious act" than that committed against a school employee as discussed in Tanelli, supra. (Reply Exceptions, at p. 15) The Board thus concurs with the ALJ's conclusion that respondent's unbecoming conduct was sufficiently severe to justify dismissal.

In response to respondent's citing Martin, supra; Lieb, supra; and Pappa, supra, in support of his argument that a single incident of unbecoming conduct is insufficient to justify dismissal, it claims that is has been held that a single incident of unbecoming conduct is sufficient to warrant dismissal of a teaching staff member, even if that conduct does not touch upon a teacher's employment. Moreover, the Board contends there were no extenuating circumstances underlying respondent's action, as there were present in such cases as Lieb to suggest a basis for mitigation of the penalty of dismissal. Further, "the Board takes issue with respondent's conclusion that the conduct in Pappa is as outrageous as Mr. Molinaro's admitted harassment of Ms. Pisarchuk and his invasion of her privacy in her own home." (Id., at p. 16)

> Clearly, there are no such extenuating circumstances in this case. There is no evidence upon which the Administrative Law Judge could find as a reasonable rationale for Mr. Molinaro's actions which would suggest that leniency is appropriate. Mr. Molinaro refused to cooperate with the police during the investigation. As Officer Gaffney testified and as the Administrative Law Judge properly found, Mr. Molinaro tried to avoid the consequences of his act. He has steadfastly maintained that his conduct was not unbecoming a teaching staff member. He has never apologized to Ms. Pisarchuk for his actions nor shown any remorse. Moreover, Mr. Molinaro required a psychiatric leave of absence from the Board and admits to being under continued psychiatric care as a result of his

> conduct, yet no evidence of his fitness to teach or that he is not likely to again engage in such conduct was submitted on his behalf. Clearly, the Administrative Law Judge and the Commissioner may infer from this failure that any such testimony would be adverse to Mr. Molinaro's continuance as a teacher. Under these circumstances, even were it to be finally determined that there was only one incident, the dismissal from tenure was correct and should be affirmed. (Id., at pp. 16-17)

Upon a careful and independent review of the instant record, the Commissioner adopts the initial decision in regard to the ALJ's findings of fact and conclusions of law, but he rejects the ALJ's assessment of an appropriate penalty for the reasons stated below.

Initially, the Commissioner notes his accord with the ALJ's conclusion as embodied in the Partial Summary Judgment dated May 5, 1989 dismissing the charges against respondent with the exception of the phone call on August 26, 1987. The Commissioner is in agreement with the ALJ's recitation of Manalapan-Englistown Ed. Assn., v. Bd. of Ed., etc., 187 N.J. Super. 426, 432 (1981) for the proposition that the Board must provide respondent with charges sufficiently specific to determine whether there is probable cause to credit the evidence in support of the charge(s) and whether such charge, if credited is (are) sufficient to warrant a dismissal or reduction of salary. Without knowledge as to the exact nature of the alleged other phone call(s) which the Board concedes it did not have, the Board was without sufficient information to determine whether probable cause existed to certify a charge that respondent had made an obscene phone call(s) in addition to the harassing call made and admitted to by respondent on August 26, 1987. Thus, he adopts the Partial Summary Judgment for the reasons expressed in his oral decision dated May 1, 1989 and in his written order dated May 5, 1989 at pages 3-4 as supplemented herein. See also 5-1-89 Tr. 7-11.

Moreover, the Commissioner concurs with the ALJ's determination and respondent's admission that the call respondent made to Mrs. Jeannette Pisarchuk on August 26, 1987 constitutes conduct unbecoming a teaching staff member and that said call, while harassing, was not obscene. However, the Commissioner disagrees that the appropriate penalty to be imposed for having made such call should be dismissal from his tenured teaching position. Instead, the Commissioner finds that while respondent's single instance of misconduct mars an otherwise unblemished record with the district, his offense was unlike the circumstances of cases such as Tanelli, supra; Levitt, supra, and Fulcoli, supra. He concludes that the call was not made to a school employee and, thus, in that regard, was not disruptive of the educational environment. Further, the offense in question is a disorderly persons offense for which respondent admitted his guilt and for which he complied fully with the terms of the sentence imposed by the municipal court judge.

Neither were terroristic threats involved in the instant matter, as there were in Fulcoli.

Accordingly, and in consideration of the high standard of behavior expected of a teaching staff member, the Commissioner directs that respondent shall forfeit any increments paid for the 1989-90 school year plus three months salary, as well as the 120 days salary withheld at time of suspension pursuant to N.J.S.A. 18A:6-14.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 26, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6299-87
AGENCY DKT. NO. 249-8/87

WASHINGTON TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
UPPER FREEHOLD REGIONAL BOARD OF EDUCATION, PLUMSTED TOWNSHIP BOARD OF EDUCATION, AND MILLSTONE TOWNSHIP BOARD OF EDUCATION,
Respondents.

David Carroll, Esq., for petitioner

Wayne J. Oppito, Esq., for respondent Plumsted Board of Education

Edward B. Kasselman, Esq., for respondent Millstone Township Board of Education (Bathgate, Wegener, Wouters & Neumann)

Peter P. Kalac, Esq., for respondent Upper Freehold Regional School District Board of Education (Kalac, Newman & Lavender)

Record Closed: December 15, 1988 Decided: May 1, 1989

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

INTRODUCTION

The Washington Township Board of Education (Washington Board) seeks approval of the Commissioner of Education to terminate its more than 60-year-old sending-receiving agreement with the Upper Freehold Regional School District Board of

Education (Regional Board). The Regional Board, pursuant to such agreement, provides on a tuition basis Washington Township pupils a high school grade 9-12 education. The Washington Board wishes to enter a sending-receiving relationship with the Lawrence Township Board of Education (Lawrence Board) by which the Lawrence Board would provide on a tuition basis Washington pupils a program of instruction in grades 9 through 12. The Regional Board vigorously opposes the request of the Washington Board. After the Commissioner of Education transferred the matter on September 16, 1987 to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., a prehearing conference was scheduled by the Newark Office of Administrative Law and conducted by this judge on December 4, 1987. Extensive discovery by the parties followed. A plenary hearing began May 9, 1988 and continued on 21 succeeding days until its conclusion on July 29, 1988. Briefs and reply briefs were filed by the parties in support of their respective positions. The record, consisting of transcripts of the testimony of witnesses and documents is extensive. Extensions of time within which to file this initial decision have been authorized. The conclusion is reached in this initial decision that the application of Washington Township to terminate its relationship with Upper Freehold in favor of a similar relationship with Lawrence Township must be **GRANTED.**

BACKGROUND

The background facts of the matter, as established by the evidence in this record, which set the scene of the dispute are these. The Upper Freehold Regional School District, operated by the Upper Freehold Regional Board of Education, is a kindergarten through grade 12 district located in Monmouth County, approximately 15 miles east of Trenton, which is composed of the Borough of Allentown and the Township of Upper Freehold. Membership on the Regional Board of Education is limited to residents in either Allentown or Upper Freehold Township. The Regional Board alone performs all functions and makes all decisions for the total operation of the Regional School District.

In addition to the sending-receiving relationship with Washington Township which is located in Mercer County, Upper Freehold also provides on a receiving tuition basis a grade 9 through 12 program of instruction at its Allentown High School for pupils sent from Millstone Township, located in Monmouth County, and from Plumsted Township, located in Ocean County. Neither the Millstone nor Plumsted Board of Education elected to participate in this matter beyond Millstone simply filing a letter indicating its intention

not to participate while Plumsted filed an answer to the petition of Washington Township which may, at best, be considered impartial favoring neither Washington Township nor Upper Freehold Regional.

This is not the first occasion on which either the Washington Board or the Regional Board sought to terminate the long-standing sending-receiving relationship. In 1972, Upper Freehold sought to terminate the relationship and to require Washington Township to seek other arrangements for the education of its pupils in grades 9 through 12. Washington Township at that time opposed the application filed by Upper Freehold. See, In the Matter of the Application of the Upper Freehold Regional Board of Education for the termination of the sending-receiving relationship with the Board of Education of the Township of Washington, Mercer County 1972 S.L.D. 627. Under the then existing legal standard at N.J.S.A. 18A:38-13, the Commissioner determined that Upper Freehold failed to show good and sufficient reason to approve its request to terminate the sending-receiving relationship with Washington Township and because there was then no known alternative placement for pupils from Washington Township. Nevertheless, the Commissioner expressed his belief that the then geographic size of the Upper Freehold Regional School District and its high school sending districts had such a potential for population growth that future developments would require periodic scrutiny. The Commissioner, therefore, recommended the Washington Board expand its planning efforts for purposes of educating its high school age pupils and to explore with the Mercer County superintendent of schools alternatives to its then existing sending-receiving relationship with Upper Freehold. The Commissioner directed both Washington Township and Upper Freehold to report to him in 1974 regarding the status of their relationship.

In 1974 the Commissioner noted that certain expressed fears of the Regional Board regarding population growth in Washington Township had not materialized and that its projection of a substantial general population growth in its own regional district was not as rapid as it, the Regional Board, had earlier projected. The Commissioner dismissed the Upper Freehold petition without prejudice to be refiled by either party at some future time under new conditions. See, In the Matter of the Application of the Upper Freehold Regional Board of Education for the termination of the sending-receiving relationship with the Board of Education of the Township of Washington, Mercer County 1974 S.L.D. 856.

In 1980 the Washington Township Board of Education sought to gain approval to terminate its sending-receiving relationship with Upper Freehold. That litigation endured for six years until the Appellate Division affirmed the State Board ruling during June 1986 which denied the application for withdrawal on the grounds Washington Township failed to establish good and sufficient reason for withdrawal.

The credible evidence in this record shows that the Borough of Allentown, one of the two constituent districts of the Regional District, has a present population of approximately 2,000 which is expected to increase to 2,200 by the year 2000. Upper Freehold Township, the other constituent of the Regional District, has a present population of approximately 3,700 which, by the year 2000, is expected to increase to 5,000. Ninety of the 844 pupils, including pupils in need of special education, enrolled at Allentown High School as of September 30, 1987 were from Allentown, while 157 were from Upper Freehold Township.

Millstone Township, one of the three sending districts to the Regional high school, has a present population of approximately 5,000 which is expected to rise to 7,000 by the year 2000. One hundred ninety-three of the 844 pupils enrolled at Allentown High on September 30, 1987 were from Millstone Township. Plumsted Township, another sending district to Allentown High, has a present population of approximately 8,000 which is expected to rise to 12,400 by the turn of the century. Three hundred eighteen of the 844 pupils at Allentown on September 30, 1987 were from Plumsted. Finally, Washington Township, the petitioning sending district here, has a present population of 5,800 which is expected to rise to 8,000 by the year 2000. Eighty-six of the 844 pupils enrolled at Allentown High on September 30, 1987 were from Washington Township. The Washington Township superintendent testified that approximately 96 high school age students from Washington Township presently choose to attend at their own expense a high school other than Allentown High School. Note that the Upper Freehold Regional High School receives approximately 70 percent of its pupils from sending districts. According to a report from the Department of Education 8 districts of 169 sending-receiving relationships receive more than 50 percent of their enrolled pupils.

The present population of Lawrence Township is approximately 25,000 and is expected to reached 32,000 by the year 2000. Lawrence High School had a pupil enrollment of 723 as of September 30, 1987, exclusive of pupils in need of special

education. The Lawrence Township Board of Education is comprised of members who must be resident of Lawrence Township. Consequently, if Washington Township is successful on this application, it would have as much local legal representation on the Lawrence Township Board as it presently has on the Upper Freehold Township Board which is none.

The parties here stipulate that the present functional capacity of the Allentown High School is 838 pupils. The parties further stipulate that upon completion of a planned addition to Allentown High School, the functional capacity shall increase to 960 pupils. According to the evidence of record, the present functional capacity of Lawrence Township High School is 961 (P-1, at p.131).

After the Appellate Division on September 17, 1986 affirmed the State Board's decision of June 6, 1985 by which Washington Township's 1980 application to seek termination of the agreement for failure to establish good and sufficient reason, the statutory language of N.J.S.A. 18A:38-13 was amended by L. 1986, c. 156, effective November 24, 1986. The amendment deleted the "good and sufficient reason" standard against which decisions were to be made whether to grant approval on applications to terminate then existing sending-receiving relationships. The good and sufficient reason standard had been the death knell to prior efforts of both Washington Township and Upper Freehold Regional to terminate the existing sending-receiving relationship. Neither could demonstrate to either the Commissioner's satisfaction or to the satisfaction of the State Board of Education that good and sufficient reason existed to allow the dissolution of the agreement.

Washington Township renews its attempt to dissolve the existing agreement under the amended N.J.S.A. 18A:38-13 which, according to the State Board of Education in Cranbury Tp. Board of Ed. v. Lawrence Tp. Board of Ed., 1987 S.L.D. _____ (April 3, 1987) furthers a policy of favoring local involvement. Washington Township proposes a phased withdrawal of its pupils from Allentown High beginning September 1989. Under the plan its pupils other than those entering ninth grade would remain at and graduate from Allentown High. Pupils who would otherwise enter ninth grade at Allentown in September 1989 would enter Lawrence High and each year thereafter graduating Washington Township eighth graders would commence ninth grade at Lawrence. The Cranbury Board of Education had had a sending-receiving relationship with the Lawrence

Township Board of Education since 1978. Cranbury petitioned the Commissioner in 1982 for approval to terminate that relationship and withdraw its pupils in favor of sending them to Princeton High School. The State Board of Education approved Cranbury's withdrawal from Lawrence Township.

LAW

N.J.S.A. 18A:38-13, as amended, provides in full as follows:

> No such designation of a high school or high schools and no such allocation or aportionment of pupils thereto, heretofore or hereafter made pursuant to law, shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the effected districts, the impact on the quality of education received by pupils, and the effect upon the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative effect will result therefrom.

In addition to the deletion of the statutory good and sufficient reason standard, any school district now entering into a sending-receiving relationship after severing a prior sending-receivin relationship shall remain in the subsequent relationship for not less than five years. N.J.S.A. 18A:38-13.1. But, with respect to the deletion of the good and sufficient reason standard, the State Board of Education said this in Cranbury, supra, even though it decided the Cranbury case on the statute prior to amendment.

> Thus, the Legislature has modified the standard to be applied in considering requests to alter or terminate sending-receiving relationships***Specifically, the Legislature has eliminated the language that required that 'good and sufficient reason' be presented before approval for termination could be granted. Instead, the new law requires that prior to making its application to the Commissioner, a district wishing to sever a sending-

> receiving relationship prepare and submit a feasibility study considering the educational, financial and racial implications, and mandates that the Commissioner grant the request to sever the relationship if no substantial negative impact will result.

Elsewhere in the same opinion, the State Board of Education ruled that the statutorily required feasibility study is a threshold requirement which must be met prior to actual litigation of applications to terminate existing sending-receiving relationships. In this case, that threshold requirement has been met in that a feasibility study (P-1) was submitted. Thus, on its face, the standard of the statute has been met. The State Board continued its instruction on the elimination of the good and sufficient reason standard when it said this:

> We find that, as expressed by its modification of the standard to be applied in considering requests for alteration or termination of sending-receiving relationships, the statute as amended does not represent a departure from the legislative policies embodied in the statutory scheme applicable to sending-receiving relationships prior to amendment of N.J.S.A. 18A:38-13, but rather gives further definition to the balance between those policies.
>
> By elimination of the requirement that the petitioning district establish educationally based reasons for its preference of where to education (its) students, the Legislature has furthered the policy favoring local involvement. It however also has given further guidance in effectuating the policy favoring stability by the adoption of specific statutory criteria to be applied in assessing the impact of termination, criteria that we emphasize were developed through our decisional law under the predecessor statute. (Citation omitted)***

Washington Township points out in its filed brief that the State Board also addressed the general statutory scheme which governs sending-receiving relationship before and after amendment to N.J.S.A. 18A:38-13. In this regard, the State Board noted as follows with citations omitted:

> Initially, we emphasize that this statutory scheme was intended to make unused facilities available to those in need of education in outside districts, specifically to students in districts that lack high school facilities***Although application of the statutory scheme has long reflected the policy of insuring stability in sending-receiving relationships***we emphasize that the policy favoring stability did not create in a receiving district a statutory right to continue as the receiving district for a particular sending district indefinitely or to perpetuity***

> Further, in addition to effectuating the policy favoring stability when determining whether termination is warranted in a particular case, the State Board also is required to effectuate the legislative policy of this state to guarantee local participation in educational matters***In effectuating this policy, we recognize that the involvement of a sending district in decisions effecting the education of its students is limited by the fact that another district actually provides the educational programs to its students. However, we find that the fact that a district does not have the facilities to educate its students within its own district and therefore must enter into a sending-receiving relationship in order to insure a thorough and efficient education for its students should not totally deprive a sending district of involvement in any of the decisions effecting the education of its students. We further find that, given the reality that the substance and direction of the educational programs provided to students of a sending district by the receiving district are largely determined by the receiving district, the most significant educational decision made by a sending district is the decision concerning where its students will be educated***

The State Board noted that the decision of where students who must be sent out of district for their education because of a lack of in-district facilities is the most significant decision concerning the students' eduction in which the citizens of the sending district are involved. Therefore, the State Board says, it is obligated to effectuate the desire of a sending district to educate its students in another district so long as its preference is educationally based and the termination of an existing agreement does not create unwarranted instability.

The remainder of this initial decision shall shadow the amended statute as construed by the State Board of Education. Findings shall be reached on the reasons advanced for termination of the sending-receiving relationship and pupil enrollment projections and whether the evidence discloses that the requested termination of the sending-receiving relationship will result in a substantial negative financial impact, racial impact, educational impact, facility impact, or transportation impact. First, though, it is noted that the Regional Board's motion to dismiss on the assertion the feasibility study is fatally defective because of asserted numerous errors was, and continues here to be **DENIED.**

The feasibility study (P-1) submitted to the Commissioner of Education by Washington Township in support of its application was prepared by Dr. Raymond E. Babineau of University Associates, which is identified in this record as a consulting firm of educational planners and consultants. The feasibility study addresses the demographics

of the various communities involved in the matter, enrollment projections, educational facilities and school capacities, educational programs, and financial implications. Babineau filed a consultant's report (P-2) one year later during March 1988, which itself was revised in May 1988. The consultant's report was intended to update information contained within the feasibility study in order to re-evaluate the educational, racial and financial impact of the proposed withdrawal. Dr. Murray Peyton, presently a school business administrator employed by a board of education in northern New Jersey, consulted on the feasibility study and consultant's report for Babineau. Babineau and Peyton were particularly subjected to intense cross-examination. The Washington Board also called as witnesses Richard Ekholm who is assigned to teach computers at the Washington elementary school, although admittedly not certified to teach computers at the elementary level; Charlotte Sause, its curriculum coordinator; Marie Shanko, transportation coordinator; Maurice James, Jr., a present Board member; and, Gail Tapper, the Lawrence High School principal. The Regional Board called as witnesses Robert A. Savitt, the president of Guidelines, Incorporated, identified as an educational consulting firm; Joann Snook, a teacher of English at Allentown High School and the department chairperson; Evelyn Bieber-Freuler, a supervisor employed by the Department of Education and assigned to the monitoring team at the Monmouth County office; Richard A. Simon, the Allentown High School principal; Alfred M. Zielinski, Jr., the Regional District computer manager and the assistant computer instruction coordinator at Allentown High School; Joseph Jakubowski, the director of special services at Allentown High School; Gerald Woehr, the Plumsted Township superintendent of schools; Edward A. Miklus, the Monmouth County school business administrator; Steven Sokolow, the Regional School District superintendent; Jerry Hal Rodner, an Allentown Borough councilman; and, Milton Hughes, the Monmouth County superintendent of schools.

REASONS FOR TERMINATION

Local boards of education are creations of the state and, as such, may exercise only those powers granted to them by the Legislature either expressly or by necessary or fair implication. Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed., 79 N.J. 574 (1979). When a board of education, as an administrative agency created and empowered by the Legislature, 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. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327 (App. Div. 1965).

Here, the Washington Township Board of Education is statutorily authorized pursuant to N.J.S.A. 18A:38-13 to seek termination of the sending-receiving relationship it has with the Upper Freehold Regional Board of Education. While the Washington Township Board is not obligated to establish good and sufficient reasons for its application, the Board may not seek such termination for reasons which are affirmatively shown by the Regional Board to be arbitrary, capricious, or unreasonable.

In this regard, the Regional Board contends that the Washington Township superintendent of schools and the Washington Board had a collective mindset since at least 1976 to bring about termination of the existing agreement; that that mindset impaired their collective objective judgment regarding the educational program offered at Allentown High School compared to Lawrence Township High School; that because the evidence shows Washington Township pupils who are enrolled at the Allentown High School are average and below average in academic achievement the Washington Board should have as its primary concern which high school, Allentown or Lawrence Township, can best provide for such pupils; that its statement of philosophy is more clearly and crisply stated than is the philosophy of Lawrence Township; that while Lawrence Township High School is acknowledged for its excellent program for the "academically elite" there is no evidence to show an equally strong committment to students of lesser ability such as those pupils the Regional District receives from Washington Township; and, that the Regional Board has "***a strong tradition of striving to provide effective education for all students commensurate with their abilities and their developmental needs". The Regional District points out that it has an award-winning alternative high school; it provides honors in advanced placement courses for high achievers; that its educational program while different from the Lawrence Township High School program is not inferior to that program; that the Regional High School has a proven track record of providing a staff and program which has been successful in meeting the needs of Washington Township students; that it offers a superior school system for the average students to such a system for Lawrence Township High School which, the Regional Board contends, is merely in a developmental stage; and, that because the Washington Township superintendent is of the view that many pupils who presently attend a private high school would return to the public high school if that public high school were Lawrence Township High School, and in conjunction with the superintendent's prior lack of objectivity, permission of the Commissioner in the mission of the Township Board to withdraw from the Regional Board is not warranted because the Washington Township Board seeks to withdraw for arbitrary, capricious, or unfounded reasons.

I have reviewed the evidence submitted by the parties on the issue of reasons why Washington Township chooses to withdraw from its present agreement to send its pupils to Allentown High in favor of Lawrence High and I **CONCLUDE** such reasons are legitimate, honest, and straightforward.

The proofs show, I **FIND**, that the Washington Township Board desires to send its pupils to Lawrence Township High School because of a long period of dissatisfaction with Allentown High School. The Washington Township superintendent did take a survey of sorts of parents and discovered that there is some community dissatisfaction with Allentown High School. The Washington Township Board of Education does represent the citizens of Washington Township with respect to the public school education of their children and it is obligated to seek involvement of the community in decisions it makes. Moreover, the asserted community dissatisfaction is not the sole reason why the Washington Township Board seeks to effectuate a change in its receiving high school.

The evidence establishes that Lawrence Township High School does provide a more varied selection of courses than does Allentown High School particularly in computer science, English, fine arts, music, foreign languages, mathematics, science and social studies. It is recognized that the evidence shows the Department of Education monitoring team under the direction of Ms. Freuler found Allentown High School acceptable in all 51 indicators of the Department of Education evaluation for purposes of thorough and efficient monitoring. Nevertheless, the evidence absolutely points to the fact Washington Township chooses to have its pupils exposed to the program offered at Lawrence High School.

Washington Township is of the view that if they enter a sending-receiving relationship with Lawrence Township that there would be more effective articulation in the sense of communication between Lawrence High School and the Washington Township schools than there had been with Allentown High. The evidence in this record shows that Washington Township officials are of the view that less than open communication exists and existed between the two schools while the superintendent of schools of Upper Freehold Regional takes the view that he, his administrators, and his Board were always ready to communicate with Washington Township. The evidence shows that Washington Township officials are of the real belief that they could not effectively communicate with representatives from the Regional District. That belief is sufficient, I **FIND**, to be a legitimate reason for Washington Township to seek withdrawal regardless of whether that

belief is well-founded by objective criteria to sustain a finding that an articulation difficulty did exist between the two schools. A perception by one of two parties to an agreement that communication between them is deficient is sufficient, I **FIND**, to show a lack of communication despite protests to the contrary by the other party for purposes of seeking to terminate a sending-receiving relationship.

The evidence shows that another reason, though isolated but perhaps symptomatic of the perceived poor communication between Washington Township and Upper Freehold, is grounded in the absence of communication with Washington Township by Upper Freehold in its high school building addition plans. It is noted that renovations and additions to the existing high school have been undertaken by the Upper Freehold Regional Board of Education, part of which cost shall be paid by the sending districts in the form of increased tuition. The evidence shows that the Regional District determined the nature and scope of the building program with little communication with its sending districts. Even after Washington Township protested regarding the lack of communication from Upper Freehold, Washington Township was not advised by the Regional District of a hearing before representatives of the Department of Education during August 1987 regarding a lease purchase arrangement for the addition.

Finally, Washington Township notes that the facility of the Lawrence Township High School is larger and more spacious than that of Allentown High School. The evidence shows that Lawrence High School has approximately 167,000 square feet in usuable space, compared with 111,000 square feet at Allentown High School even after completion of the additions and alterations.

These reasons are neither obscure, irrational, nor beyond comprehension why Washington seeks withdrawal from the Regional in favor of entering a sending-receiving relationship with Lawrence High School. In sum, I find that Washington Township seeks to sever its relationship with Upper Freehold and enter a similar relationship with Lawrence Township for reasons which are educationally based.

PUPIL ENROLLMENT PROJECTIONS

In order to consider the financial, facility, and educational implications for the sending-receiving districts regarding an application to sever any existing relationship, it is reasonable to consider pupil enrollment projections for the sending and receiving school

districts. In this case, Dr. Babineau presented his pupil enrollment projections in the initial feasibility study (P-1) which were subsequently updated in his consultant's report filed during March 1988 (P-2). Babineau projected pupil enrollment by relying upon what is called the cohort survival analysis, a statistical technique for projecting into the future pupil enrollment based upon the history of pupil enrollment.

Babineau relied upon the preceeding three years of actual pupil enrollment as reported by the various districts to the Department of Education for purposes of state aid in order to secure the historical data. Based on that data, Babineau then projected five years into the future what he believes the pupil enrollment shall be in each of the affected districts in this case. The cohort survival analysis has been described as the method which involves a pattern of "survival ratios" or quotients in which the denominator is enrollment in one year and the numerator is enrollment in the immediately succeeding year. Application of an average survival ratio to present enrollment figures produces an estimate of future enrollment.

The survival ratios reflect the most recent historical enrollment trends and these survival ratios are then used to project enrollments forward for the next five years. This methodology automatically takes into account such factors as in-and-out migration of pupils; influx to and from private, special educational, and vocational schools; births and deaths of pupils; school dropouts and retention policy; and new, converted and abandoned housing in the community. Since the cohort analysis assumes a continuation of the same trends in the coming five years as experienced in the past three years, consideration is given to whether any of the variables are undergoing change. In this case, Dr. Babineau found that the only evidence of change was in the area of new housing. Because the cohort survival rate already accounted for new housing built in the last three years, Babineau projected new housing for the new five years but then subtracted from that projection new housing in the last three years. The difference results in the number of new housing units not otherwise accounted for in the cohort survival analysis.

Once Babineau arrived at his housing projections, he then applied per-child factors for each new housing unit. In this regard, Babineau used factors of 0.4 students per additional single family home; 0.25 pupils per townshouse, and 0.125 pupils per condominium or other multi-family residence. Babineau used these factors in other studies he completed in New Jersey despite the fact that when he prepared the

consultant's report (P-2) he had possession of pupil enrollment projections (R-2) prepared by Dr. Robert W. Burchell, of Rutgers University, who used different multipliers. (See also P-4) However, Dr. Babineau is content to rely upon his projected pupil factors.

Dr. Babineau, using the cohort survival analysis technique with adjustments for new housing, arrived at low-range pupil enrollment projections, mid-range pupil enrollment projections, and high-range pupil enrollment projections. The low-range projections were arrived at through the application of the straight cohort analysis. The high-range projection was arrived at by adding to the straight cohort projection the number of additional pupils resulting from the increased rate of anticipated new housing. The mid-range projections are simply the mid-point, or one-half the difference between the low-range and high-range projections. Babineau opined that his opinion is the mid-range projections would turn out to be the most likely scenario of actual pupil enrollment in the future because it was unlikely that all new projected housing would in fact be built over the next five years.

Dr. Babineau prepared enrollment projections for each of the affected districts in this case including Washington Township, Millstone Township, Plumsted Township, Upper Freehold Regional, and Lawrence Township. By combining enrollment projections for all of the districts involved in the Regional District Babineau arrived at the following mid-range projections for Allentown High School and as set forth in his updated consultant's report for the 1988-89 school year and forward five years based on historical data from the three preceeding years of 1987-88, 1986-87, and 1985-86 school years.

ALLENTOWN
HIGH SCHOOL ENROLLMENT
Mid-Range Projection

School Year	Washington Remaining	Phased Withdrawal Beginning 1989-90
1988-89	855	855
1989-90	851	823
1990-91	895	826
1991-92	956	838
1992-93	1049	871

(P-2, at 41.)

It is noted that while these preceding figures are projections, or estimates, of future pupil enrollment the actual stipulated enrollment at Allentown High as of September 30, 1988 was 823. Babineau's projected enrollment was 855.

Dr. Babineau also projected pupil enrollment for the Lawrence Township High School for the same five years as follows:

LAWRENCE
HIGH SCHOOL ENROLLMENT
Mid-Range Projection

School Year	Without Washington	Washington Phase-In Beginning 1989-90
1988-89	783	783
1989-90	740	768
1990-91	741	810
1991-92	777	894
1992-93	806	984

The Regional Board contends that no credibility may attach to Babineau's pupil enrollment projections because of Babineau's admissions of errors in his housing forcasts. As an example, while Dr. Babineau forcasted 831 new houses in 1987 for the five affected districts, 201 new houses were actually constructed during that year. The difference, 630, is largely attributable to forcasts Babineau made in Millstone and Plumsted. Babineau forcasted 450 new houses for Millstone Township for 1987 while 78 were actually built. He forcasted 200 new homes for Plumsted Township, while 52 new homes were actually built. While the percentage of difference between the forcast of new homes and new homes actually built is 400 percent, it is of no value to characterize the 400 percent difference as "error" or "egregious error" because there is no known "standard of error" in demography for housing projections. Forcasts are, as Babineau explains, forcasts, projections, educated guesses, best guesses, or guesses.

The only expert opinion regarding pupil enrollment projections before me is that of Dr. Babineau despite the admission by Dr. Steven Sokolow, the Upper Freehold Regional School District superintendent of schools, in a meeting before the Department of Education on August 25, 1987 (P-49), that the Regional Board caused a comprehensive long-range pupil enrollment study to be undertaken by a Dr. Averback who considered added-housing to his pupil projections. Nevertheless, Dr. Averback's study is not in

evidence in this case. Dr. Sokolow testified he believes studies and projected enrollments, including housing forcasts, are conjecture and that such studies invariably are wrong. Consequently, Sokolow places little weight, if any at all, on such studies.

I accept Babineau's mid-range pupil enrollment projections for purposes of assessing impacts of the proposed phased withdrawal as reasonable estimates of what pupil enrollments may be in the future. Neither the legislature nor the State Board of Education requires pupil projections to be wholly accurate for purposes of the feasibility study. That is not to say that pupil projections which are outrageously inaccurate or patently false are acceptable. In this case, I find that Babineau's mid-range enrollment projections are estimates of what future pupil enrollments shall be in the respective school districts based on some reliable data and upon some data whose reliability is suspect. Nevertheless, considering Dr. Babineau's feasibility study (P-1) and follow-up consultant's report (P-2) as a whole, his findings and conclusions appear more reliable than not.

FINANCIAL IMPACT

Dr. Peyton, the Washington Board's expert on school finance, concluded that the proposed phased withdrawal of Washington Township pupils from Allentown High School would not result in a substantial negative financial impact on either Washington Township or any of the districts which would continue to enroll their pupils at Allentown High. Peyton arrived at that conclusion through a five-step analysis of (1) projected high school costs based on historical data, (2) determining and (3) estimating average daily enrollment and per pupil tuition, (4) projected financial impact in dollars on Washington Township and on the remaining districts, and (5) by projecting the tax bill impact on an average homeowner in each district.

Presently, the Upper Freehold Regional School District total current expense budget of approximately $8.25 million attributable solely to its Allentown High School is $4.5 million which yields a 1988-89 per pupil tuition of $5,714 for each of the average daily enrollment of 778 pupils. Five years earlier in 1984-85 the tuition rate was $4,076 per pupil. Peyton estimates that if Washington Township pupils remain the Regional Board's current expense budget attributable to the estimated high school enrollment in 1992-93 of the 955 pupils will be approximately $6.2 million for a per pupil tuition cost of $6,462, an increase of 11.3% from 1988-89. If Washington Township completes a phased

withdrawal, the Regional Board's 1992-93 current expense budget attributable to the 793 pupil high school would be approximately $6 million for a per pupil tuition cost of $7,640, an increase of approximately 10.3% over the estimated tuition if Washington Township remains. In dollars, the loss of Washington Township's estimated 162 pupils from Allentown High School in 1992-93 would likely result in Millstone and Plumsted paying $1,200 more in per pupil tuition than if Washington Township remains while the per pupil cost to Allentown and Upper Freehold for its high school current expense costs would likely increase by a similar amount. The gross tuition bill to the Millstone Board in 1992-93 for its estimated 270 pupils then in attendance at Allentown High School would be $320,000 more than if Washington Township remained. The Plumsted Board would, if Washington Township withdraws, in 1992-93 pay a tuition bill for its estimated 280 pupils at Allentown High School #336,000 more than if Washington Township remains. The estimated per pupil cost in 1992-93 to the regional constituant districts of Allentown and Upper Freehold for their combined 243 estimated pupils would be $291,600 more than it would be if Washington Township remained.

These increased tuition costs would result from the loss of tuition received from Washington Township in projected current expense budgets attributable to the high school. The current expense budget projections attributed to the high school are based on average percentage increases in the Regional's current expense budgets for the past 5 years. One the average percentage increase was applied to present and future budgets, the total amount was then divided by the estimated average daily enrollment which was figured by Peyton for each of the 4 districts here to be 91% of actual September 30 enrollment. The quotient is the estimated per pupil tuition costs to be assessed the sending districts by the Regional Board.

Increased tuition costs to the districts remaining at Allentown High School should Washington Township withdraw will be mitigated somewhat by increased State equalization aid. It is also noted that Babineau projects pupil enrollment at Allentown High in 1992-93 to be 793 even with the withdrawal of Washington Township. Should pupil enrollment reach 793 at that point, that number would be an increase over existing pupil enrollment at the high school which presently includes Washington Township. Dr. Sokolow acknowledged during the August 1987 meeting at the Department of Education regarding the lease-purchase proposal for the high school addition that should Washington Township remain he expects pupil enrollment by 1993 to exceed the functional capacity of the school of 960. Increased pupil enrollment, on the other hand, results in decreased per pupil costs.

While Dr. Peyton had offered no opinion in the consultant's report (P-2) regarding the financial impact of withdrawal upon the Washington Township budget, he did opine during the hearing that if the taxes on an average household would increase by $200 in any one of the 4 years of the proposed withdrawal that that increase would constitute a significant financial impact. A chart (R-11A) prepared by Dr. Peyton at the request of the Regional Board during the hearing shows that the average Washington Township household would, in the event Washington pupils attended Lawrence High, pay additional amounts of $22, 59, 87, and $110 each of the respective years of the withdrawal. While on a concumulative basis the impact would be $278, there is no one year when the increase from the immediately preceeding year is estimated to be more than $110. Dr. Peyton acknowledged that he did not consider the return of Washington Township pupils presently in attendance at private schools should Lawrence High School become the designated receiving school.

Increased taxes to the districts of Allentown, Upper Freehold, Millstone, and Plumsted should Washington Township withdraw were projected by Dr. Peyton on the basis of the assessed evaluations of each municipality. Once Dr. Peyton arrived at the assessed evaluations, and the 1988 average home assessment, he then calculated the impact of lost tuition revenue on the average homeowner in each of the 4 municipalities. (P-2, at p.87, Table 57) In a four-year period, the average home assessment in Allentown would be increased by $41; in Upper Freehold it would be increased by $34; in Millstone the average tax increase would be increased by $46; and, in Plumsted the tax increase would be $26.

Dr. Sokolow, relied upon by the Regional Board as its expert on school finance, prepared a report (R-7) on his perceived negative educational and financial impacts resulting from the proposed withdrawal of Washington Township pupils. However, Dr. Sokolow used as his predicate that Washington Township had been allowed to withdrawa all 78 of its students from Allentown High School beginning with the 1986-87 school year. Dr. Sokolow explains in this regard that that was the last year he had definitive and tangible data wherein he knew the exact enrollment, he knew exact expenditures and having that certain knowledge he could then go back and assess what the impact would have been had Washington Township withdrew all pupils in one year in 1986-87. Needless to say, that is not what Washington Township is proposing in this case and little weight is attached here to the report prepared by Dr. Sokolow. It is not realistic in that it does not study what is in fact being proposed by Washington Township.

Rather, Dr. Sokolow's report addresses past historical events and, without establishing a relationship to present circumstances, attempts to apply conclusions from 1986-87 to present day.

Nevertheless, Sokolow presented in his report three sets of circumstances all of which assume that Washington Township was allowed to withdraw all 78 of its pupils in 1986-87 and all conclusions are then based on what would have occurred in Sokolow's view in 1986-87. Sokolow believes that had Washington Township withdrawn in 1986-87 and had the Regional Board decided on a combination of tax and tuition increases to make up the tuition loss in 1986-87, that in 1986-87 a substantial financial negative impact would have occurred; that if the Board had decided not to increase taxes and tuition to make up the tuition loss but to cut programs no significant financial impact would have occurred, and if the Board decided not to cut programs but to make up the revenue loss by increasing taxes and tuition there would be substantial financial impact. In short, Sokolow claims that based on what could have happened in 1986-87 will in fact happen presently should Washington Township be allowed to withdraw because in Sokolow's view there would be a significant negative financial impact upon Plumsted, Millstone, Upper Freehold, and Allentown.

Edward Miklus, the Monmouth County School Business Administrator, testified as an expert in school finance although Miklus submitted no report regarding financial impacts of the proposed withdrawal. In fact, Mr. Miklus was in my view very reluctant to offer an expert opinion in response to hypothetical questions posed him by counsel for Upper Freehold Regional.

Jerry Hal Rodner, a member of the Allentown Borough Council, testified regarding the geographic size of Allentown Borough; that only 5 homes were built in the Borough between 1980 and 1985; that there is no major industry in Allentown; the biggest commercial operation is an auto body shop and that AT&T has a switching station; that there are two developments pending which, if completed, would exhaust all useable land in Allentown; that Allentown must upgrade its sewer plant; that during March 1988 the Allentown Electric refused council the authority to exceed the municipal tax cap despite the fact that the referendum involved the volunteer fire company, first aid, and local police. In his view, Allentown would suffer a substantial negative financial impact should Washington Township be allowed to withdraw from Allentown High School.

Having considered the testimony and evidence offered by Washington Township through Dr. Babineau and through Dr. Peyton, when considered in light of the testimony of Dr. Sokolow, Mr. Miklus, and Jerry Hal Rodner, I am more persuaded by the opinions of Dr. Peyton that should Washington Township be allowed to withdraw its pupils from Allentown High School on a four-year phased withdrawal that there will be no substantial negative financial impact on any of the districts involved.

RACIAL IMPACT

The consultant's report (P-2, at p.37, Table 41) shows that during 1987-88 Allentown High School had 48 black pupils enrolled and 14 hispanic pupils enrolled. Should Washington Township withdraw, Allentown High School would have 44 black pupils and 11 hispanic pupils who remain. In short, if the withdrawal is granted Allentown High School would lose 4 black pupils and 3 hispanic pupils.

Upper Freehold Regional acknowledges there would be no substantial negative impact on racial balance stemming from the withdrawal either at Allentown High School or at Lawrence High School.

EDUCATIONAL IMPACT

Initially, it is noted that the Regional Board points out that Dr. Babineau has no high school administrative experience other than that of "a part-time Social Studies Chairman of the Jefferson Township, New Jersey school district from 1965-1967" (Regional Board's brief, p. 12). The Regional Board suggests that Dr. Babineau's opinion on the educational impact of the proposed withdrawal be rejected because of his lack of high school administrative experience particularly when compared to the high school administrative experience of Dr. Sokolow. I am not persuaded by the Regional Board's argument in this regard and it is **REJECTED.**

Dr. Babineau concluded that the withdrawal of Washington Township pupils from Allentown High School would not result in a substantial negative impact on the quality of education being offered by either Allentown High School or Lawrence High School. In this regard, Babineau did in fact compare course offerings at both high schools for 1987-88 and 1988-89 and found that courses offered at Lawrence High were generally

in fact conducted while that was less true for Allentown High School. Next, Babineau considered actual enrollment of Washington Township pupils in each course conducted at Allentown during 1987-88 and found that all courses throughout the seven period day would have sufficient pupils enrolled to continue even if Washington Township withdrew all at once. (P-2, pp. 59-65, Tables 45). In his consultant's report, Dr. Babineau notes that during 1987-88 Allentown High School had 63 full-time equivalent teachers which, based on a pupil enrollment of 844, produced a 13.4 to 1 student-teacher ratio. Lawrence Township had 83 full-time equivalent teachers which, based on a student enrollment of 800, produced a 9.6 to 1 student-teacher ratio. Babineau anticipates that the withdrawal of Washington Township pupils would not necessitate the reduction of Allentown High School staff. To the contrary, he concluded that should Washington Township be required to remain at Allentown High School additional staff would be necessary to meet the instructional needs of the anticipated increasing enrollment through 1996-97.

The argument of the Regional Board through its witnesses and through its filed brief appears to be that because Lawrence Township offers a curriculum with a high academic orientation and because the pupils Washington Township will be sending to it are of average ability it, Allentown High School, is more suited to provide the kind of program necessary for an average student than is Lawrence Township High School. (Regional Board's brief, p. 15) There is no evidence in this record to suggest Lawrence Township is not capable of meeting the needs of Washington Township pupils, be they of average, above average, or of superior academic ability.

Dr. Sokolow testified that based on his report (R-7), which is predicated upon the assumption all Washington Township pupils withdrew in 1986-87, that a significant educational impact would have resulted had Washington Township withdrew all pupils in 1986-87 and the Board then decided on a combination of tax and tuition increases as well as program reductions to make up the revenue loss or, alternatively, if the Board had then decided not to increase taxes and tuition to make up the loss but merely to cut programs. I find little value for present purposes in Dr. Sokolow's testimony regarding what he believes would have happened in 1986-87 had Washington Township withdrawn all pupils at one time. Milton Hughes, the Monmouth County superintendent of schools, testified that a high school facility with less than 700 pupils could provide a quality program depending upon the philosophy of the operating board of education and the extent to which the citizens were willing to subsidize or pay for the quality of the program they desired. In fact, Dr. Hughes went on to note that in Monmouth County Keyport High School has an extremely low enrollment while simultaneously offering a quality program.

Richard Simon, the principal of Allentown High School, testified regarding his understanding of the three cases presented by Dr. Sokolow in his report (R-7). But beyond that report, Dr. Simon testified that he believes a pupil population in the low eight hundreds would impact upon extra curricular offerings should the population be reduced further through the withdrawal of Washington Township pupils. As examples, Dr. Simon testified that should Washington Township withdraw that the impact might be felt on extra curricular offerings such as the football team and the band. Finally, Dr. Simon testified that Washington Township pupils are better served in Allentown High School as opposed to Lawrence Township High School.

Dr. Robert F. Savitt, the president of Guidelines, Incorporated, identified as an educational consulting firm from Great Neck, Long Island, testified on behalf of the Board regarding his study of the educational impact of the proposed withdrawal of Washington Township pupils from Allentown High School (R-6). Dr. Savitt concludes that should Washington Township withdraw its pupils, the quality of educational programs at Allentown High School would be substantially affected and that the revenue loss would result in serious cuts in staff, programs and services. Furthermore, Dr. Savitt concludes as follows:

> There would be a substantial negative educational impact for Washington Township students scheduled to enter Allentown High School in the future. They would be deprived of attending a high quality high school that has served students from Washington Township well in the past providing a comprehensive program able to meet the needs and interests of students of all abilities. If transferred to Lawrence High School, students would be spending additional time on the bus going to and from the more distant new high school.
> (R-6, at p. 35)

In the course of his report (R-6) Dr. Savitt spends nine pages on selected portions of Dr. Babineau's feasibility study (P-1) and offering comments thereon. As an example, on page 27 of his report R-6, Dr. Savitt notes that Dr. Babineau states in his feasibility study that "The school climate at Lawrence Township High School is such that Washington Township pupils are likely to find a welcome atmosphere". Dr. Savitt notes in his comment to that selected excerpt "For years Washington Township pupils have been integral, productive part of Allentown High School. As a result of a comprehensive orientation program in continuing parent-school interaction, complaints from Washington Township parents and pupils have been practically non-existant." Such comparisons add nothing to issue of whether the application under consideration should be granted.

As noted by the Regional Board in its brief at page 59, Dr. Savitt concluded Washington Township pupils would be better served at Allentown High School than Lawrence Township High School because of Allentown High School's "track record"; that he believes the relationship between the Allentown High School and parents from Washington Township has been fine; that data supplied him by the superintendent of Washington Township shows that Washington Township sends "average" pupils to Allentown High School, that the Middle States Evaluation Committee recommended to Lawrence Township High School to improve its program for the average youngster; and, essentially because the Allentown High School program works Washington Township should continue to send its pupils there.

Joseph J. Jakubowski, the Regional Board's Director of Special Services, testified that Washington Township does in fact send "its average and below-average students to Allentown High School." (Regional Board's brief, p. 61) He explained that its basic skills program and its alternate high school program has served average and below-average pupils well in the past and he anticipates that it would continue to do so in the future.

Finally, Gerald Woehr, the Superintendent of Plumsted, testified that if Washington Township withdrew its pupils from Allentown High School the resultant increase in tuition to his district would mean that he would have to cut programs. Nevertheless, as noted earlier the Plumsted Board of Education chose not to participate in this proceeding other than to file an answer to the petition of Washington Township.

I have considered the proofs offered by the respective parties regarding educational impact and I am persuaded that should Washington Township withdraw from Allentown High School that there would be no substantial negative impact on the quality of education received by pupils at Allentown High School or at Lawrence Township High School. This finding is based in part upon Dr. Sokolow's acknowledgement before the Department of Education that he anticipates pupil enrollment at Allentown High School to continue to rise through the middle 1990s to the extent that should Washington Township remain the functional capacity of Allentown High School would be exceeded. The argument presented by Dr. Sokolow, Dr. Savitt, and Principal Simon are anchored on the loss of students as having a direct impact upon the quality of education offered at Allentown High School. The loss of pupils at Allentown High School which will be

occasioned by the withdrawal of Washington Township pupils will be more than made up by the expected increasing enrollments during the 1990s. Alternatively, a high school with a pupil enrollment of less than 800 does not automatically lessen the quality of program so long as its professional staff is prepared to meet such a challenge.

I am persuaded by the evidence offered by the Washington Township Board of Education that should it withdraw its pupils from Allentown High School over the next four years that no substantial negative impact would result in any one of the four years and that no substantial impact would result on the Allentown High School program on a cumulative basis at the commencement of the fifth year, the year after the withdrawal is complete. I am also persuaded that the quality of education offered at Lawrence Township High School would suffer should it enter a sending-receiving relationship with Washington Township.

FACILITIES IMPACT

As noted by the Washington Township Board in its filed brief, the Allentown High School facility contains approximately 86,000 square feet of space which will be increased to 98,000 square feet when the addition is completed. In addition, Allentown High School maintains shops and greenhouses which contain approximately 11,000 square feet of space and its alternate school program which is estimated at 2,000 square feet of space. By comparison, Lawrence Township contains 141,000 square feet of space and an addition currently underway to that facility will increase square footage available to 167,000.

Considering that the functional capacity of Allentown High School is stipulated to be 960 students and the functional capacity of Lawrence Township High School to range between 1082 and 1150, the estimated pupil enrollment at Allentown High School should Washington Township withdraw would be close to exceeing functional capacity in 1992-93. If Washington Township does not withdraw, Dr. Sokolow anticipates that the functional capacity of Allentown High School would be exceeded.

I find no basis upon which to conclude that should Washington Township pupils withdraw from Allentown High School that a substantial negative impact would result upon the facilities of either Allentown High School or Lawrence Township High School.

TRANSPORTATION IMPACT

According to the evidence (P-29) of record, Washington Township presently operates 3 school bus routes for its pupils to Allentown High School and 2 school bus routes to Notre Dame High School, a local private parochial school which is located in Mercer County and very close to Lawrence High School. Allentown High School is located outside of Mercer County in Monmouth County and in the opposite direction of Notre Dame High School. If Washington Township were to send its pupils to Lawrence High School, the Washington Township coordinator estimates that Washington Township could reduce its present 5 school bus routes to 3 school bus routes because of the close proximity of Notre Dame High School to Lawrence High School. Nevertheless, the coordinator estimates that until Lawrence High School and Notre Dame High School coordinate their pupil release schedules, it may be necessary to operate 4 bus routes in the afternoon. Nevertheless, the coordinator estimates that school bus transportation costs would still be lower if Washington Township sends to Lawrence High School instead of Allentown High School.

The travel time for pupils would not be significantly different in terms of time between Allentown High School and Lawrence Township School. The routes operated by Washington Township for its pupils attending Mercer County's Assunpink Vocational Center and the Sypek Vocational Center would be shortened if Lawrence High School becomes the receiving district. The Assunpink Center is about the same distance to Lawrence High School as it is to Allentown High School. The Sypek Vocational Center is much closer to Lawrence High School than it is to Allentown High School which would result in a cost saving to Washington Township.

There is no evidence in this record to suggest that there would be a substantial negative impact regarding pupil transportation should the application of Washington Township be granted.

This concludes a recitation of the relevant evidence and facts established by that evidence in this case.

CONCLUSION

The Regional Board anchors much of its argument against granting the withdrawal application of Washington Township upon what it asserts are numerous

admissions of errors by both Dr. Babineau and Dr. Peyton regarding the feasibility study (P-1) and the consultant's report (P-2) which would preclude their testimony from reaching a minimal level of credibility which, in turn, forecloses equitable determinations based on that testimony. Furthermore, the Regional Board recites on several occasions throughout its filed brief that this judge observed "***we all know what happens to one's credibility if repeatedly there are a number of admissions with respect to errors". Ostensibly, the Regional Board seeks the inference that this judge already ruled during the hearing that a credibility determination was made at the hearing regarding admissions made by Dr. Babineau and by Dr. Peyton that certain figures were in error. Such an inference is incorrect and invalid. Having reviewed the extensive record in this matter, I am persuaded by the expert opinion of both Dr. Babineau and Dr. Peyton. Admittedly, both tended to become confused during intensive cross-examination in this trial-type proceeding. Nevertheless, when the initial gloss from the cross-examination is removed the persuasiveness of their opinion remains.

It was noted earlier that there is no standard of error or measurement of error which is generally acceptable in the field of demographics. I am not at all persuaded that the difference in estimated housing relied upon initially by Dr. Babineau compared to actual housing is an "error" which would foreclose the reliability of Dr. Babineau's feasibility study and pupil projections contained therein, as supplemented by the consultant's report.

I have already found that the Washington Township Board seeks to withdraw from the sending-receiving relationship with the Upper Freehold Regional Board of Education for reasons which are legitimate, honest, straightforward, and educationally based. I have also found that the application of Washington Township to withdraw from the sending-receiving relationship with Upper Freehold Regional will not result in a substantial negative financial impact in any of the affected districts regarding, educational, financial, racial, or upon the quality of education to be received by pupils.

It was noted earlier that the State Board in Cranbury, supra, noted that the decision of where students must be sent out of the district for their education because of a lack of in-district facilities is the most significant decision concerning the student's education in which the citizens of the sending district are involved. In the same opinion, the State Board also held that the statutory scheme under which sending-receiving relationships are authorized is not intended and was not intended to create a revenue

source through districts to subsidize the expansion of facilities and program for the benefit of the receiving district or to protect the receiving district's citizens from tax increases. Unlike the Regional Board's position that the State Board never anticipated a situation as here where the receiving district receives more than 50 percent of its pupils, I am **PERSUADED** that the State Board was fully aware of the fact that 8 districts of the 169 districts party to a sending-receiving relationship receive more than 50 percent of their enrolled pupils. What is more important and more critical in the position taken by the State Board of Education is that it recognizes the decision of where a board of education which has no facilities sends its pupils for a high school education is the most significant decision that board, representing its citizens, may make regarding the student's education. In this case, the choice of the Washington Township Board of Education is to send its pupils to Lawrence High School. That decision must be respected so long as the decision is educationally-based, which it is, and the termination of the existing agreement with Upper Freehold Regional does not create unwarranted instability which, in this case, it does not.

Accordingly, the application of Washington Township to withdraw from its sending-receiving relationship with the Upper Freehold Regional Board of Education should be **GRANTED** in order for Washington Township to enter a new sending-receiving relationship with the Lawrence Township Board of Education. The effective date that such a withdrawal should commence should be September 1990, not September 1989. By postponing the effective date of the commencement of the withdrawal to September 1990, all parties would then have 18 months lee time in order to prepare for the commencement of the phased withdrawal.

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.

May 1, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

5-1-89
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 4 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY, BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Upper Freehold Regional Board's (Regional Board) exceptions were timely filed, as was petitioner's reply, pursuant to N.J.A.C. 1:1-18.4.

The Regional Board avers that the initial decision is fatally flawed in that the ALJ failed to make equitable determinations, as required by N.J.S.A. 18A:38-13, on the educational implications for all of the districts affected in this matter. More specifically, the Regional Board contends that the ALJ made only a passing reference to the testimony of the Plumsted School District's superintendent with respect to the educational impact of severance of the sending relationship with the Regional Board on its district. Further, the ALJ then proceeded to dismiss the testimony totally because the Plumsted Board chose not to participate in the hearings. As to this, the Regional Board avers that the Plumsted Board's non-participation cannot foreclose it from establishing a substantial negative educational impact on Plumsted.

The Regional Board maintains that since the testimony of Plumsted's superintendent stated that there would be a need to cut programs in that district if Washington Township withdrew from Allentown High School, the ALJ erred in not making any specific findings of fact on the educational impact of withdrawal on Plumsted. Further, no findings of educational impact were made regarding the other two elementary districts that send students to that high school, i.e., Washington Township itself and Millstone. The Regional Board deems this as error since all three are "affected districts" within the intendment of N.J.S.A. 18A:38-13. In other words, the assessment of educational impact by the ALJ should not have been limited to Allentown High School and Lawrence High School.

The Regional Board goes on to point out that while the Washington Township Board offered no proofs regarding the impact on its elementary system, the ALJ had sufficient proof before him through cross-examination of petitioner's own witnesses, particularly that of Board Member James to reach a conclusion of negative impact. It also points to Exhibit R-55 wherein Mr. James requested that the Regional Board delay consideration of major building renovations to Allentown High School because $80,000 pro-rated over a four-year period would place an unmanageable financial burden on all districts; yet, according to James, $1,390,395 in withdrawal costs over the same four-year period would not result in a significant negative financial impact. (T 5/26/88, 89 to 90)

The Regional Board's second exception avers that the testimony of petitioner's experts was so riddled with admissions of error that it never reached the level of believability and, thus, cannot serve as the basis upon which equitable determinations can be supported in this matter. It alleges that the case must rise or fall on the testimony of petitioner's two experts, Drs. Babineau and Peyton and points to the initial decision, ante, wherein the ALJ stated of these experts, "Admittedly, both tended to become confused during intensive cross-examination***" which it characterizes as an understatement.

More specifically, the Regional Board takes exception to the ALJ excusing the experts' confusion and to his failure to find a 400% error in Dr. Babineau's housing projections to be egregious error merely because "there is no known 'standard of error' in demography for housing projections." (Initial Decision, ante) It characterizes as "totally inexplicable" (Exceptions, at p. 9) the ALJ's acceptance of Babineau's and Peyton's testimony when the ALJ states in the initial decision, ante, "Nevertheless, when the initial gloss from the cross-examination is removed, the persuasiveness of their opinion remains." Further, the Regional Board urges that when coupling the above with (1) Dr. Babineau's concession that his forecasts were based on "guesses" (Initial Decision, ante), (2) the ALJ's finding that certain of the data relied on by Dr. Babineau was "suspect" (id. at p. 16), and (3) Dr. Peyton's refusal to acknowledge he made a significant mathematical error evident on its face in the assessed valuation of single-family homes in Washington Township in 1988.

The Regional Board contends that a domino effect emerges if a flaw in housing projections exists because housing projections, to a large extent, influence enrollment projections; enrollment projections influence financial projections; and financial projections, in turn, influence educational impact. Hence, if the housing forecasts are significantly flawed in this matter, the Board avers that the projected enrollments will be similiarly flawed and the financial data will be unreliable, a claim which, it contends, petitioner's own expert concedes. (T 5/11/88, 77 to 78).

As to this, the Regional Board reiterates Dr. Babineau used a cohort survival technique to forecast enrollments which he adjusted to account for significant housing. In 1987, Dr. Babineau missed the mark on housing projections by 630; i.e., he forecasted 831 new housing units but only 201 actually were built. Even more significantly from the Regional Board's perspective, he did not adjust for the error, when in 1988 he updated/supplemented his consultant's report (P-2).

The Regional Board points out that while Dr. Babineau's mid-range figures for enrollment projections, which were relied upon by petitioner and the ALJ, were inaccurate, his low-range figures, i.e., the straight application of cohort survival technique, were practically on target. Yet, the ALJ accepted the mid-range figures which were off by an average of 32 pupils for 1987-88 and 1988-89. It is the Regional Board's position that an overestimate of 32 tuition pupils is significant since this amounts to $192,000 ($6,000 tuition x 32 pupils). Moreover, it emphasizes that Dr. Peyton's testimony regarding financial impact relied exclusively on the erroneous mid-range figures. (T 5/24/88, 12)

Further, the Regional Board maintains that equitable determinations have to be made on the financial impact on Washington Township's school budget, which Dr. Peyton admitted he did not do. (T 5/19/88, 121) Rather, he allowed that a $200 increase on the average household tax bill would occur as a result of withdrawal. As to this, the Board avers that Dr. Peyton himself established a substantial negative effect for Washington since the $200 cumulative increase, once built into the tax rate, would continue ad infinitum. Moreover, on cross-examination, Dr. Peyton acknowledged that the increase would be $286, not $200. (T 5/24/88, 117 to 118) In addition, the Regional Board lists other examples of what it believes further illustrate the incoherence and error of Dr. Peyton's testimony.

In summary, the Regional Board states that the testimony of Drs. Babineau and Peyton cannot be categorized as "substantial," "adequate," "sufficient," or "competent" (Exceptions, at pp. 20-21) as required by the New Jersey Superior Court Appellate Division in such cases as In Re Grossman, 127 N.J. Super. 13 (App. Div. 1974), Maple Hill Farms, Inc. v. Division of New Jersey Real Estate Commission, 67 N.J. Super. 223 (App. Div. 1961); Dore v. Bedminster Board of Education, 185 N.J. Super. 447 (App. Div. 1982).

The Regional Board's last exception contends that the testimony of expert witness, Superintendent Sokolow, was significantly more reliable than petitioner's. It further avers that the testimony established that substantial negative educational and financial impacts would result from Washington Township's withdrawal from the sending-receiving relationship. Rather than depending on forecasts or other "suspect" data, the superintendent and the Regional Board used actual figures from the 1986-87 school year to answer the question of impact if withdrawal en masse occured.

It is the Regional Board's contention that phase-out over four years only buffers financial impact for, in the final analysis, the major financial impact and concomitant educational impact occurs at the end of the fourth year and those are the impacts which the receiving district must live with in perpetuity. Thus, rejection of this approach by the ALJ was in error because impacts based on actual enrollment and financial figures for 1986-87 would be true for any future year, assuming the constancy of pupil population which has been in effect for many years. (P-2, pp. 27-28, R-5)

Petitioner's reply exceptions rebut the Regional Board's assertions that the ALJ erred in assessing educational impact only on Lawrence High School and Allentown High School and not the elementary programs at Plumsted, Millstone and Washington. It avers that the case deals only with the choice of educational programs at the secondary level since no programs were sought or proposed for any of the elementary programs. Further, petitioner maintains that the only impact withdrawal may possibly have at the elementary level is indirect; i.e., it would occur only if a local board chose to cut programs at that level rather than to increase taxes in order to offset tuition increases at the high school level. Thus, it maintains the real issue is financial rather than educational.

Petitioner emphasizes that the ALJ found the financial impact of the withdrawal on the average homeowner in Plumsted will total only $26 spread over a four-year period. Likewise, Millstone's increase will total $46 over the four-year period. (Initial Decision, ante; P-2 at p. 87, Table 57). Hence, petitioner avers it is inconceivable that those districts would choose to cut their programs at the elementary level. Moreover, petitioner points to Dr. Peyton's conclusion, which was adopted by the ALJ, that the projected tuition increase for Allentown High School from $5,714 in 1988-89 to $7,640 in 1992-93, if withdrawal is granted, compares favorably to prior years' increases. (P-2, tables 52 and 53)

As to the weight accorded the testimony of the Plumsted superintendent, petitioner points to the fact that he was neither properly notified nor qualified as an expert witness (T 7/28/88 42-49). Further, (1) he did not submit a written report; (2) his testimony assumed en masse rather than phased out withdrawal of Washington Township's students; and (3) it assumed no tax increase. Moreover, even if the superintendent's testimony were accepted at face value, substantial negative impact is not supported since he acknowledged on cross-examination that Plumsted could absorb a tax increase even greater than that projected by Dr. Peyton ($75,000 v. $60,000) and the district would in succeeding years get two-thirds of the previous year's local tax levy back in the form of increased equalization aid. (T 5/20/88 62-63)

Insofar as the assertion that financial impact on Washington Township was not assessed, petitioner contends that the ALJ was not accurate in stating the initial decision, ante, that Dr. Peyton offered no opinion in his written report on this issue. It avers that he thoroughly analyzed such impact in both his written report and testimony and it is clear that Washington Township can absorb the increased tuition without cutting elementary programs or imposing significant burdens on its taxpayers. Moreover, even in the face of increased costs for the opening of its new middle school (R-23) and increased tuition if withdrawal is granted, petitioner emphasizes that the Washington Township community has consistently and strongly expressed its preference for making the change in its sending-receiving relationship and absorbing the increased costs. Moreover, the Washington Township Board of Education itself was fully aware of the increased costs as reflected by Board Member James' testimony (T 5/26/88, 27-28, and P-31).

As to the Regional Board's arguments with respect to the ALJ's acceptance of the projections made by Drs. Babineau and Peyton and the rejection of Dr. Sokolow's, petitioner's position is that such arguments are superficial because they focus on a single variable for a single year when enrollment projections are based on many variables over several years. Hence, a difference between actual and projected figures for one year does not necessarily affect the bottom line.

In support of this, petitioner argues, inter alia, that Dr. Babineau's margin of error between the mid-range projections and the actual enrollment figures for 1987-88 was 3.65% for Allentown High School and 2.14% for Lawrence High School and for 1988-89 (September 30, 1988 count) his projections were within a similarly very small margin of error. (Reply Exceptions, at p. 10)

Petitioner also characterizes as superficial the Regional Board's argument that errors in P-1 are necessarily duplicated in P-2. It avers that while Dr. Babineau used the same methodology in both studies, he testified that the underlying data in P-2, which were relied upon in this matter, were stronger than in P-1 and in the end there was only a 2.1% difference in the predictions between the two documents (4826 v. 4930 new units predicted). (Id., at p. 13)

Petitioner further asserts that Dr. Babineau's approach to enrollment projections was both rational and understandable and by the Regional Board's superintendent's own admission was consistent with the technique used by its demographic expert, i.e., five-year trend plus added housing. That expert's report was not submitted as evidence, nor was he called by the Regional Board to testify at hearing. Moreover, petitioner avers that when it sought to introduce evidence very early in the hearing that there would be no significant negative financial impact, even under low-range

projections, the Regional Board objected to any line of questioning dealing with that range, "claiming it was immaterial, irrelevant, and a total waste of time. 5/19, T 80-81." (Id., at p. 16) Thus, it should not now be permitted to offer conjectures as to what impact the low range might be.

In regard to the litany of "errors" by Drs. Babineau and Peyton cited by the Regional Board in its exceptions, petitioner avers that the Regional Board "has missed the forest for the trees" since none of the "minor and very few errors that came up in six days of cross-examination of these two witnesses amounted to anything of consequence or significance.*** [O]n their key conclusions, all of which are contained in P-2, there were few errors found." (Id.) Moreover, petitioner asserts that Dr. Peyton set forth in P-2, Tables 47-57-1, pages 81-87A his analysis and conclusions as to the financial impact on the remaining districts and except for a minor typographical error corrected on the record for Table 54, there were no "errors" in any of the tables.

Lastly, petitioner contends that the ALJ appropriately set forth the many reasons for rejecting or discounting the testimony of the Regional Board's expert witnesses. It relies on the arguments set forth in its post-hearing brief and the Regional Board's reply brief, the specifics of which are incorporated in the record by reference. Also incorporated in the record are the corrections to the initial decision set forth on page 19 of petitioner's reply exceptions.

Upon a careful and thorough review of the record in this matter, including the exceptions and reply exceptions, the Commissioner agrees with the findings and conclusions of the ALJ and adopts his recommended decision as the final decision in this matter.

As to the Regional Board's exceptions regarding the enrollment projections and the 400% "error" in housing forecasts, the Commissioner does not agree that those enrollment figures are discredited and should not have been relied upon by the ALJ. Petitioner is correct in pointing out that housing forecasts are but one variable in projecting enrollments. Further, the Commissioner is in full agreement with the ALJ that it is of no value to characterize the 400% difference between projected housing and actual housing as "error" or "egregious error" because there is no known "standard of error" applicable and because forecasts are by their very nature projections and estimates not anything more. (Initial Decision, ante) More importantly, the margin of error on projected mid-range enrollment figures and actual enrollments for 1987-88 and for September 30, 1988 were within a reasonable margin of error (2.14% to 4%). As recognized by the ALJ, pupil projections which are outrageously inaccurate or patently false would be rejected, but such is not the case herein. The nature of the review in sending-receiving cases requires that assessments be made on future impacts to affected districts and by necessity reasoned

estimates or projections of student erollments must be utilized. So long as those projections are reasonably and rationally developed and result in fairly accurate estimates, they may be appropriately considered in matters such as herein.

That the ALJ accorded greater weight to the reports and testimony of petitioner's experts than to the Regional Board's superintendent was appropriate. The Commissioner fully agrees that Dr. Sokolow's report which is predicated on en masse withdrawal of Washington Township pupils should not be accorded much weight as it does not address the actual circumstances of the proposed withdrawal over a four-year period.

Moreover, the Commissioner does not agree with the Regional Board's assertion that the ALJ did not assess impact on the elementary districts sending to Allentown High School. The minimal weight accorded to the Plumsted superintendent's testimony was appropriate for the reasons set forth by petitioner in its reply exceptions above. More importantly, however, financial impact was assessed for such districts (P-1 and P-2). In the Commissioner's judgment, it was perfectly reasonable for the Washington Township Board to assume that the other elementary districts would not be required to reduce educational programs at the elementary level given that the data demonstrated they would not experience significant negative financial impact if Washington Township withdrew. Further, the Washington Township Board would be in no position to make judgments relative to educational programs that might arise from the relatively minor financial impact since such judgments would require placing itself in the position of the other sending boards of education. That is, it is not the Washington Township Board's role to determine how the financial impact, though minor, will be absorbed.

Having given careful consideration of the proofs in this matter, the Commissioner determines that the ALJ's findings of fact are accurate and well grounded in the record. Moreover, his analysis of the issues and the law is found to be thorough and cogent. Consequently, his conclusions of law that the withdrawal of Washington Township from the sending-receiving relationship with Upper Freehold Regional School District would not result in substantial negative financial, racial, or educational impacts in any of the affected districts are adopted by the Commissioner.

The ALJ has specifically and forcefully addressed the efforts of the Regional Board to infer that the ALJ had on the record discredited the reliability of petitioner's experts, Drs. Babineau and Peyton. He states in the initial decision, ante, that any such "inference is incorrect and invalid" and that he is, in fact, persuaded by their expert opinion, notwithstanding some confusion exhibited during six days of intensive cross-examination. Having reviewed that testimony, the Commissioner concurs that "the persuasiveness of their opinion remains." (Initial Decision, ante)

As expressed by the State Board of Education in Board of Education of Brielle v. Board of Education of Manasquan et al., at page 8, August 7, 1985 and the Appellate Court in Board of Education of Kinnelon v. Board of Education of Riverdale, App. Div., Docket No. A-3587-83T2, at page 2 (February 8, 1985) a receiving district does not have a statutory right to continue as the receiver for a particular sending district indefinitely or to perpetuity. Further, as correctly recognized by the ALJ, the State Board has indicated that the statutory scheme under which sending-receiving relationships is authorized is not intended to create a revenue source for the receiver to subsidize expansion of facilities and programs, nor are receiving districts or other sending districts protected from tax increases. What must be demonstrated in this case is that the withdrawal of Washington Township students will create no signficiant negative impact. This burden has been met as set forth in the initial decision and elaborated upon in petitioner's reply exceptions.

Accordingly, petitioner's application to withdraw from its sending-receiving relationship with Upper Freehold Regional Board of Education is granted in order for the Washington Township Board to enter such a relationship with Lawrence Township Board of Education commencing September 1990.

COMMISSIONER OF EDUCATION

June 27, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7495-88
AGENCY DKT. NO. 304-9/88

ALBERT J. REINOSO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner
(New Jersey Principals and Supervisors Association)

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

Record Closed: April 3, 1989 Decided: May 16, 1989

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

Albert J. Reinoso, a tenured vice principal employed by the Board of Education of the City of Orange, Essex County, was notified that the Board acted at its meeting of June 28, 1988 to withhold his employment and adjustment increments for the 1988-89 school year for poor performance as reflected in his evaluation. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on September 19, 1988, petitioner alleged he had not been evaluated during the 1986-87 school year, in contravention of N.J.A.C. 6:3-1.21, and did not receive any evaluations between December 21, 1987 and June 10, 1988. He alleged Board action in withholding the increments was arbitrary, unreasonable and without factual basis. He sought restoration of increments and such further relief as

was just. In its answer filed in the Division on October 11, 1988, the Board admitted the withholding but alleged such action was in good faith and properly based, within the meaning of N.J.S.A 18A:29-14.

The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on October 12, 1988, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on November 15, 1988, and an order was entered establishing, inter alia, hearing dates beginning February 14, 1989. The matter was heard and concluded on that date. Thereafter, time for posthearing submissions having elapsed and such submissions having been made, the record closed on April 3, 1989.

As established in the prehearing order, at issue were the following:

A. At issue in the matter is whether petitioner shall have proven by a preponderance of the credible evidence that Board action in withholding his employment and adjustment increments for 1988-89 was arbitrary, capricious or otherwise contrary to law; and

B. If so, whether judgment should be given restoring such increments?

PRELIMINARY FINDINGS AND EVIDENCE AT HEARING

I

Albert J. Reinoso, a tenured vice principal employed by the Board at Orange High School, was hired in 1974. During his service, he served thrice as acting principal in absence of the principal: twice officially in 1981 for four months and once unofficially in 1986-87. He holds a B.A. 1963 in political science from Villanova University, an M.A. 1968 in educational administration from Seton Hall University and has earned 60 credits there beyond masters level. From 1971 to 1974 he was employed at Fair Lawn High School, Bergen County, as teacher of social studies, from

1966-71 in Roselle as teacher of social studies and administrator, and in 1964-66 taught at St. Benedict's Prep School. He holds New Jersey certifications as teacher of social studies K-12 and since 1974 as principal/supervisor and school business administrator.

On July 1, 1987, a new principal was appointed to Orange High School, Dr. Joseph Moore. Petitioner then was reassigned to his tenured position as vice principal. Before 1987 petitioner's previous evaluations and performance reports since 1981 were all graded satisfactory to outstanding. J-4, J-5 and J-6. Petitioner's performance report of December 21, 1987, under Moore's administration (J-8) also contained evaluations ranging between satisfactory and outstanding. Six areas that identified petitioner's need to improve by June 1988, however, were as follows:

1. Provide teachers with more feedback regarding disposition of discipline cases.
2. Develop and implement a system to detect and discipline students who consistently "cut" classes.
3. Conduct more early morning parent conferences.
4. Increase the supervision of teachers on hall duty and door duty.
5. Develop and implement strategies to improve the climate of the cafeteria.
6. Be more visible and accessible to teachers on the second floor, especially those in the math department.

Petitioner concurred in the evaluation. J-8 at 3, 4.

The district job description for assistant principal-Orange High School, is J-2 in evidence. Among the duties and responsibilities in a role that is broad and flexible, the job description provides:

> [The incumbent] will be engaged in administration, evaluation, supervision, articulation both within the school and with outside-the-school people and agencies; his/ her responsibilities include scheduling, recording and interpretation of data, discipline, building operation and maintenance, curricular review, monitoring of student and staff performance, reporting to the principal and beyond to local, county, state and federal officials [J-2].

Petitioner's professional improvement plan (PIP), dated October 15, 1987, which was evolved with him and Principal Moore, required that:

1. By January of 1988, the school's discipline code will be fully operational and parents, students and teachers will have been informed about the content of the code.

2. By June of 1988, all aspects of the district and school attendance policy will have been followed, resulting in improved student attendance at Orange High School.

3. By June 30, 1988, the "Student Handbook" will have been revised and ready for editing.

4. By June of 1988, recommendations will be presented to the principal concerning the improvement of operational procedures in the student cafeteria.

5. By May of 1988, the educational environment at Orange High School will have improved as measured through observation of the school climate and responses from students and teachers. [J-7.]

On April 4, 1988, Principal Moore, in response to a request from the acting superintendent of schools to assess petitioner's performance in connection with the discipline, security and attendance problems at the high school, responded with a report listing strengths and areas that needed improvement. J-9. Specifically, Moore felt petitioner needed to provide more feedback to teachers about students referred for rule infractions, needed to get to work early enough in the morning to monitor teachers and meet parents, needed to follow through on getting details of an automatic call system for absences, needed to be more aggressive and initiate more projects, especially, for example, assembly programs, cafeteria supervision, security of the building and maintenance of facilities. Petitioner needed also to review and update the student handbook and develop procedures to implement rules and regulations. He should set up a system for use of badges in school for school events and lunches. He should evaluate security personnel in timely manner and supervise teachers assigned to hall duty and cafeteria duty on a regular basis. He should be more comprehensive in description of problems in suspension letters. He needed to become more visible to teachers and students during passing of classes. It was noted petitioner had been assigned to chair a discipline committee but had never convened it. J-9 at 1, 2.

Petitioner's annual performance report was dated June 10, 1988. J-10. Evaluation of his professional abilities, professional qualities, interpersonal relationships with pupils and personal qualities was in marked contrast to the performance report made the previous December 21, 1987 in J-8. Petitioner's evaluations slipped among those categories to show some 12 below average professional ability/growth ratings. There were three unacceptable professional ability/growth ratings. J-10 at 2, 3. It was noted, generally, further, petitioner had been asked to review and update the student handbook the previous year but had done nothing to follow through with the task. The performance report of June 10, 1988 concluded with a recommendation that petitioner's increment be withheld for 1988-89. J-10 at 4.

The Board took that action at its meeting of June 28, 1988. J-15.

I **FIND** the above facts not substantially disputed or disputable.

II

Petitioner testified Principal Moore began his service at Orange High School July 1, 1987. The two had previously met in June 1987. They had a conference in early July, from which Moore developed a personalized job description for petitioner's position as vice principal. J-3. One of its requirements was that petitioner update the student handbook. Petitioner said he did not believe the Board ever officially adopted it, however. Concerning J-7, petitioner's PIP for 1987-88, petitioner said he reviewed it with Moore in October 1987. In singling out priorities to be set, petitioner said, student and staff attendance and HSPT scores were emphasized. Petitioner said he understood he was to concentrate on that and the educational environment. He noted there was a student handbook in existence, revised about May 1988. Petitioner understood Moore was to condense a handbook into a folder that was to be printed in the summer of 1988. Again, petitioner said Moore wanted him to be responsible for student safety and the operation of the cafeteria, where he was to be assigned from 11 a.m. to 2 p.m., four periods each day.

From his first evaluation by Moore in December 1987 (J-8), petitioner said, between the PIP and the evaluation of his performance on December 21, 1987, he

received no other formal written evaluations from Moore, until the annual performance report on June 10, 1988 (J-10). Between December 1987 and June 1988, Moore gave petitioner no other documents concerning his performance, petitioner said, although he admitted he was aware of Moore's assessment of his performance as reported to the acting superintendent on April 4, 1988 (J-9). In comparing his performance ratings by Moore as reflected in J-8 and J-10, that is, between December 21, 1987 and June 10, 1988, petitioner said his diminished ratings were never explicitly explained to him by Moore. Petitioner said he was shocked and surprised. His rebuttal to the June 10, 1988 annual performance report, petitioner said, was J-11 in evidence, which he said summarized his responses. Concerning class absences, petitioner pointed to inaccuracy and untimeliness of computer absentee reporting. He said he held early morning conferences with parents whenever so requested. On only two occasions did parents come to school early without a previously scheduled appointment and could not meet with him. Concerning cafeteria duties, petitioner said he was there always between 11 a.m. and 2 p.m. every day except when forced to deal with discipline problems elsewhere. He rejected teacher complaints concerning his unavailability, since he was always available in the cafeteria each day. The security force at the high school was ineffective because of absenteeism and preferential treatment, he said. He was prompt in reporting properly physical damage to school property. He insisted he was in constant and extensive collaboration with the head custodian and maintenance staff to keep abreast of building needs and condition. Concerning the student handbook, petitioner complained it had not been made completely clear to him that the update could not be done during the summer months. Delays in suspension letters were only because of details not being furnished properly to him. He protested his lowered "F" and "U" ratings. In summary, he noted he had been an educator for 25 years, during which time he never had a negative comment on his evaluations. He suggested the building principal "due to personal insecurity and professional inability [was] attempting to use [him] as a scapegoat and a political tool to advance his own position and divert criticism." He voiced disagreement with the nature and content of the evaluation; he requested a hearing with the superintendent of schools. J-11 at 1-4.

II

Called by the Board, Dr. Joseph Moore, who holds the doctorate in education from Fairleigh Dickinson University 1989 and New Jersey educational certifications as principal/supervisor K-12, guidance counselor and elementary teacher K-8, and who has served in various teaching, guidance and supervisory positions for 29 years, testified he was hired by the Board in May 1987 and began his service as high school principal on July 1, 1987. His first step was to meet staff, to set directions and to discuss previous and future improvement plans. At the time, he said, he wanted to develop a plan for vice principals, which he said he did with the assistance of petitioner (J-3). Moore said the "job description--vice principal" of July 13, 1987 was a working and not generic job description.

J-16 was Moore's memorandum to respondent on July 2, 1987 reminding him to complete written observations for various personnel under his supervision; they were overdue.

J-7 was respondent's professional improvement plan (PIP) for 1987-88, dated October 15, 1987, which was developed by Moore and respondent. Among the priorities in it, from a school improvement plan, were efforts to improve attendance and discipline, security of the school and educational improvement through a cooperative administrative team. From date of its development, Moore said, until December 1987, he spoke almost daily with respondent to remind him of his concerns as reflected in the working job description and/or in respondent's PIP. Moore said he had become concerned by respondent's late arrivals in the morning. Parents would sometimes show up early at school but could not be interviewed because respondent was not there. In all, Moore said, respondent was late some 15 times, which caused Moore to have to speak to parents himself on occasion.

J-8 was Moore's formal observation of petitioner, dated December 21, 1987. The performance report contained six areas that Moore said responded needed to improve in by June of 1988:

1. Provide teachers with more feedback regarding the disposition of discipline cases.

2. Develop and implement a system to detect and discipline students who consistently "cut" classes.

3. Conduct more early morning parent conferences.

4. Increase the supervision of teachers on hall duty and door duty.

5. Develop and implement strategies to improve the climate of the cafeteria.

6. Be more visible and accessible to teachers on the second floor, especially those in the math department.

A memorandum by Moore to the acting superintendent on April 4, 1988 (J-9) was an assessment of respondent's performance, made at the acting superintendent's request. It listed areas that needed improvement. It was reviewed with respondent, who disagreed with it but declined any lengthy discussion about it.

J-10 was respondent's final evaluation by Moore, dated June 10, 1988. It concluded with a recommendation that respondent's increment be withheld for the ensuing school year. Respondent was graded below average in professional ability/growth or unacceptable professional ability/growth in seven functions under roman numeral I professional abilities; five below average or unacceptable professional ability/growth areas under roman numeral II professional quality; two areas of below average professional ability/growth under roman numeral III interpersonal relationships with pupils; and one area of below average professional ability/growth under roman numeral IV personal qualities (cooperative and supportive with staff). An overall summary statement criticized respondent for failing to develop or implement a system effectively to deal with proliferation of class absences. It noted his habit of late arrival to school in the morning interfered with hall duty and prevented early morning parent conferences on a consistent basis. Respondent's visibility and accessibility to teachers was not consistent. He failed to follow through on obtaining details of an automatic call system to monitor attendance. He was asked to review and update the student handbook the year before. He did nothing to follow through, however. He did not follow through on responsibility to develop procedures in suspension.

DISCUSSION

Respondent argued generally that Board action in withholding his salary and adjustment increment was arbitrary, unreasonable and capricious, (1) because he was not properly notified of the alleged deficiency before the action was taken; and (2) the underlying facts purporting to support the Board action were not as those were portrayed in his evaluation (J-10). The Board argued to the contrary.

The Board specifically noted the legal authority upon which a board of education may rely in order to withhold a teaching staff member's salary increments is in N.J.S.A. 18A:29-14:

> A board of education may withhold, for inefficiency or 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. . . .

Both parties concurred that the standard to be applied in administering the discipline of withholding increments is that used by the court in Kopera v. Board of Ed. of West Orange, 60 N.J. Super. 288 (App. Div. 1960). The court noted the action to withhold is discretionary under the statute but not completely without constraint since the action may be reviewed by the Commissioner of the Department of Education. His job, said the court, was not to substitute his judgment for that of those on the board who made the evaluation but to determine whether they had a reasonable basis for their conclusion. Id. at 296. The challenger to the action, however, must bear the burdens of proof and persuasion by a preponderance of the evidence that the withholding action was arbitrary, capricious or unreasonable or by proving that the facts on which the board relied were untrue.

Here, I am satisfied that respondent has not sustained either burden. I **FIND** the proofs preponderate in favor of the Board assertion that the basis for administrative evaluation, accepted by the Board, was consistent and of nearly a year's standing. The two performance evaluations of respondent in December 1987 and June 1988 were consistent in the areas of deficiency noted and only dissimilar in that in the evaluator's judgment respondent's performance had become more deficient. I **FIND** specifically, therefore, that not only were the facts upon which administration

recommended and the Board ultimately acted established in the evidential record but that the areas of deficiency were consistent with the due process requirement of notice for at least a sufficient time to permit respondent to defend or improve under Fitzpatrick v. Montvale Board of Ed., 1969 S.L.D. 4, 7.

CONCLUSION

For the foregoing reasons, having considered the evidence both documentary and testimonial, as well as arguments of parties, I **CONCLUDE** that the action of the Board of Education of the City of Orange in acting at its meeting of June 28, 1988 to withhold respondent's employment and adjustment increments for the 1988-89 school year for poor performance as reflected in his evaluations should be, and is hereby, **AFFIRMED**. The petition of appeal is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 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(c).

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

May 16, 1989
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

Agency Receipt:

May 16, 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 1989
DATE
amr

Janice A. Venables
OFFICE OF ADMINISTRATIVE LAW

ALBERT J. REINOSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed a timely submission in support of the initial decision, as well as timely reply exceptions.

Petitioner's exceptions raise no new arguments. His exceptions, which are a verbatim recitation of his post-hearing brief, are summarized in pertinent part below.

EXCEPTION ONE

THE ALJ ERRED IN NOT FINDING THAT RESPONDENT'S ACTION WAS ARBITRARY, UNREASONABLE AND CAPRICIOUS, IN THAT PETITIONER WAS NOT PROPERLY NOTIFIED OF THE ALLEGED DEFICIENCY

Relying on Fitzpatrick v. Montvale Borough Board of Education, 1969 S.L.D. 4, 7, petitioner iterates his argument that at no time between his December 1987 evaluation and his June 1988 evaluation, was he informed that his job performance was less than satisfactory. According to petitioner, "respondent has not demonstrated any of the elements of fair play as outlined in Fitzpatrick, supra and its action to withhold petitioner's increment was therefore, arbitrary, unreasonable, and/or capricious." (Exceptions, at p. 2)

EXCEPTION TWO

THE ALJ ERRED IN NOT FINDING THAT RESPONDENT'S ACTION WAS ARBITRARY, UNREASONABLE AND CAPRICIOUS IN THAT THE UNDERLYING FACTS ARE NOT AS PORTRAYED BY RESPONDENT

Petitioner relies on J-11, his rebuttal letter submitted following receipt of his June 1988 evaluation for his version of the facts in this matter. He claims that in comparing the objectives and timelines set forth in his PIP (J-7) with his evaluations (J-8 and J-10), as well as his rebuttal, "it becomes convincingly clear that the rebuttal more accurately sets forth the facts and that

petitioner met the goals of the PIP." (Id., at p. 3) Petitioner submits that because the underlying facts are not as portrayed by his supervisor, the Board has failed to meet the standard set forth in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). He claims further that, for these reasons, the increment withholding therefore cannot be sustained. Petitioner seeks an order restoring his increments with all benefits and emoluments retroactive with legal interest to July 8, 1988.

The Board's submission in support of the initial decision claims that as a matter of fact and law, the initial decision in this case should be affirmed by the Commissioner for the reasons expressed by the ALJ.

The Board's reply exceptions submit a rebuttal to petitioner's claim that he failed to receive appropriate notice in advance from his superiors that his performance was less than satisfactory. The Board relies on J-7, J-8 and J-9, petitioner's PIP, the December 1987 evaluation, and the memo from the principal to the acting superintendent evaluating petitioner's performance, as well as the personal conferences held with petitioner by the principal, as indications provided petitioner of specific deficiencies that required corrective action. It further cites R-1 through R-5 as indicating deficiencies noted by the former associate superintendent/personnel.

The Board also cites the transcript of the hearing below at page 51 for testimony from Dr. Joseph Moore, petitioner's supervising principal, for further evidence that petitioner had notice of his deficiencies, by explaining that Dr. Moore carefully considered the strengths and weaknesses demonstrated by petitioner when he wrote up his final evaluation J-10. Moreover, the Board cites Dr. Moore's testimony in general for the proposition that Dr. Moore spoke with petitioner daily about concerns that had been expressed in his PIP. Thus, the Board contends it met the Kopera standard and the Commissioner should adopt the initial decision in its entirety and order the petition dismissed.

Upon his careful and independent review of the instant matter, which, it is noted, does not include transcripts of the hearing below, the Commissioner agrees with the findings and conclusion of the Office of Administrative Law that the Orange Board of Education was not unreasonable in withholding petitioner's increments for the reasons expressed in the initial decision. Petitioner's exceptions bring no new evidence or arguments to bear in claiming that the Board failed to provide him adequate notice of his deficiencies, in conformity with the Commissioner's holding in Fitzpatrick, supra.

The Commissioner's review of the record comports with the ALJ that the two performance evaluations conducted by Dr. Moore were consistent in expressing areas of deficiency. Moreover, the Commissioner's perusal of the documents labeled as exhibits J-8 and J-10 makes clear that in the evaluator's judgment petitioner's performance had become more deficient by June 1988 than it had been

in the preceding evaluation period. Further, the Commissioner agrees with the ALJ that sufficient time existed between such evaluations to comply with the requirement of notice and a sufficient amount of time existed to permit petitioner to improve his performance. The Commissioner further finds no new arguments raised in petitioner's exceptions relative to the standards to be applied in withholding cases as set forth in Kopera, supra.

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

COMMISSIONER OF EDUCATION

June 29, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 270-89
AGENCY DKT. NO. 1-1/89

MARIA PACIO,
Petitioner,
v.
BOARD OF EDUCATION OF LAKELAND REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

Appearances:

William P. Higgins, Esq., for petitioner, Maria Pacio

Frank N. D'Ambra, Esq., for respondent,
Board of Education of Lakeland Regional High School District
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

BEFORE: **JAYNEE LaVECCHIA,** DIRECTOR:

This matter was opened for consideration by counsel for respondent, Board of Education of Lakeland Regional High School District ("Board") on motion for summary decision pursuant to N.J.A.C. 1:1-12.5. The motion seeks dismissal of the petition on the basis that the petition was not filed in a timely manner as required by N.J.A.C. 6:24-1.2.

A petition of appeal, dated December 29, 1988, was filed with the Commissioner of Education on January 3, 1989. An answer, dated January 10, 1989, was filed on behalf of the Board with the Commissioner on January 11, 1989. Pursuant to N.J.S.A. 52:14F-1 et

seq., the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case.

In accordance with N.J.A.C. 1:1-9.1, a prehearing conference was conducted in this matter on March 15, 1989. During the prehearing conference, counsel for respondent advised that the Board was considering filing a motion for summary decision. A schedule for such motion was included in the prehearing order. It provided that the motion would be filed and served no later than May 1, 1989, and that any response thereto would be filed and served no later than May 12, 1989. The instant motion for summary decision has been filed in accordance with that time schedule. A timely response to the motion has been filed on behalf of petitioner. After a careful review of the pleadings filed in this matter, the moving papers and the responding papers, it appears that there is no genuine issue as to any material fact, and that respondent is entitled to prevail on its motion as a matter of law.

FINDINGS OF FACT

The facts material to the instant motion to dismiss are not in dispute.

On April 19, 1988, the Board voted not to renew the teaching contract of petitioner, Maria Pacio, a non-tenured teacher. Exhibit A to Brief in Opposition to Motion for Summary Decision. Petitioner had commenced employment with the Board in January 1986 and continued teaching with the Board until the close of the 1987-1988 school year. Affidavit of Maria Pacio; Exhibit I to the Verified Petition. At the request of petitioner, a statement of reasons for the Board's decision not to renew her teaching contract were presented to petitioner by letter dated May 2, 1988, signed by the Superintendent of Schools, Dr. Gerald S. Lysik. Exhibit E to the Verified Petition. Thereafter, at a meeting of the Board conducted May 24, 1988, the Board voted to affirm its previous decision not to renew petitioner's teaching contract. Accordingly, petitioner's employment with the Board terminated at the end of the 1987/88 school year. Exhibit H to the Verified Petition.

Between the close of the 1987/88 school year and the filing of the petition of appeal, petitioner, through her attorney, attempted to have the Board change its reasons for the non-renewal. Exhibit I to the Verified Petition. These discussions did

not resolve the matter, and by a petition of appeal dated December 29, 1988, which was filed with the Commissioner of Education on January 3, 1989, petitioner commenced this matter as a controversy and dispute arising under the school laws. N.J.S.A. 18A:6-9.

APPLICABLE LAW AND DISCUSSION

Respondent asserts that petitioner is barred from asserting the claims in her petition by the statute of limitations set forth in N.J.A.C.6:24-1.2. That regulation provides in pertinent part:

> (a) To initiate a contested case for the commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall serve a copy of a petition upon each respondent. The petitioner then shall file proof of service and the original of the petition with the Commissioner. . . .
> (b) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

Petitioner's teaching contract was not renewed for the 1988-89 school year when the Board acted on April 19, 1988. She received a written statement of reasons for non-renewal, which statement was provided at her request, by letter dated May 2, 1988. Therefore, since May 2, 1988, petitioner was on notice that her teaching contract would not renewed, and she knew the reasons for the non-renewal. To the extent that she contends that she has a controversy and dispute under the school laws with the Board, that controversy arose no later than May 2, 1988. Petitioner could not expand that time period by continually requesting the Board to reconsider its action not to renew and to change its reasons for the non-renewal. The language of N.J.A.C. 6:24-1.2 is mandatory, the "petitioner shall file a petition no later than the 90th day . . ."

The fact that petitioner spent part of the time period attempting to resolve the matter in other ways does not provide justification for extending the 90 day limit. In Reilly v. Hunterdon Central Board of Education, 173 N.J. Super. 109 (App. Div. 1980), the Appellate Division applied N.J.A.C. 6:24-1.2 and dismissed the petitioner's action filed with the Commissioner. In that matter, the teacher attempted to resolve her controversy by filing a grievance demanding binding

arbitration on the issue of the procedural propriety of the non-renewal of her employment contract. Ultimately, the arbitrator found against Reilly. In its decision, the Appellate Division ruled that the Board's motion to dismiss must be granted because the matter was filed out of time, notwithstanding that Reilly had spent part of her time pursuing resolution of the case elsewhere. The limitation period was not tolled because Reilly had attempted to resolve the issues in another way. Similarly, the fact that petitioner had attempted to resolve this matter by repeatedly asking the Board to consider rescinding its action and/or the reasons for its action does not require any different conclusion.

While N.J.A.C. 6:24-1.17 authorizes the relaxation of the 90 day rule, relaxation has been reserved for limited situations wherein a compelling reason can be demonstrated for expanding the limitation period. The Commissioner of Education has described these reasons as follows:

> Where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination, and where a matter of significant public interest is involved. (Citations deleted). Miller v. Morris School District, 1980 S.L.D. _____ (February 25, 1980).

See also Weir v. Board of Education of the Northern Valley Regional High School District, OAL Docket No. EDU 8609-83, affirmed by the Commissioner (July 20, 1984), affirmed by State Board of Education (March 6, 1985), affirmed by the Appellate Division, Docket No. A-3520-84 (April 9, 1986).

In this matter, no constitutional issue is presented and no informal administrative determination involving a matter of significant public interest is at stake. Petitioner's action is grounded upon her disagreement over the Board's stated reasons for her nonrenewal, reasons which were provided on May 2, 1988 at her request. A question arises as to whether this matter even raises a justiciable controversy under the school laws. See Dore v. Board of Education of the Township of Bedminster, 185 N.J. Super. 447 (App. Div. 1982). Although not pressed by the parties, the nature of petitioner's claim must nevertheless be assessed to some degree to determine whether a significant public interest is at stake in this matter. In my opinion, there is no such interest involved in this case, although I do recognize the importance of this case to petitioner. However, simply because petitioner does not like the reasons for her nonrenewal, provided by the Board when she requested

them, does not mean that petitioner has posed a matter of substantial public interest. The issues in this case do not militate in favor of relaxation of the 90 day rule.

There will always be instances where application of the 90 day limitation may produce a harsh result to an individual litigant. However, that is not the test of whether a compelling reason to relax the rule is present, for if it were relaxed every time a harsh result occurred, then the rule and its salutary public policy of encouraging the prompt resolution of disputes would be nullified. As noted by Administrative Law Judge Duncan in Newman v. Board of Education of the Borough of Spring Lake, 1984 S.L.D. _____ (January 17, 1984), (slip opinion at 5):

> The prompt filing and expeditious processing of actions brought before the Commissioner serves to preserve immediacy of the record and stabilize existing relations, e.g.,between teachers and administration, and thus avoid disruption of the educational process. Furthermore, since local school districts must operate on a cash basis, it is important that prompt filing of claims requiring expenditures for legal expenses and involving the potential for an award of money damages should be encouraged. (Citations omitted).

Petitioner in this matter cannot be able to unilaterally expand her time for filing this action by her repeated requests, through counsel, to have the Board change its reasons for nonrenewal. The fact that the Superintendent of Schools conducted a "straw poll" of the Board regarding its willingness to reconsider yet again its stated reasons for nonrenewal of petitioner in November of 1988 should not change this result. The 90-day limitation period is designed purposefully to establish a reasonable period of time for parties to reach an amicable resolution. At some point, and the regulation defines that time as 90 days from the accrual of the cause of action, a petitioner must commence her action with the commissioner in order to bring finality to a dispute. Petitioner did not file her action until January 3, 1989, well beyond the 90 days from the Board's April 19 action and from its May 24 action.

Petitioner seeks to challenge the "straw poll'" conducted by the Superintendent of Schools in November 1988, not only to expand the time limit for filing this action, but also to bring an Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., challenge to that Board action. She also raises Open Public Meeting Act challenges to the Board's April 19 and May 24, 1988 actions.

The Act requires a challenge to be brought within 45 days, therefore, her challenges to the April 19 and May 24, 1988 actions are out of time as a matter of law. N.J.S.A. 10:4-15. With regard to her challenge to the November 15, 1988 "straw poll" of the Board by the Superintendent, it must be noted that the Commissioner of Education's jurisdiction to hear Open Public Meetings Act questions is incidental to his otherwise validly invoked jurisdiction to hear school law disputes. See Sukin v. Northfield Board of Education, 171 N.J. Super. 184, 187 (App. Div. 1979). Since the Board action of nonrenewal and its reasons therefor which petitioner seeks to challenge occurred in May 1988, no timely petition of appeal is before the Commissioner. Accordingly, the additional question of whether an Open Public Meetings Act violation occurred in November of 1988 is not properly before the Commissioner.

CONCLUSION

For all of the foregoing reasons, respondent's motion to dismiss the petition is **GRANTED** and the petition is **DISMISSED WITH PREJUDICE**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

May 18, 1989
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

May 23 1989
Date

for the **DEPARTMENT OF EDUCATION**

Mailed to Parties:

May 17, 1989
Date

OFFICE OF ADMINISTRATIVE LAW

ahk

MARIA PACIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner contends that an action taken by the Board at its November 15, 1988 meeting, rather than the letter dated May 2, 1988 she received from the Board expressing reasons for her nonrenewal, triggered the date from which her 90 days began to run, pursuant to the language of N.J.A.C. 6:24-1.2 which states in part that a party shall file a petition no later than 90 days "***from the date of receipt of the notice of a final order, ruling or other action by the district board of education." (emphasis in text) (Exceptions, at p. 1, quoting N.J.A.C. 6:24-1.2) She avers that "[t]he fact that Petitioner may have had a right of appeal as a result of the May 2, 1988 notice should not cut off her right to appeal any subsequent decisions or actions of the Board of Education.***" (Id., at p. 2)

Petitioner avers that the Board's "informal straw poll" (id.) put before it to determine whether the Board would reconsider the bases for her nonrenewal taken at its November 15 meeting is a central issue in her contention that the time for her to file an appeal with the Commissioner began on November 15. Petitioner avers the ALJ did not consider whether such straw poll constituted "other action" by the Board pursuant to N.J.A.C. 6:24-1.2.

Petitioner claims that this issue cannot be resolved by summary decision because there was no evidence proffered by the Board to suggest that its straw vote was anything other than an action to deny petitioner's requested relief. She claims this issue presents a factual question which must be disposed of at a hearing. She suggests such straw poll must be considered as other action by the Board, which, if it had been favorable to petitioner, would have resulted in the rescission of the Board's original decision and would have permitted petitioner to resign.

Finally, petitioner contends the facts in her case can be readily distinguished from Riely v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980). "In the present matter, there was much more than unilateral action on the Petitioner's part. The Board of Education took action in the form of a vote affirming her dismissed (sic) for the reasons stated at its meeting of May 24, 1988." (Exceptions, at p. 3)

For the above reasons, petitioner submits the petition was timely filed pursuant to N.J.A.C. 6:24-1.2.

The Board submits that the ALJ's decision below should be affirmed for the reasons expressed therein. It rebuts petitioner's argument that another final action was taken by the Board on November 15, 1988 stating such position belies logic. It claims that since the Board took final action on May 2, "neither 'the ruling' or 'other action' language in N.J.A.C. 6:24-1.2 applies." (Reply Exceptions, at p. 2)

Further, the Board claims that following "repealed (sic) and persistent requests from Petitioner to have the Board reconsider its May 2 decision***" (id.), the superintendent presented the Board with a "straw poll" to see if it would reconsider the bases for nonrenewal of petitioner's contract. The Board rejected such consideration, it avers. "To accept Petitioner's argument that this was in effect another final action will result in a finding that no board action is ever final." (Id., at pp. 2-3)

Finally, the Board avers that petitioner's attempt to distinguish her situation from Riely, supra, is without merit. It suggests:

> ***Contrary to her argument, Petitioner's actions, as were in Riely, were taken unilaterally. On November 15, 1988, the Board chose not to become a party to Petitioner's actions when it informally determined to take no further action. To grieve that event is a separate act apart from Petitioner's termination on May 2, 1988, which must stand as a final act by the Board. (Id., at p. 3)

Upon a careful and independent review of the instant matter, the Commissioner adopts as his own the findings and conclusions of the ALJ below for the reasons expressed in the initial decision. He would add the following.

The record contains no indication of how or when petitioner received her formal written notice in April 1988 that her contract would not be renewed, pursuant to N.J.S.A. 18A:27-10. Whether it was from hearsay following the Board meeting, or perhaps from her having received a written communique in the mail, reasons for her nonrenewal on April 29, 1989 and that such reasons were provided on May 2, 1988. (Petitioner's Exhibit E) Because the May 2, 1988 letter from Dr. Lysik, Superintendent of Schools, is the first

written notice the record contains indicating that petitioner was not to be renewed as a teaching staff member in respondent's district for the 1988-89 school year, the Commissioner agrees with the ALJ that such date represents the date from which petitioner's 90-day notice began to run for filing a petition of appeal before the Commissioner, because this date represents when she unquestionably received a written notice from the Board of its "final determination" not to renew her contract. N.J.A.C. 6:24-1.2 Either way, be it late April or May 2, the Commissioner concurs with the ALJ that as a result of the Board's final determination on such date, Ms. Pacio's Petition of Appeal challenging her nonrenewal was untimely filed.

Further, the Commissioner would clarify for the record that requests to a board for reconsideration of its final determination do not toll the running of the 90-day rule. See Marvin J. and Susan M. Markman v. Board of Education of the Township of Teaneck, Bergen County, decided by the Commissioner August 22, 1986. See also Augustus C. and Colette Gerding v. Board of Education of the Matawan-Aberdeen Regional School District, Monmouth County, decided by the Commissioner December 24, 1987, aff'd State Board April 6, 1988, aff'd/rem'd to State Board by New Jersey Superior Court, Appellate Division December 6, 1988, rem'd to Commissioner February 1, 1989. Thus, no date beyond May 2, 1988 needs to be considered in this matter because, as the ALJ found, the Board's final determination to not renew petitioner's contract was made known to her no later than May 2, 1988.

Finally, the Commissioner finds no merit in petitioner's contention that Riely, supra, is distinguishable from the instant circumstances for the reasons expressed by the ALJ wherein she stated:

> ***the fact that petitioner had attempted to resolve this matter by repeatedly asking the Board to consider rescinding its action and/or the reasons for its action does not require any different conclusion [from the Appellate Division's decision in Riely].
> (Initial Decision, ante)

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

COMMISSIONER OF EDUCATION

June 29, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 7748-88 and
EDU 7749-88
AGENCY DKT. NOS. 308-9/88 and
303-9/88
(CONSOLIDATED)

BRUCE SCHIPMANN AND RAYMOND ZAITZ,
Petitioners,
v.
PISCATAWAY TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Gerald Gordon, Esq., for petitioners (Pincus, Gordan and Zuckerman)

David B. Rubin, Esq., for respondent (Rubin, Rubin & Malgran)

Record Closed: May 1, 1989 Decided: May 25, 1989

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

Raymond Zaitz and Bruce Schipmann (petitioners) claim tenure in supervisory positions as maintenance employees in the employ of the Piscataway Township Board of Education (Board). Petitioners claim the Board violated their tenure status in their supervisory positions as maintenance employees when they were reassigned from the position mechanical supervisor to the position of maintenance man. Petitioners seek relief in the form of an Order by which they would be returned to the position of maintenance supervisor, together with an Order requiring the Board to pay them the difference between the salary they received as maintenance man compared to what they claim they should have received as maintenance supervisor. After the Commissioner transferred the matters to the Office of Administrative Law on October 25, 1988 as

contested cases under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted January 6, 1989 during which a consolidation order was issued. Furthermore, ancillary issues to the main issue of petitioners' tenure claim were set forth as shown in the prehearing orders. The Board placed petitioners on notice during that conference that it intended to file a letter memorandum in support of its motion to dismiss the cases no later than March 15, 1989 for failure to state a justiciable issue. The Board did file such a motion. Petitioners requested and were granted an extension of time within which to file their response. That extended time expired May 1, 1989. Petitioners failed to respond to the Board's motion to dismiss.

The conclusion is reached in this initial decision that both petitions must be dismissed on the substantive merits of the Board's arguments and for failure of petitioners to respond to the motion to dismiss.

MOTION TO DISMISS

School district employees may acquire tenure only where expressly sanctioned by statute. Lange v. Board of Education of Audubon, 26 N.J. Super. 83 (App. Div. 1953). The only statutory provision for acquisition of tenure by janitorial personnel is at N.J.S.A. 18A:17-3 which provides in part:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency ***

There is no provision in the statute for a "supervisor" in a janitorial sense to acquire a status of tenure. Tenure is a legislative protection which may only be acquired by meeting the precise conditions articulated in the statute.

Petitioners' claim to a tenure status in the position of supervisor in a janitorial sense is without a basis in law. That being so, there is no basis to petitioners' claim that they have some right to due process before being reassigned from a locally-created supervisory position to that of a janitorial position. That being so, petitioners present no justiciable cause of action. Consequently, the petitions of appeal must individually and collectively be dismissed for failure to state a cause of action. Moreover, the petitions of appeal are subject to dismissal for failure of petitioners to respond to the Board's motion to dismiss.

In either case, both petitions of appeal are 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.

May 25, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

May 26, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 30 1989
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

ij

BRUCE SCHIPMANN AND RAYMOND ZAITZ, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were untimely filed.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that both petitions brought herein must be dismissed on the substantive issue that there is no provision in N.J.S.A. 18A:17-3 which provides for a janitor to acquire the status of tenure in the category of supervisor. See initial decision at pages 2-3.

Notwithstanding the fact that petitioners' exceptions were untimely filed, the Commissioner feels constrained to mention the issue of the timeliness of petitioners' response to the Board's Motion to Dismiss. While the Commissioner cannot pass judgment on whether petitioners' counsel did, in fact, submit such a response to the ALJ, or whether it was timely, absent proof presented to him that the response to said motion was in fact filed before the ALJ,

the Commissioner does note, in light of the legal finding above, that the arguments raised in such papers in no way impact upon the substantive issue. Thus, the Commissioner need not reach the issue of whether petitioners timely replied to the Board's Motion to Dismiss.

Accordingly, the Commissioner adopts only that part of the initial decision which finds there is no basis in law for acquiring tenure as a janitorial supervisor pursuant to N.J.S.A. 18A:17-3. Consequently, the instant Petitions of Appeal are dismissed, with prejudice.

COMMISSIONER OF EDUCATION

JULY 3, 1989

DATE OF MAILING - JULY 3, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2764-89
AGENCY DKT. NO. 100-4/89

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION FOR THE SCHOOL DISTRICT OF MANNINGTON, SALEM COUNTY.

F. Lyman Hine, petitioner, pro se

John D. Jordan, Esq., for respondent (Jordan and Jordan, attorneys)

Record Closed: May 9, 1989 Decided: May 23, 1989

BEFORE **JEFF S. MASIN**, ALJ:

This matter involves a challenge to the results of the School Board election held in the Mannington school district on April 4, 1989. As a result of the voting, the school budget was defeated in both the current expense and capital outlay areas and three candidates were elected to fill seats on the School Board. Subsequent to the election, a concerned citizen, F. Lyman Hine, filed a petitioner with the Commissioner of Education on April 8, 1989, in which he alleged that the election had been marred by violations of election laws and misrepresenations concerning budget matters such that he believed that the Commissioner should take action to void the results of the election. The Commissioner forwarded the matter to the Office of Administrative Law for a hearing, pursuant to N.J.S.A. 52:14F-1 et seq. A hearing on the matter was held before Administrative Law Judge Jeff S. Masin at the Pilesgrove Municipal Court on May 9, 1989. Following presentation of the petitioner's proofs, counsel for the respondent moved for dismissal of the petition pursuant to the legal test set forth in Dolson v. Anastasia, 55 N.J. 2 (1969). Upon review of the evidence in accordance with the appropriate test, the

Administrative Law Judge determined that the respondent's motion was proper and that the petition should be dismissed. This Initial Decision will incorporate the findings and conclusions stated by the Administrative Law Judge on the record at the hearing.

THE ELECTION RESULTS

Representations and evidence presented at the hearing established that there were three seats available on the School Board, which were filled by the voters who elected Charlotte Holladay, John G. Sakewicz, and Elwood S. Du Bois. In addition, the voters rejected the capital expense portion of the school budget by a vote of 174 in favor and 191 against and rejected the capital outlay portion by a vote of 174 in favor and 182 against. Following the election Mr. F. Lyman Hine, who is not a candidate and who had not apparently been very active in the campaign, filed his petition of April 8, 1989, in which he discussed various attachments to the petition which he believed indicated irregularities in the election. These generally fall within two categories. The first concerns various advertisements cointained in newspapers and letters and/or handouts which were produced in favor of candidates Robert Wilson, Charlotte Holladay and Elwood Du Bois, and which documents concededly failed to contain any information as to who caused the "same to be printed, copied or published or of the name and address of a person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and the name and address of the person or persons by whom the same is printed, copied or published" as required by N.J.S.A. 18A:14-97, a portion of the school election law. These items, which were marked in evidence on behalf of the petitioner as P-1, P-2, P-3, and P-6, consist of newspaper advertisements, P-1 and P-2; a letter from candidates Wilson, Holladay and Du Bois sent to selected Mannington Township voters, P-3; and a green slip of paper bearing on its front information concerning the date, time and location of the election and the names of the three candidates, Wilson, Holladay and Du Bois, plus the word "(over)" and on the reverse side a listing of "question one and two - no" and "three -yes," P-6. As noted, it is undisputed that none of these documents contained the required information pursuant to the statute. In addition, with respect to P-6, although no witness specifically agreed that they had distributed or had knowledge of the distribution of green slips of paper such as P-6 or that they had anything to do with the purported addition of the word "(over)" and the budget information on the back of the form, several witnesses did agree that white papers bearing only the information about time, date and location and the name of the three candidates were in fact distributed and

did not contain the required information under the statute. As such, and as will be noted below, it appears that Mr. Hine's complaint as to the failure to include the required information with respect to these documents is well taken. Findings and conclusions with respect to these items and the legal signficance of them in the context of the inquiry into the election will be discussed below.

The second aspect of Mr. Hine's complaints dealt with his claim that with respect to the school budget which was to be voted upon by the voters, information concerning the budget was misrepresented by candidates Holladay, Wilson and Du Bois, and that in addition they had been aided in their campaigns and assisted and/or supported concerning these "misrepresentations" by Rita Shade, a member of the School Board. Apparently, in Mr. Hine's view, these asserted misrepresentations and the involvement of Ms. Shade had the affect of misleading voters as to the true facts concerning the budget and therefore in some way tainted the election.

EVIDENCE

The petitioner called Messrs. Du Bois and Wilson and Mrs. Holladay as his witnesses. According to Du Bois, his petition was taken around by Ms. Shade. With reference to the candidate's letter, P-3 in evidence, Du Bois explained the statement contained in the third paragraph, beginning "the total school budget proposed for the upcoming yearing is more than $2.1 million — nearly a nine percent increase." The 2.1 million consisted of the 1.8 million which the Board had listed in the newspaper printing of the school budget on February 27, 1989, P-4 in evidence, as the 1989-90 appropriations, plus approximately $300,000 in free balance or surplus which, in the logic of the three candidates, constituted money available to the Board for expenditures and therefore part of the "total budget." In addition, he explained that the comment in the letter concerning the need for the Board to "take another $81,000 from surplus . . ." came from information received at a budget presentation presented by the Board when it appeared that the state would not provide this $81,000 in school aid and it would have to be taken from surplus. He acknowledged that the budget on its face purported the call for no increase in the tax levy. He also acknowledged a mistake was made in calculating the current expense budget for 1989-90 in that the capital outlay of $50,000 was added to the $1,783,882 current expense portion in getting a figure of $1,834,097 which was mistakenly considered by the candidates to be the current expense appropriation. Du Bois acknowledged that he

made no attempt to check his and his fellow candidates figures and calculations against the budgetary material produced by the Board or to check with anybody else at the Board to determine the accuracy of their calculations. They simply read through the published budget and were absolutely sure that they were right in the way they calculated their figures. Du Bois claimed to be the author of P-3, although the other candidates had some input. He was uncertain as to whether Ms. Shade was involved in its distribution. He also denied that Ms. Shade was in anyway responsible for paying for the printing of P-3. As far as he knew, it was mailed out to those on a mailing list which Ms. Holladay had in her possession. He originally thought that it was sent to all eligible voters, although he later found out this was not the case.

The witness denied that there was any information concerning the budget vote on the white pieces of paper similar to P-6. He does not know who distributed them, although he was aware of their existence.

Ms. Charlotte Holladay testified that she had a mailing list which was drawn up from the voter registration list. She picked and chose who to send P-3 to and was uncertain how many were sent out. She also explained the candidate's calculations concerning the increase in the current expense budget from $1,645,729 for 1988-89 to $1,783,882 for 1989-90 and adding the capital outlays of $22,000 for 1988-89 and $50,215 for 1989-90, as well as a debt service cost of $73,667 for 1988-89 with no debt service cost for 1989-90, the candidates came up with total figures of $1,741,396 for 1988-89 and $1,834,970 for 1988-89. With a free balance of $422,953 added to each figure, the total budgetary figures for 1988-89 were, according to the method of calculation used by the candidates, $2,164,349 for 1988-89, and $2,257,050 for 1989-90. When comparing the total for 1988-89 without free balance of $1,741,396 and the $1,834,097 for 1988-89, there was a 9.9 percent increase, which was more than the nine percent increase stated in the letter.

Ms. Holladay had input in the writing of the letter. She assumed that Ms. Shade had made phone calls on her behalf, but had no personal knowledge of this. In addition, Ms. Shade "carried" her petition. Ms. Holladay also testified that she typed and copied the small white calls which were distributed and that there was nothing on the back of the cards and that the word "over" was not on the front of the cards. Since the last Board meeting when she learned of the additional information on these cards, she

found out that one Alan Munyon, a person who she does not know, placed this information on the card.

Robert M. Wilson, the third candidate who advertised with Du Bois and Holladay, testified that he agreed on the figures and participated in the preparation of P-3.

Rita A. Shade, a member of the School Board, testified that she supported the three candidates and distributed slips of paper on their behalf. She also looked at P-3, although she was not involved in drawing it up. The candidates went over their position on the budget with her and she felt that spending had to be controlled and that it was not a good idea to regularly have to draw down from surplus. She explained that there had been one six hour work session to review the budget, which had been set up by the superintendent of schools. The concept was to keep full funding from the State at all costs. If full funding did not occur, there would be an $81,000 shortage which would have to be drawn down from surplus.

The witness was questioned whether she had voted favorably in favor of the budget. She indicated that she did, although she tried to convince the other members of the Board of the need for frugality regarding spending. She also did not think that the current tax levy should be lowered.

James A. Bambrick, who was an incumbent on the Board and was defeated in the election, testified that he was a member of the organization committee of the Board. Ms. Shade was also on this committee. However, the budget was not presented directly to the organization committee but was presented directly to the Board as a whole because of its importance. The Board directed the superintendent to keep the tax levy the same and to try to increase State aid as much as possible.

With respect to P-3, the witness indicated that it was clear that there was no increase in the tax levy and also that it was not proper to include the surplus or free balance as part of the budget, but only to include expenditures.

DISCUSSION

The evidence presented, in the form of documents and testimony, must be judged in accordance with standards which have been established by the Supreme Court of New Jersey and the Commissioner of Education with respect to the review of election proceedings. The basic statement concerning challenges to elections in this state is contained in the decision of In Re Wene, 26 N.J. Super. 363 (Law. Div. 1953), aff'd, Wene v. Meyner, 13 N.J. 185 (1953).

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of the legal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will. 26 N.J. Super. at 383.

Even where gross irregularities occur, where no fraud is established, election results will not be overturned. Love v. Board of Chosen Freeholders, 35 N.J.L. 269 (Sup. Ct. 1871); Stone v. Wyckoff, 102 N.J. Super. 26 (App. Div. 1968).

The Commissioner of Education has considered the applicability of these judicial standards to the school election process. Generally, the Commissioner has applied the Wene doctrine as the test in such matters. South River, 174 S.L.D. 1040, 1048. More specifically, the Commissioner has applied the Wene standard in cases of specific types of irregularities and has applied the same general rule as to the sanctity of election results in connection with these violations. For instance, in Greater Egg Harbor Reg. Sch. Dis., 1978 S.L.D. 11, the Commissioner dealt with allegations of literature which had been distributed without bearing the required identifications of the printer and the persons paying for the printing, as required by N.J.S.A. 18A:14-97. In Greater Egg Harbor, the Commissioner found that while the record indicated that the precise provisions of the statute had not been followed, "there is no evidence in the record to establish that the

distribution of the flyer thwarted the will of the people." The Commissioner applied the Wene standard and held that:

> Violations, however, either individually or collectively do not establish that the announced succesful candidates would be other than those declared. It is the clear intent of the law that elections are to be given effect whenever possible. It is well established that gross irregularities, when not amounting to fraud, do not vitiate an election . . . . It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible the determination of the will of the people, that an election will be set aside.

In applying the Wene test to the evidence in this case as presented by the petitioner, the respondent suggests in its motion to dismiss the case at the end of the petitioner's presentation that no reasonable finder of fact could conclude that the evidence, even giving it the benefit of all reasonable inferences arising therefrom, could reasonably find that any basis existed for overturning the results of the election. This is the test for determining the propriety of dismissal at the end of the petitioner's case which is set forth in Dolson v. Anastasia, 55 N.J. 2 (1969). Where no such conclusion favorable to the petitioner's case could be reached by a reasonable finder of fact applying this test, it is the responsibility of the judge to dismiss the petitioner's case without requiring the respondent to go forward with its evidence.

In the present case, it is noted that the petitioner called as witnesses the three candidates whose literature is attacked as being in violation of the statute and whose claims concerning the budget are contended to be misleading and perhaps fraudulent, as well as Ms. Shade. Thus, one can anticipate that a substantial portion, if not all, of the respondent's case has in effect already been presented through the testimony of the petitioners who explained their conduct, their knowledge concerning the documents and Ms. Shade's role in their campaigns and the method upon which they calculated the information which was placed in the document, P-3.

As noted, a violation of the requirement for the printing of the information concerning the printer and the persons paying for the printing of flyers, letters, advertisements, etc., is generally not a basis for overturning the results of an election unless there is clear evidence of some voters being prevented from voting or some illegal

votes being cast as a result of the violation or some other indication of fraud which would appear to have thwarted the will of the electorate. No such evidence of any kind has been presented in this case. Although I **FIND** that the candidates Holladay, Wilson and Du Bois did distribute material, or at least material was distributed on their behalf, which failed to conform to the provisions of N.J.S.A. 18A:14-97, I **FIND** that there is absolutely no proof whatsoever of any voters being affected one way or the other by these advertisements, much less the lack of any information as to who paid for them, and there is no evidence at all that this violation, improper as it is, had any negative affect upon the electorates' ability to express its opinions at the poles. While the failure to comply with the advertising requirements may constitute a violation of law which would be of interest to the county prosecutor, under existing law governing the challenge to elections, the evidence fails to reach a level, giving it all reasonable inferences, upon which a reasonable finder of fact could possibly determine that the outcome of the election has to be voided.

With respect to the second aspect of the petitioner's claims, that is, the claims that there were misrepresentations in P-3 and that Ms. Shade's involvement in the campaign of the three candidates in some way worked a misrepresentation or a fraud on the electorate, the petitioner has similarly failed to demonstrate a case for affecting the outcome of the election. Firstly, there is no law which clearly makes it illegal for candidates in an election to make statements which may not be accurate. While some such instances may constitute a fraud, generally it appears that in a democracy claims by candidates are to be judged by the electorate using its own collective common sense, wisdom and experience and that opposing candidates are free to point out errors and submit their conclusions to the electorate as well. Thus, the mere fact that a candidate's literature may have completely inaccurate statements concerning budgetary matters or any other issue is not a basis for affecting the outcome of the election. Here, the candidates explained the manner in which they came up with their figures and the conclusions which they drew. Without any need for determining from School Board accountants or any other experts the propriety of their methods of calculating the total budget, the possible tax levy increase, the increase in expenditures, etc., I **FIND** that their presentation had at least a colorable basis and that their statements were clearly within the confines of fair comment and proper election activities. Further, I am convinced that there is no evidence that Ms. Shade's acknowledged involvement in the election campaign on behalf of these candidates did in any sense provide them with some imprimateur of

certification as to the accuracy of their claims concerning the budget nor did her involvement in any way work a fraud upon the electorate. Ms. Shade was within her rights as a citizen to campaign for candidates for the School Board. There is no claim, nor is there any evidence, that she was prevented from doing so because of her official position as a member of the board. In addition, while it is unclear whether she completely agreed with the candidates' assessment of the budget or not, and while it is clear and I **FIND** that she voted in favor of the budget, there is certainly nothing which prevents a public official from voting on an issue brought before him or her and then campaigning for those who may oppose that position. There are many reasons why public officials will vote in favor of specific matters when in fact they may have reasons for having negative thoughts or perhaps even oppose the matter. The fact that Ms. Shade may have had some consultative role in connection with the information contained in P-3 has not been shown to have worked a fraud on anyone. If her activities are viewed as being inappropriate in the sense that she might be accused by someone of being two-faced or of voting one way and campaigning another, such would appear to be appropriate for comment in the course of her next election campaign. However, there is no basis upon which a reasonable finder of fact could conclude that her activities were such as to permit the election results to be changed.

I **CONCLUDE** that the petitioner has completely failed to establish any evidence from which a reasonable finder of fact could conclude, even with all reasonable inferences in favor of that evidence, that the acknowledged violations of the election laws and/or the asserted improprieties constitute a legal basis for overturning the election results under the Wene standard. Further, I **FIND** that there is no evidence from which a reasonable finder of fact could conclude that Ms. Shade's activities on behalf of the candidates, and/or the candidates own statements in connection with the budget, constituted any violations of election laws. Therefore, I **CONCLUDE** that the respondent's motion for dismissal of the case at the end of the petitioner's presentation is appropriate. The motion is **GRANTED**. The petition is **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.

5/23/1989
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

May 24 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 25 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

OAL DKT. NO. EDU 2764-89

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION FOR THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
MANNINGTON, SALEM COUNTY.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the petitioner has "***failed to establish any evidence from which a reasonable finder of fact could conclude, even with all reasonable inferences in favor of that evidence, that the acknowledged violations of the election laws and/or the asserted improprieties constitute a legal basis for overturning the election results under the Wene standard." (Initial Decision, ante) The Commissioner also accepts the ALJ's finding that "***there is no evidence from which a reasonable finder of fact could conclude that Ms. Shade's activities on behalf of the candidates, and/or the candidates own statements in connection with the budget, constituted any violations of election laws." (Id.)

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision. Inasmuch as it has been established that there were violations of the election laws, specifically N.J.S.A. 18A:14-97, the Commissioner directs a copy of this matter be forwarded to the Salem County Prosecutor, for whatever action is deemed appropriate, since the penalties prescribed for such offenses are not within the authority of the Commissioner of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 10, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4432-88
AGENCY DKT. NO. 144-5/88

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
NEPTUNE TOWNSHIP BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Oxfeld)

James G. Hundley, Esq., for respondent (Patterson & Hundley)

Record Closed: April 12, 1989 Decided: May 25, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

INTRODUCTION

The Neptune Township Education Association (Association) is the recognized majority representative for all non-supervisory professional and non-professional employees including teachers, secretaries, educational aides, internal attendance officers, and van drivers in the employ of the Neptune Township Board of Education (Board). The Association, on behalf of all such employees, claims that a Staff Attendance Policy adopted by the Board and effective July 1, 1988 is arbitrary, capricious, unreasonable, in contravention of prior decisions of the Commissioner of Education and State Board of Education, and in contravention of negotiated contract provisions between it and the

Board. After the Commissioner of Education transferred the matter on June 17, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., the parties agreed that the matter could and should be decided by way of cross-motions for summary decision. The conclusion is reached in this initial decision that the controverted Staff Attendance Policy is not on its face arbitrary, capricious, unreasonable or in contravention of prior administrative rulings of the Commissioner and/or State Board of Education and that, as such, the adoption of the policy is well within the authority of the Board.

ISSUE

The issue for adjudication by way of cross-motions for summary decision is as stated by the Association in its letter memorandum and is as follows:

> Whether the controverted Staff Attendance Policy adopted by the Board is facially arbitrary, capricious, unreasonable or in contravention of prior administrative rulings of the Commissioner and/or State Board of Education.

STIPULATED FACTS

The issue states an attack upon the facial validity of the Policy. The issue is not at all concerned with asserted instances of wrongful or arbitrary application of the Policy to specific employees. Accordingly, the facts relevant to the facial attack and not otherwise in dispute between the parties are these.

STAFF ATTENDANCE

> The Neptune Township Board of Education believes that regular presence of assigned personnel is vital to the success of the district's programs.
>
> The Superintendent of Schools shall develop procedures to encourage all Staff to strive for excellent attendance records. A system of monitoring staff attendance shall be developed for the purpose of maintaining accurate and up-to-date attendance information.
>
> The Board of Education shall acknowledge exceptional Staff attendance in a regular program of Staff recognition.

GUIDELINES AND PROCEDURES

GUIDELINES

To ensure that absences are not abused to the point of being harmful to students' education, the efficient operation of the school plant and related services, transportation, food services, custodial and clerical, the following procedures should apply in monitoring staff absenteeism. Each employee's case will be considered individually and consideration will be given for circumstances or reason for absence.

The conference component of the Policy found in Steps I, II, IV and V is designed to provide the employee ample opportunity to present the designated Administrator with legitimate explanation and also present medical documentation in regard to continuous debilitating illnesses.

PROCEDURES

Individual school Administrators shall review the attendance records of all employees, certificated and non-certificated, assigned to his/her school. The Superintendent of Schools or his designee shall review the attendance records of Administrators district-wide.

STEP I

Four (4) days absent - letter from Administrator relative to amount of absence. Staff member may request conference.

STEP II

Seven (7) days absent - conference with Administrator and conference summary prepared and signed.

STEP III

Nine (9) days absent - written notification to Superintendent by Principal including the following information:

1. Review of staff member's current attendance record
2. Review of staff member's past attendance record
3. Supportive data to the Superintendent or designee

STEP IV

Letter may be sent to staff member by the Superintendent depending on data from Step III, giving notice that additional absences of 3 additional days may result in a conference with the Superintendent or his designee.

STEP V

Staff members who have gone through Steps I through IV and whose record indicated similar patterns of absence in prior years, will appear before a committee of Administrators including the Principal, Assistant Superintendent and Superintendent of Schools for the purpose of further deciding on a course of action to remediate the situation. A formal report will be submitted to the Board of Education summarizing all steps followed and recommendations for future action.

ADMINISTRATIVE CONFERENCE

All Administrative Conferences with the employee will require the Administrator to prepare a written summary of the Attendance Conference with the individual employee. The employee may have representation at all conferences from his/her Association. The employee may attach a response to the Conference Summary Statement within ten (10) days.

It is agreed by the parties that the foregoing Policy became effective July 1, 1988. Prior to the adoption of the Policy, the annual rate of occasional professional staff absenteeism during 1987-88 was 4.23 percent. After the adoption of the Policy, the rate of occasional professional staff absenteeism during 1988-89 was 3.84 percent through February 28, 1989.

This concludes a recitation of all relevant and material facts of the matter for purposes of determining whether the controverted Policy is on its face improper, arbitrary, capricious, or unreasonable, or in violation of prior Commissioner or State Board of Education decisions.

LEGAL ARGUMENTS

Association Arguments

The thrust of the Association's attack upon the facial validity of the Policy is that the negotiated agreement with the Board provides employees a maximum of 4 personal days absence with prior approval of the superintendent, religious observance days, a maximum 5 bereavement days, a maximum 3 illness in family days, mandatory and voluntary professional in-service days, together with the possibility of a statutory disability leave under N.J.S.A. 18A:30-2.1. No Policy, the Association contends, regarding staff attendance may establish guidelines by which conferences are convened and disciplinary penalties contemplated or imposed because of the employee's use of such contractually or statutorily granted, or Board ordered days away from their teaching duties. The Association contends that any policy which attempts to limit contractually or statutorily granted days of absence is in contravention of the Commissioner's decision in City of Burlington Education Association v. Board of Education of the City of Burlington, 1985 S.L.D. _____ (July 1, 1985), aff'd State Board of Ed., 1985 S.L.D. ____ (Nov. 8, 1985). The Association contends that attendance policies under the Burlington decision may relate only to individual illness days and may not cover the taking of contractually granted personal days, religious observance days, bereavement days, illness in the family days, in-service professional days, or statutorily-granted service-connected disability days. According to the Association, the controverted Policy in its present form has "outraged" hundreds of school district employees who have been subjected to memoranda and conferences, with potential disciplinary overtones, while they have maintained a perfect or near-perfect attendance record in terms of not utilizing any of their accumulated sick leave.

Board Arguments

The Board contends that its adoption of the Staff Attendance Policy is a reasonable exercise of the Board's managerial authority and that the Policy is reasonably calculated to achieve the goal of reducing occasional absenteeism to 3.5 percent or below as is its obligation under N.J.A.C. 6:8-4.3(a)6 iv. The Board contends the Policy is not arbitrary or capricious because it acts merely as a fact-finding vehicle and it is not

automatically applied by way of a discipline in any manner to any employee. Finally, the Board points out that no law nor administrative ruling limits the application of an attendance policy only to personal illness days.

DISCUSSION AND CONCLUSION

Initially it is noted that the Association's argument regarding the outrage of hundreds of school district employees who assertedly have been subjected to memoranda and conferences has no place in this dispute because the Association itself states the issue as a facial attack upon the controverted Policy. That is, the Association contends the Policy is itself an arbitrary exercise of the Board's authority.

A review of the Staff Attendance Policy shows that while there is a mechanical application of the Policy to the extent that a letter is sent by an administrator to an employee who is absent four days, or an employee who is absent seven days has a conference with an administrator, or following nine days absence Step 3 is invoked, and so on, no one of those mechanical applications has a deleterious effect upon the employee. Rather, as noted by the Board the Policy is a vehicle upon which the administrator finds facts surrounding the underlying reasons for the absences. The Policy contains no inherent discipline to be automatically imposed upon any employee for any reason regarding absences. Rather, the Policy is replete with various steps upon which the affected employee may communicate with an administrator the underlying reason for the absence in question.

The Association's argument that a board of education is without authority to adopt an attendance policy which may impact upon the use of personal days, religious observance days, bereavement days, illness in the family days, or professional in-service day as allowed under a negotiated agreement is rejected. The thrust of this controverted Policy as stated in the guidelines is to insure that absences are not abused to the point of being harmful to the education of the Board's students. The personal days allowable under the agreement must be approved in advance by the superintendent. The Policy arguably could be applied if the employee decided to take a personal day without prior approval of the superintendent. Such conduct by the employee could be considered an abuse of the use of a personal day allowable under the agreement. So, too, with religious observance

days, bereavement days, or illness in the family days. Merely because an agreement provides for the exercise of such a benefit by an employee does not entitle the employee to each and every one of those days without conditions precedent being met.

The Burlington City case contains nothing which would prohibit this Board or any other board of education from adopting a policy such as herein in an effort to insure that an abuse of absences does not occur and to encourage steady attendance by all employees. Clearly, the adoption of such a policy is well within the management prerogative of all boards of education. No authority has been presented by the Association which would prohibit this Board of Education from adopting and implementing the controverted Policy.

Accordingly, the petition of appeal must be dismissed for failure of the Association to establish by a preponderance of credible evidence the truth of its allegations. The petition of appeal is **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.

May 25, 1989
DATE

Daniel B McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

May 26, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 30 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner's exceptions to the initial decision reiterate those arguments set forth in the brief submitted to and reviewed by the ALJ. They also aver that the ALJ totally ignored prior Commissioner of Education and State Board decision in not concluding that the Board's Staff Attendance Policy was an arbitrary and unreasonable exercise of its discretionary authority. Further, it contends that the ALJ cited no authority for his decision to ignore his own previous decision in Burlington, supra, a case which petitioner argues is directly on point and is still good case law.

Petitioner also contends that attendance improvement policies reviewed by the Commissioner after Burlington related exclusively to personal illness days. East Brunswick Education Association et al. v. East Brunswick Board of Education, Middlesex County decided by the Commissioner June 24, 1986 and Hoboken Teachers Association v. Hoboken Board of Education, Hudson County, decided by the Commissioner August 14, 1986 (Exceptions, at p. 7)

More specifically, petitioner avers that the disputed policy herein is virtually identical to the one struck down in Burlington, supra, which did not distinguish between school district employees who may, in fact, abuse sick leave benefits or other leave benefits and those who are legitimately ill, injured, or otherwise legitimately absent. It also references the ALJ's conclusions in that matter that:

> ***such a policy could not rationally achieve the salutory goal of consistent and regular employee attendance to their duties and impermissibly limited employees from the proper exercise of legitimately granted allowable sick leave and further limited an employee's exercise of legitimately negotiated contractual benefits set forth in a collective negotiations agreement entered into between the Board of Education and the Organization representing the school district employees. (Id., at p. 16)

Petitioner contends that the ALJ has not made any effort to distinguish Burlington's policy from Neptune's and suggests that that is due to the fact they are indistinguishable. (Id.) Further, it maintains that (1) contrary to the averments of the ALJ, the policy applies to all absences and (2) his statement on page 6 of the initial decision that "[t]he Policy arguably could be applied if the employee decided to take a personal day without prior approval of the superintendent" ignores that if an employee takes a personal day without prior approval, he would not have been granted a day off. (Id., at p. 17)

Petitioner likewise objects to the ALJ's conclusion that nothing in the attendance policy fashioned a disciplinary sanction and that the mechanical applications of the policy had not been proven to have a deleterious effect upon an employee. (Initial Decision, ante) As to this, it points to the decision in Burlington, supra, which ruled it was of no moment that no staff members had been disciplined or that the letters referring to attendance and the fact-finding conferences were not intended to be disciplinary inasmuch as it was obvious that the nature of the policy could lead to disciplinary action. (Exceptions, at p. 18)

Moreover, petitioner avers:

> It is plain as a pikestaff that a comparison of the Burlington and Neptune Township policies, considered along with the positional statement of the State Department of Education issued in May of 1984 that is referenced in the Burlington City decision, mandates the conclusion that the Neptune Township policy which uncontrovertedly has been applied without regard to the underlying reasons for employee absences represents an arbitrary and unreasonable exercise of the Neptune Township Board of Education's discretion. The Board of Education should be required to cease and desist from continuing to apply the policy in its present form and must be ordered to remove any records from school district employees files which include warning letters and/or notifications of violations of the disputed attendance policy. (Id.)

Upon review of the record in this matter including the exceptions, the Commissioner concurs with the ALJ's finding which rejects petitioner's argument that a board of education is without authority to adopt an attendance policy which may impact upon the use of personal days, illness in the family days, bereavement days, in-service days or other days allowed under a negotiated agreement. Absences, even legitimate ones, are not immune from disciplinary action being taken by a board of education seeking to deter the harmful or deleterious effect of excessive absences on the continuity of instruction being provided to its students. Trautwein v. Bound Brook Board of Education, 1980 S.L.D. 1539 (N.J. Appellate Division decision), cert. den. 84 N.J. 469 (1980); Angelucci and Nehemiah v. West Orange Board of Education, 1980 S.L.D. 1066; Edna Booth v. School District of West Orange, Essex County, decided by the Commissioner October 24, 1985, aff'd State Board March 5, 1986

A board of education is not permitted, however, to take disciplinary action against a staff member unless it has taken into consideration the nature of the illness and has not relied on sheer number of days for its action. Kuehn v. Board of Education of Teaneck, 1981 S.L.D. 1290, rev'd State Board 1983 S.L.D. 1581; Meli v. Board of Education of Burlington County Vocational Technical School, Burlington County, decided March 15, 1985, rev'd State Board December 4, 1985, aff'd N.J. Superior Court, Appellate Division March 4, 1987

More specific to the matter herein, board of education attendance policies which rely on sheer number of absences and do not take into consideration the nature of absences will not be upheld by the Commissioner or the courts. Montville Township Education Association et al. v. Montville Township Board of Education, 1984 S.L.D. 550, rev'd State Board 559, rev'd N.J. Superior Court, Appellate Division December 6, 1985; Burlington, supra

The Commissioner has in recent years upheld an attendance policy dealing with sick leave in Hoboken Teachers Association, supra, and a policy addressing excessive absenteeism in East Brunswick Education Association, supra, because neither policy was applied in a mechanical fashion to any and all absences of staff, nor was either policy applied without regard to the underlying reasons for the specific absences.

Upon a thorough examination of the attendance policy in the instant matter, the Commissioner finds and concludes that Steps I-III of the policy lack the above-cited dimensions necessary for sustaining an attendance policy, i.e., that the policy not be applied in a mechanistic fashion based on sheer number of days and that the underlying reasons for the specific absences be considered before a given action is taken with respect to a staff member's absences. For example, a staff member with perfect attendance who contracts pneumonia or has a work injury and is absent for ten days would under Neptune's policy be subject to Steps I-IV of the policy. Further, another staff member with an exemplary attendance record who unfortunately experiences the loss of a close relative which necessitates taking 5 days of approved bereavement leave would receive a letter from his or her administrator (Step I) relative to the absence. If that individual is a member of the Jewish faith and he or she then uses three approved contractual days for purposes of religious observance, the staff member would now be required to attend a conference, with Association representation, if desired, and be the subject of a written summary report prepared and signed by the administrator which is subject to rebuttal (Step II). Should that person then need to take a sick day, written notification about his or her absences would therefore be sent to the superintendent together with a review of his current and past attendance record as well as supportive data (Step III). It is only at Step IV that this mechanistic application of the policy ceases and judgments are made by an administrator about the nature of the absences and the possible consequences.

If the first three steps of the policy allowed the administrator to review the underlying reasons for the absences and accorded the administrator the flexibility to exercise his or her judgment as to the need to invoke the use of a letter, a conference, a written report and referral to the superintendent, the policy would be sustained. Since it is rigid in its application at Steps I-III, however, the policy cannot be sustained in its current form. Although the letter with respect to attendance, the conference, the written report, and referral to the superintendent are not per se disciplinary, they can only be seen, as was true in Burlington, supra, as initial steps in a disciplinary process.

Notwithstanding the above, the Commissioner does not concur with petitioner that the instant matter is virtually identical with the factual circumstances of Burlington. Initially, it is stressed that the board of education in that case had declared that occasional absences, except for professional days, were against board policy and it used a districtwide Department of Education monitoring standard to assess individual violation of that policy which the Department had expressly directed boards of education not to use. Secondly, the policy was even more rigid than in the instant matter. In Burlington a formal warning of violation of board policy and notice of need to improve would result if one were absent as few as two days for religious observance during September-October of a given school year. (Slip Opinion, at pp. 25-26)

Accordingly, the Commissioner rejects the ALJ's recommended decision dismissing the Petition of Appeal for the reasons stated above. He does, however, direct that the Board review and revise the wording of its attendance policy to delete any mechanistic application of measures without regard to underlying reasons for absences. He further directs that any letters or conference reports placed in teaching staff personnel files as an out growth of the mechanistic application of its policy, deemed herein to be inappropriate, be removed.

Additionally, the Commissioner notes that on page 10 of petitioner's exceptions there appears to be exact contract language cited which accords to staff paid days for religious observance which are other than personal days. In this regard, the Commissioner deems it appropriate to bring to the attention of the Board and its legal counsel the findings of the New Jersey Superior Court, Appellate Division which were affirmed by the New Jersey Supreme Court in Hunterdon Central H.S. Bd. of Ed. v. Hunterdon Tchrs. Association, 174 N.J. Super. 468 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981). He further directs that it reconsider such contract language in light of that decision and the recent Public Employment Relations Commission decision in In the Matter of Jersey City Board of Education and Jersey City Education Association, P.E.R.C. No. 89-115, issued May 1, 1989.

COMMISSIONER OF EDUCATION

July 10, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
IMMEDIATE REVIEW REQUESTED
OAL DKT. NO. EDU. 4210-89
AGENCY DKT. NO. 184-6/89

P.G., A MINOR BY HER GUARDIAN AD LITEM, J.G.; M.R.; N.M., BY HER GUARDIAN AD LITEM, J.M.; N.J.; R.B., BY HIS GUARDIAN AD LITEM, R.B.; P.M.; M.K., BY HIS GUARDIAN AD LITEM, M.P.K.; S.J.S.
Petitioners,
v.
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

Michael Hawkins, Esq., for petitioners
Louis J. Greco, Esq., for respondent

Record Closed: June 9, 1989 Decided: June 9, 1989

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, twelfth grade students under the direction and control of the Board of Education of the Greater Egg Harbor Regional High School District (Board), through their parents and/or guardians, seek to enjoin the Board from denying petitioner's attendance and participation at its graduation exercise until a full hearing is afforded petitioner's based upon allegations that petitioners consumed alcoholic beverages on the Senior Class trip.

On June 8, 1989, petitioners served their Petition of Appeal on the Board and Commissioner of Education (Commissioner). On the same day, 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 - et seq. and for an emergent proceeding. The hearing was held on June 9, 1989, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey and the record was closed on that date.

The relevant and material facts are not in dispute and have been stipulated by the parties, as follows:

1. Prior to May 4, 1989, a senior class trip for Oakcrest High School was planned for a period covering May 4, 1989 to May 7, 1989.

2. Student petitioners are members of the senior class and participated in the class trip.

3. Except for N.M., a parent or legal guardian signed a form agreeing to allow the student petitioners to participate in the trip. (Exhibit C.) No form for N.M. was signed by a legal guardian; N.M. was a minor at all relevant times herein (her aunt signed).

4. The trip included an overnight stay at a motel in Williamsburg, Virginia at Busch Gardens Amusement park.

5. The stop at Busch Gardens included recreational activity at a placed called Water Country.

6. Due to the inclement weather, the Water Country facility would not admit the trip participants.

7. No alternative activities were planned.

8. Busch Gardens Amusement is a theme park operated by the makers of budweiser beer.

9. The theme park has the name of budweiser and associated themes throughout the park.

10. Beer is manufactured at the theme park and is sold throughout the park.

11. At some time on the evening of May 6, 1989, a student told a teacher that some students had purchased or consumed some beer.

12. At approximately 4:00 a.m., student petitioners were interrogated by teachers who accompanied them on the trip; the interrogations took place in the hall way near their motel rooms or in the rooms.

13. The students were asked about their participation in the consumption and or purchase of beer.

14. At no time was any attempt made to contact any parent to gain permission to interrogate any student.

15. Student petitioners either admitted to some consumption or were implicated by others in the consumption of the beer.

16. Late evening on May 6, or early morning on May 7, 1989, teachers searched the rooms of students, without permission of students.

17. Information regarding the consumption of beer came from the following: student interrogations; a statement by a student informant. The beer was located.

18. Either Dr. Harmon or Mr. Forman called parents to inform them of the beer incident; calls were received on the morning of May 7, 1989.

19. Trip participants arrived back at school on the evening of May 7, 1989.

20. School administrators, including Mr. Forman, Dr. Harmon and Mr. Platt met together and decided to not allow any student implicated in the beer drinking incident to participate in any extracurricular activities, including graduation.

21. At no time was an opportunity given to the students or their parents to review the report prepared by the teachers, ask questions about the incident, present witnesses or examine witnesses nor were parents or students told why the punishment included graduation exclusion. Nothing has been revealed of the process or substance of that meeting.

22. Denied by the Board.

23. An appeal was allowed to the Board of Education Appeals Committee. The Committee simply asked the students to explain why the punishment should not be enforced. (Exhibit B).

24. An appeal to the full Board was allowed; the Board split into two parts. Again, the spokesperson for the Board simply asked why the punishment should not be enforced. At this point the only issue was graduation since the other activities had passed. Parents indicated that graduation exercises involved parents and family and that students worked for many years to earn the right to participate in graduation.

25. On June 6, 1989, students were told verbally that the Appeal was denied.

26. On June 7, a letter appeal was delivered to the Office of the County Superintendent in Mays Landing. (Exhibit D). (Board has no knowledge).

27. Patrick Macomber was placed on home instruction and not allowed back on school property.

These are the primary stipulated facts pertinent to the instant matter. Petitioners maintain, among other things, that their rights were infringed when they were interrogated at the motel in the Commonwealth of Virginia; that the Board failed to consider the competency of the evidence presented to it which was adverse to petitioners; and, that the Board failed to supply copies of records and reports upon which the Board based its decision to exclude petitioner from the 1989 commencement exercises. The Board denies such avowals and finds no error in its determinations. The factual truth of the alleged offenses, the consumption of alcoholic beverages, was not in doubt but, rather, admitted by the petitioners.

Petitioners contend that the Board's action to deny their attendance and participation in the graduation exercises was based on fatally defective procedures and that the decision represents an unjust, excessive and unreasonable penalty. In support of their position, petitioners rely on *R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 N.J. Super., 337 (App. Div. 1970); *Kopera v. West Orange Bd. of Ed.*, 60 N.J. Super. 299 (App. Div. 1960).

The Board avers that the legal arguments of petitioners deal with pupil suspension and expulsion and is not at issue here. Rather, the only issue for presentation to the Commissioner is whether or not the denial of graduation privileges represents an excessive punishment, given the facts of this matter. The Board asserts that the evidence is clear; i.e., each parent or guardian and each student (except for N.M.) signed a form wherein the student and parent was made aware that: (1) all school rules would be strictly enforced during the Senior Class trip; and (2) any alcohol or drug violations could result in criminal prosecution as well as subject the student to school disciplinary sanctions; and (3) discipline problems on the trip could result in the loss of any or all Senior Activity privileges, including graduation exercises (Exhibit C, Petition of Appeal). The students, including N.M., having been placed on notice, violated their trust when they consumed alcoholic beverages. Therefore, the Board contends, its decision to bar petitioners from the graduation exercises was wholly consonant with its obligation

for the governance of its schools and does not constitute arbitrary, capricious or unreasonable punishment inflicted on petitioners.

DISCUSSION AND CONCLUSIONS

I **CONCLUDE** that the Board's decision to withhold a public award privilege is entirely justified in the interest of an orderly and efficiently operated school system. *Gertner, et als v. Bd. of Ed. of the Borough of Elmwood Park*, 1974 S.L.D. 611. I **CONCLUDE** that the penalty imposed by the Board upon petitioners is not excessively harsh in view of the admitted breach of discipline committed by them. As the Commissioner said in the case of *Wermuth et al v. Bd. of Ed. of Twp. of Livingston*, 1965 S.L.D. 121 at 129:

> "***An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct***"

The facts in this matter demonstrate that the Board exercised its discretionary authority to impose what it considers an appropriate penalty as a deterrent against future abuse of the kind alleged and admitted by petitioners. The Commissioner has consistently held that he will not set aside a discretionary action taken by a local board of education, acting within its statutory authority, unless he finds that the board's exercise of its discretion constituted an arbitrary, capricious, or unreasonable action. *Thomas v. Bd. of Ed. of the Twp. of Morris*, 89 N.J. Super. 327, 328 (App. Div. 1965), aff'd. 46 N.J. 581 (1966).

I **FIND** no evidence of an abuse of discretion in this controverted matter. Therefore, the Board's action to deny petitioner's attendance and participation in the Oakcrest High School graduation exercises to be held on Tuesday, June 13, 1989, is hereby **SUSTAINED** and the Petitioner of Appeal **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.

9 June 1989
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

dho

P.G., a minor by her guardian ad litem, J.G.; M.R.; N.M., by her guardian ad litem, J.M.; N.J.; R.B., by his guardian ad litem, R.B.; P.M.; M.K., by his guardian ad litem, M.P.K.; S.J.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record, the Commissioner is in full agreement with the ALJ's findings and conclusions dismissing the Petition of Appeal. It is noted for the record that the audio tapes of the proceedings indicated that Finding No. 21 was denied in its entirety, not Finding No. 22 as stated on page 4 of the initial decision. According to the tape, Finding No. 22 should read, "Mr. Platt sent a letter informing parents and students of the decision (Exhibit A)."

As to the substantive issues of the matter, the Commissioner finds that the ALJ's analysis and conclusions of law are accurate and appropriate. He, therefore, adopts the recommended decision as the final decision in the matter for the reasons stated therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 18, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5963-88
AGENCY DKT. NO. 218-7/88

DIANE HANSEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE MAYWOOD SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

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

Gregory C. Hart, Esq., for respondent
(Gladstone & Hart, attorneys)

Record Closed: March 28, 1989 Decided: June 1, 1989

BEFORE **OLIVER B. QUINN**, ALJ:

Petitioner, an employee of respondent school board ("Board"), alleges that the Board violated her tenure rights by not reemploying her for the 1988-89 school year while employing a person without tenure as a confidential secretary. Specifically, petitioner claims that, for purposes of acquiring tenure as a secretary under N.J.S.A. 18A:17-2, she should be given credit for the school years 1982-83 through 1986-87 because during those years, in which she was employed in the District as a switchboard operator, she also performed secretarial duties. The Board denies that petitioner acquired tenure as a secretary, because most of her working time from 1982-83 through 1985-86 was spent on

the switchboard, not performing secretarial duties.

PROCEDURAL HISTORY

Petitioner filed a verified petition with the Commissioner of Education on July 7, 1988. The Board filed its answer on August 5, 1988, and the matter was transmitted to the Office of Administrative Law (OAL) on August 9, 1988, 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 27, 1988 and a prehearing order was entered. A hearing was held on February 21, 1989, at the Office of Administrative Law in Newark, New Jersey. The record was held open to allow for the submission of posthearing briefs and response briefs, and the record was closed March 28, 1989.

DISCUSSION OF TESTIMONY AND EVIDENCE

Petitioner, Diane Hansen, testified on her own behalf. She was first hired by the Board in September 1982 as a switchboard operator. Ms. Hansen testified that she held the title of switchboard operator until the 1987-88 school year, when she was given the title of secretary.

Prior to 1986, the district's telephone system was controlled by a PBX switchboard with five lines. All of the district's in-coming and out-going telephone calls were manually handled by the switchboard operator. Hansen testified that three quarters of her time was spent at the switchboard either receiving calls or placing out-going calls. The other one-quarter of her time was spent on other functions such as duplicating materials for teachers, limited typing, sorting and distributing mail, verifying student absences and general clerical and administrative functions.

Hansen testified that the switchboard was located in the front office at the district's Maywood Avenue School. Prior to 1985-86, she shared the office with the principal's secretary, but in 1985-86, the principal's secretary moved to another office and

she was alone in the front office. Her evaluation for that year (Exhibit P-5) evidences satisfaction with her performance and her interaction with parents and staff. Paragraph three of that evaluation makes reference to "typing and follow up jobs" performed by Hansen in addition to her switchboard responsibilities during that year. The evaluation mentioned the following tasks performed at various times by Ms. Hansen: preparing and running off ditto materials, doing small typing assignments, and counting flyers and notices for grades 3-8. These tasks were assigned to Hansen by the Maywood Avenue School's principal, who encouraged her to improve her typing skills (Exhibit P-4).

Hansen then referred to Exhibit P-7, a June 2, 1986 letter to her from the Superintendent and Board Secretary/Business Administrator, which refers to Hansen as a "tenured employee" and indicates that "until negotiations are completed for 1986-87, you will continue to receive the following salary $5,918.12." That is the identical salary established in petitioner's 1985-86 employment contract in the title of switchboard operator (Exhibit P-13).

In school-year 1986-87, the central switchboard was removed. However, petitioner was kept in the title of switchboard operator that year. Her telephone duties were greatly reduced, leaving her only to answer in-coming calls for one school and to place long distance out-going calls. Petitioner testified that she spent only half as much time on the telephones as she had previously. She further stated that the balance of her time was spent on "assorted routine small typing jobs." For school year 1987-88, petitioner's title was changed from switchboard operator to secretary, and her salary was increased from $5,918.12 to $10,000 (Exhibit P-14). She testified that there was no change in her functions or duties between 1986-87, her last year in the switchboard operator title, and 1987-88, her first year in the secretary title. She spent about one-half of her time typing in 1987-88.

Dr. Frances E. Moran testified for respondent. Dr. Moran has been superintendent of the Maywood School District for eight and one-half years. He testified that the district found it difficult to get parts for its old switchboard, so it converted to a new telephone system. He had no complaints about petitioner's performance as switchboard operator.

Dr. Moran testified that in the spring of 1987, he met with petitioner, advised her that the switchboard operator position was to be "RIFFED" (reduced-in-force), and offered her a secretarial position. Dr. Moran stated that the district had two confidential secretaries: the superintendent's secretary and the Board office secretary. He said that the person holding the Board office secretary position is not tenured; the superintendent's secretary is tenured. Dr. Moran testified that the switchboard operator's position was held over for one year after the switchboard was removed because the district wanted to see how the new system would work out. After determining that the system would work, the Board eliminated the switchboard operator title and moved Hansen to a secretarial title.

Moran testified that while in the switchboard operator title, petitioner did some clerical work. He explained that because the school district staff was so small, there was a constant need for people to be interacting and covering for each other. He said that while petitioner did some typing during her years as switchboard operator, the "overwhelming amount" of typing was done by the principal's secretary. Dr. Moran testified that he supported petitioner's title change from switchboard operator to secretary so that she could do more than incidental clerical work as was previously the case, in his view.

After reviewing all of the evidence presented through the documents and testimony, I FIND all of the above as fact.

ISSUES

The issue presented is whether petitioner acquired tenure as a secretary pursuant to N.J.S.A. 18A:17-2.

LEGAL DISCUSSION

The tenure statute for secretaries and clerical employees of a board of education,

N.J.S.A. 18A:17-2b and c, reads in pertinent part as follows:

> b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after
>
> 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or
>
> 2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and
>
> c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary,
>
> shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 chapter 6 of this title.

Since tenure in employment is an extremely valuable right, it does not come into being until the precise conditions laid down in the statute have been met. Zimmerman v. Bd. of Ed. of Newark, 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956 (1963); Ahrensfield v. State Bd. of Ed., 126 N.J.L. 543 (E. & A. 1941).

Once the precise terms of the statute have been met, tenure will accrue whether or not the employer chooses to acknowledge it. Ruth Nearier, et al. v. Bd. of Ed. of the City of Passaic, 1975 S.L.D. 604, 609. It is axiomatic that tenure is acquired by operation

of law regardless of contracts or the intent of the employing authority regarding the accrual of tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). See, Quinlan v. Bd. of Ed. of North Bergen Tp., 73 N.J. Super 40 (App. Div. 1962).

Employment should be viewed in the light of the actual duties performed. A mere change in title or creation of a paper job description, without any substantial change in specific duties, is an evasion that should not be permitted to erode an employee's rights in the continuing accrual of tenure. The duties performed, rather than the title of the position, should be controlling, based on substance rather than form. Beaute v. Bd. of Ed. of North Arlington, OAL DKT. EDU 295-80 (July 28, 1981), adopted, Comm'r of Ed. (Sept. 14, 1981), aff'd, State Bd. of Ed. (Feb. 3, 1982).

Tenured secretarial/clerical employees do not have seniority rights. Boards of education have the authority, absent a showing of bad faith, to terminate positions of tenured secretarial/clerical employees without regard for seniority or length of service and, parenthetically, without regard to the actual position. The only rights afforded to secretaries/clerks who are tenured is that tenured secretaries/clerks must be offered a position before nontenured secretaries/clerks. Sheridan v. Bd. of Ed. of Ridgefield Park, 1976 S.L.D. 995.

In the case at hand, petitioner claims tenure as a secretary pursuant to N.J.S.A. 18A:17-2b2. She submits that the Board's use of the title of "switchboard operator" cannot defeat her claim. Petitioner asserts that whether she is viewed as a secretary whose assignment emphasized phone work until 1986-87 or as part secretary/part switchboard operator, she still achieved and retained tenure rights to a secretarial position, because she always did secretarial work.

The Board contends that petitioner did not acquire tenure as a secretary, having been employed in a secretarial position for only one year. The confidential secretarial position to which petitioner lays claim, argues respondent, carries a much higher salary, a longer term, and different responsibilities. To acquire tenure in this position, the Board continues, she would have needed to hold that position for three consecutive years plus

one more day during the succeeding year. N.J.S.A. 18A:17-2. Respondent relies on the case of Given v. Bd. of Ed. of Windsor Regional School District, 1978 S.L.D. 43, aff'd, State Bd. of Ed., 1978 S.L.D. 46, aff'd, App. Div., 1979 S.L.D. 832 for its position that the need for a "probationary" period of three years is mandated by the statute and grounded in sound public policy.

In Given, the petitioner, a tenured clerical employee under N.J.S.A. 18A:17-2b, was appointed to a secretarial position with respondent board at an increase of salary. She held this position for almost two years when she was reassigned as a clerical worker. The petitioner appealed to the Commissioner of Education for an order declaring that she was a tenured secretary and, therefore, not subject to reassignment as a clerical worker. Though Given dealt with a promotion situation, the rationale behind it applies in the instant situation. The Commissioner in that case stated:

> The Commissioner agrees that there exists a legitimate interest for a local board to have a probationary period for clerical and secretarial employees in its employ who receive a promotion. The Commissioner opines that to hold otherwise would work hardship on both the board and the employee if instant tenure were to accrue to a promotional position made in good faith by the board. A clerk or secretary so promoted would likely be required to demonstrate greater technical skills in order to properly discharge more complex responsibilities and must have a probationary period in which to adequately adjust to the new position. The fact that the Legislature has not established a specific statutory probationary period for clerks and secretaries who have been promoted, such as exists in N.J.S.A. 18A:28-6 for certificated personnel, does not obviate the need for such a probationary period. The Commissioner holds that a tenured clerk or secretary, upon promotion to another position within the school district, must satisfy the precise conditions enunciated in N.J.S.A. 18A:17-2(b) and (c) [sic] to achieve a tenure status in the new position. The Commissioner further holds that tenure rights accrued in a school system in any clerical or secretarial position prior to promotion shall not be negated by such promotion and shall remain as a continuing entitlement to such employee. Given, at 45.

The Given rule was also applied in Ehid v. Bd. of Ed. of Tp. of Piscataway, OAL DKT. EDU 9262-82 (June 28, 1983), modified on different grounds, Comm'r. of Ed. (Aug. 15, 1983), in which a "Level 3" clerical employee was promoted to a "Level 4" secretarial position. Her claim of tenure was rejected based on the probationary period rationale. The ALJ found, and the Commissioner affirmed, that although the petitioner had acquired tenure as a clerical employee, she had not achieved tenure in her secretarial position. Therefore, the Board had the right to transfer her. The ALJ concluded:

> . . . since Ms. Ehid acquired tenure in the district as a clerical employee, not in any specific position, she can be transferred by the board within that category of employment, so long as said transfer is not a demotion. Since petitioner did not acquire tenure in the specific position of high school Head Secretary or in the general category of secretary, her subsequent transfer and appointment to the position of bookkeeper was not a violation of her tenure rights. Ehid, at 18. See, Mackey v. Ridgefield Bd. of Ed., OAL DKT. EDU 7446-82 (Jan. 18, 1983), adopted, Comm'r of Ed. (March 2, 1983).

Petitioner herein seeks a confidential secretary position currently filled by a nontenured person. She bases her claim to the position on her having acquired tenure as a secretary. She could only acquire tenure if, for that purpose, she was credited for time in which she served as a switchboard operator, September 1982 through June 1986. For the reasons stated below, I **CONCLUDE** that petitioner did not acquire tenure as a secretary in the Maywood School District. Rather, she acquired tenure as a switchboard operator. By her own testimony, three quarters of her work time for the school years 1982-83 through 1985-86 was spent on the switchboard. The nature of the telephone operation in the Maywood District neccessitated that the switchboard operator be involved virtually full-time. The switchboard operator placed all out-going calls and received all in-coming calls for the district. Again, by her own testimony, three quarters of petitioner's time was spent at the switchboard and only one quarter on other functions. These other functions included incidental clerical and secretarial work.

Petitioner should be given credit towards acquiring tenure as a secretary for her work in the last year for which she held the switchboard operator title, 1986-87. During that year, the old switchboard was replaced with a new telephone system and petitioner spent only half of her time on telephone duties while the other half was spent on clerical and secretarial duties. The superintendent, Dr. Moran, testified that the district maintained the switchboard operator title that year as a hedge against the possibility that the new system would not work out and they would need that title in the future. It was in 1987-88, after a one year test period with the new telephone system, that it was determined that the switchboard operator title was no longer needed and petitioner was moved to a secretary title. Thus, I **CONCLUDE** that she is entitled to credit for 1987-88 and 1986-87 towards acquiring tenure as a secretary. As previously stated, the duties performed rather than the title of the position should be controlling. See, Beaute v. Bd. of Ed. of North Arlington. However, I cannot concur with petitioner's claim that she should be given credit for the school years 1982-83 through 1985-86 when, by her own testimony, no more than one quarter of her time during those years was spent on duties other than operating the switchboard which at that time controlled telecommunications for the district.

ORDER

It is **ORDERED** that the petition is hereby **DISMISSED**, and that the Board's action in not reemploying petitioner is **AFFIRMED**.

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** this Initial Decision with **Saul Cooperman** for consideration.

June 1, 1989
DATE

OLIVER B. QUINN, ALJ

Receipt Acknowledged:

June 6, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 6 [redacted]
DATE

OFFICE OF ADMINISTRATIVE LAW

vcb/am/e

DIANE HANSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAYWOOD SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board's reply exceptions were timely.

Petitioner avers that the ALJ's decision appears to be based on an evaluation of how much time she spent as a switchboard operator as compared to how much time she spent doing secretarial duties. Petitioner submits that

> ***the quantification of duties is not a proper basis for delineating secretarial tenure. It is a fact that answering phones and transferring calls is commonly a secretarial function. In fact it was an express part of the secretarial job description in situations where petitioner was absent or otherwise engaged. (J-3 at 8(e)).
> (Exceptions, at p. 2)

Moreover, petitioner avers that in 1986-87 during that time the ALJ adjudged that petitioner was a secretary, she spent three-eights of her time occupied with phone duties, and cites the transcript at page 94 in support of this contention.

Petitioner claims that the ALJ's decision finds "***that a person who answers the phone more frequently than another is not a secretary even though both perform a variety of the same type of secretarial duties." (Id.) She also contends that "[t]he Initial Decision would ultimately require that each secretarial job in a school district be a separate tenure category.*** Such a result makes tenure a sham." (Id.)

Petitioner would distinguish both Given, supra, and Ehid, supra. She claims that both of these cases hinged on service changing from a clerk's position to that of a secretary. Petitioner avers she has always functioned in a secretarial capacity and cites P-2, 3, and 4, as well as the transcript at pages 34-35 in support of this contention. Petitioner thus claims that

> ***whether she be viewed as a secretary whose assignment emphasized phone work until the last 2-3 years, or as part secretary, part operator (up until those last few years), she still achieved and retained tenure rights to a secretarial position. (Id., at p. 3)

Moreover, petitioner cites Kerris v. Bd. of Ed. of Glen Ridge, Essex County, decided by the Commissioner March 31, 1983, as a precedent in this matter. Petitioner claims Kerris establishes that a tenured ten-month secretary can claim tenure to a switchboard operator's position so long as she or he can establish "the ability to handle the position." (Id.) She claims that she qualified to do the work of a secretary as established by her evaluations and the documentary record of commendations, P-2 through P-6, P-8 through P-10 and P-15 and P-16. "Most importantly, the Board itself finally bestowed the official title upon her in 1987-88, thereby admitting her qualifications. Even the letter of termination expressly disavowed any dissatisfaction with her performance. (P-1)" (Id., at p. 4)

Petitioner submits she should have been employed instead of a nontenured person placed in the position of secretary to the school business administrator. She "seeks reinstatement as well as back salary calculated based upon the same percentage increase given to all similar employees for 1988-89 and thereafter as applied to her 1987-88 salary of $10,000 (P-14)." (Id)

Upon a careful and independent review of the record, the Commissioner adopts the initial decision with the following clarification.

Initially, the Commissioner notes his accord with the ALJ's recitation of the facts as embodied in the initial decision, ante. However, he questions the ALJ's summation of the Board's argument concerning the nature of the confidential secretarial position, as described in the initial decision. The Commissioner's review of the instant matter does not disclose that the salary of the confidential secretarial position "carries a much higher salary." (Id.) It is plain from the record that the superintendent did not know, at the time he testified, exactly what salary the confidential secretarial position in question carried. (Tr. 117-118). It is known that that position's salary is individually negotiated and that "is is below the level of salaries of Mrs. Lichtenberger and Mrs. Dubrowski***," (Tr. 118), two of the other secretaries in the district. Moreover, while the record is clear that the confidential secretarial position in question is a ten and one-half month position, as compared to Mrs. Hansen's former position as secretary to the principal, which was a ten-month plus nine day position, the difference in the number of days actually served is irrelevant. The Commissioner does not dispute, based on his review of J-6 and J-7, the job descriptions in question and that the duties of a confidential secretary to the school business administrator are different from those of a secretary to the principal, however. Herein lies the crux of the instant matter.

The Commissioner concurs with the ALJ's recitation of the holdings of Given, supra, as relevant to the instant case. The Commissioner reaffirms the proposition extant in those cases that where a secretarial or clerical employee is promoted, the Board has a legitimate interest in requiring a probationary period in the new position, a period which must conform precisely to the requirements set forth at N.J.S.A. 18A:17-2(b) and (c).

He finds this result is consonant with the holding in Kerris, supra. Therein the Commissioner held that the petitioner in that case, a tenured secretary, should have been given an opportunity to qualify for either of two positions available, one another secretarial position, one a switchboard operator's position. In that case, the distinguishing feature was that the positions Ms. Kerris sought to claim by virtue of her tenured secretarial status were either lateral or lesser positions. Thus, the probationary period required in promotional situations did not apply. The instant matter, thus, can be reduced to an inquiry as to whether petitioner achieved the status of tenure in her position either as a switchboard operator/clerk or as a secretary and, if so, whether a transfer to the position of confidential board office secretary would constitute a promotion.

As to the former inquiry, the Commissioner finds and determines that N.J.S.A. 18A:17-2 creates no separate tenure categories between secretaries and clerks. Moreover, nowhere is there mention of switchboard operators in such legislation. Accordingly, the Commissioner finds that by virtue of her having served in the district in some combination of capacities covered by N.J.S.A. 18A:7-2 since 1982, petitioner is a tenured employee. In so finding, the Commissioner rejects the ALJ's determination as found on page 8 of the initial decision that "***petitioner did not acquire tenure as a secretary in the Maywood School District. Rather, she acquired tenure as a switchboard operator." To accept the ALJ's logic would, as petitioner suggests in her exceptions,

> ***ultimately require that each secretarial job in a school district be a separate tenure category. This result follows because, of necessity, a Superintendent's secretary has different work than a principal's secretary or a guidance secretary.*** (Exceptions, at p. 2)

The Commissioner thus determines that the intent of N.J.S.A. 18A:17-2 is to confer the status of tenure on secretaries and clerks alike, as well as any such employee whose duties include telephone responsibilities, provided that the requisite period of time has been served in such role according to the dictates established by the statute.

However, as to the latter inquiry, the Commissioner finds and determines that because of its confidential nature, the district position known as secretary confidential to the Board business administrator is a promotion from the position in the district known

as secretary to the principal. A review of the job descriptions, J-6 and J-7, make it plain that the position of confidential secretary to the school business administrator is a hierarchically higher position which bears with it district-wide responsibilities. Therefore, it is promotional, and requires a probationary period as specified by N.J.S.A. 18A:17-2. Because of its confidential nature, this position is comparable to the position of secretary to the superintendent and this clearly represents a higher level in the hierarchical order of positions in the district.

In so finding, the Commissioner notes that while having not served the probationary period requisite for claiming the position as confidential secretary to the Board business administrator, petitioner may lay claim to any equal in rank or lesser secretarial/clerical position, which may have existed in the district at the time of her termination, by virtue of her tenure under N.J.S.A. 18A:17-2.

With the above clarification, the Commissioner adopts as him own the findings and conclusions of the Office of Administrative Law, and, thus, dismisses the instant Petition of Appeal, with prejudice.

COMMISSIONER OF EDUCATION

July 19, 1989

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7213-88
AGENCY DKT. NO. 311-9/88

JOANN McGRATH,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH,
Respondent.

Paul L. Kleinbaum, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, P.C.)

Franz J. Skok, Esq., for respondent
(Johnstone, Skok, Loughlin & Lane, P.C.)

Record Closed: May 26, 1989 Decided: June 7, 1989

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

Petitioner, Joann McGrath, a tenured teaching staff member in the employ of the respondent Kenilworth Board of Education, alleged a violation of her tenure rights when the Board reduced her employment for the 1988-89 school year from full time to 4/5ths with a commensurate salary reduction, and also seeks to have the

Board's action deemed a nullity due to its violation of the Open Public Meetings Act (OPMA).

The Board denies the allegations and asserts its action was a proper exercise of its discretionary authority and consistent with law.

The matter was transmitted to the Office of Administrative Law on September 30, 1988 as a contested case pursuant to *N.J.S.A* 52:14F-1 *et seq.* A telephone prehearing conference was held on November 14, 1988 and the matter proceeded to plenary hearing on April 17 and 18, 1989. The record was closed on May 26, 1989 with the expiration of the period for filing post hearing submissions.

I

The Kenilworth Board of Education employed two full time music education teachers prior to the 1988-89 school year. Both are tenured. Petitioner McGrath was assigned to teach general and vocal music. Howard Toplansky, the other teacher, was assigned to teach all instrumental music and band. The parties stipulated that Toplansky has the greatest seniority.

The Board acted at its public meeting on August 29, 1988 to reduce its instrumental music position to 4/5ths, and reduce McGrath's employment to 4/5ths. This action resulted in a 1988-89 assignment of McGrath to four days of general and vocal music, and an assignment of Toplansky to four days of instrumental music and band and one day of general music and band.

The above factual recitation is undisputed and is adopted herein as **FINDINGS OF FACT.**

II

McGrath testified as to her awareness of consideration being given to the reduction of the instrumental music program by 1/5th and the resultant reduction of her employment to 4/5ths. She attended the June 13, July 11 and July 25 Board meetings where the issue was under consideration, and participated in the July 11 discussion. She was also advised that such a reduction was being recommended by

the Finance Committee in a letter from the Superintendent under date of June 15. *See R*-1. A Petition of Appeal was filed on her behalf under date of July 7, but was withdrawn as premature as the Board had not as yet officially acted on the Committee's recommendation. She also testified as to her awareness of the official posting locations of public meeting notices, but did not see or search for a notice of the August 29, meeting. The fact that she was not personally served with the meeting notice is undisputed.

Howard Toplansky, the other music education teacher, testified that he attended all Board meetings from September 1987 through July 1988 and was aware of many Board discussions concerning the music education program, and knew as early as April 1988 that the instrumental program would probably be reduced and was advised in a letter under date of June 15 that his 1988-89 schedule included one day of general music. *See R*.7.

McGrath testified that she knew of Toplansky's 1988-89 schedule in June, 1988.

Principal Rica testified that the Board expressed concern of the instrumental program in September, 1987 when it requested attendance data; the Board discussed the program at its January, 1988 meeting and directed the Superintendent to prepare and conduct a survey for further deliberations, the results of which were presented in May or June, 1988.

Michael Londino, a Board member (1986-1989) testified that he was a member of the Education Committee (1986-89 and chairman 1987-89) and a member of the Finance Committee in 1987-89. The Board became concerned about the quality of the instrumental and band program because of the dearth of pupil participation and initiated a study in the Fall of 1987.

Londino stated the Education Committee collected and studied data and policy changes were made in March 1988 to improve pupil participation. A second survey was made to determine anticipated instrumental participation in 1988-89, which resulted in a determination that the instrumental position should be reduced to 4/5ths.

Londino further testified that the Finance Committee also discussed the problem and the full Board acted on the joint recommendation of the Education and Finance committees to reduce the instrumental position to 4/5ths, and also to reduce McGrath's employment to 4/5ths as Toplansky had greater seniority, notwithstanding that the Superintendent recommended retention of the full time instrumental position, which was rejected by the Board because of vague rationale.

III

The parties stipulated that the Board secretary complied with all notice requirements under the OPMA, but that McGrath was not personally noticed of the August 29 meeting at which her employment status may be discussed and/or acted on.

Posthearing submissions were filed only on the OPMA issue, which are incorporated herein by reference.

Petitioner argues that the OPMA requires that personnel matters, such as a decision to reduce a tenured teacher's employment, be discussed in private session, and may only be discussed in public session if the affected employee consents. In this matter, she continues, the Board deprived her of the opportunity to consent to a public discussion of the terms of her employment, and its August 29 action therefore must be voided. Stated in other terms, McGrath argues that she "was deprived of the statutory right to have the matter considered in private session rather than in public as occurred." She cites *Rice v. Union County Regional High School Board of Education*, 155 *N.J. Super.* 64 (App. Div. 1977) in support of her argument.

The Board also cites Rice in support of its argument that it held that where a public body relies on the personnel exception in *N.J.S.A.* 10:4-12(b)(8) to go into closed session, the employee who could be adversely affected must be given adequate advance notice of the Board's intent to provide said employee the opportunity to have the discussion in public. There is no personal notice requirement of either the OPMA or *Rice*, it argues, that a public employee has the right to force a private discussion contrary to the wishes of the public body to discuss and/or act in public.

IV

A thorough review of all testimonial and documentary evidence results in a **FINDING** that petitioner has not met her burden of proof by a preponderance of credible evidence that her tenure rights have been violated. I **FIND** the Board has exercised its discretionary authority to reduce its force for valid educational and economics reasons, consistent with law and without abuse.

V.

The Open Public Meetings Act (*N.J.S.A.* 10:4-6 *et seq.*, hereinafter, "OPMA") evidences the strong tradition favoring public involvement in almost every aspect of government. *Polillo v. Deane,* 74 *N.J.* 562, 569 (1977). In enacting the OPMA, the Legislature stated that it:

> finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

N.J.S.A. 10:4-7.

As defined by the OPMA:

> '[a]dequate' notice means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers . . . and (3) filed with the clerk of the municipality . . . Where annual notice or revisions thereof in compliance with section 13 [*N.J.S.A.* 10:4-18] of this act

> sets forth the location of any meeting, no further notice shall be required for such meeting. [emphasis added].

N.J.S.A. 10:4-8D.

The legislative history of the OPMA states that the act "requires that the public and the press have advance notice of and the opportunity to attend most meetings, including executive sessions, of public bodies, except where the public interest or individual rights would be jeopardized." *Introductory Statement, Assembly,* No. 1030 - *L.* 1975, c. 231.

One of the nine exceptions to the OPMA provides that a public body may exclude the public only from that portion of a meeting at which the public body discusses employment matters concerning any of its public employees, "unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting." *N.J.S.A.* 10:4-12b(8).

There is no language in the OPMA which requires a public body to first notify the affected individual of its intention to act. *Cole v. Woodcliff Lake Bd. of Ed.*, 155 *N.J. Super.* 398, 405 (Law Div. 1978). The *Cole* court further stated that there is no provision in the act which mandates that an affected person be individually notified. Id. at 407.

In *Crifasi v. Governing Body of Oakland*, 156 *N.J. Super.* 182 (App. Div. 1978), the Superior Court of New Jersey, Appellate Division, held that where the annual notice lists a scheduled meeting, no further notice shall be required for such meeting. *Id.* at 186; *N.J.S.A.* 10:4-8d. *Accord, La Fronz v. Weehawken Bd. of Ed.*, 164 *N.J. Super.* 5, 7 (App. Div. 1978), certif. den. 79 *N.J.* 491 (1979). Where the public body has given adequate notice of its regular meetings, as provided by statute, the objectives of the OPMA are achieved, and there is no violation of the act. *Id.* at 187.

Moreover, further notice of a regularly scheduled meeting or of action to be taken at that meeting is not required to be given to anyone who might be affected by the board's action. *Schwartz v. Bd. of Ed. of Ridgefield*, 1980 *S.L.D.* 332, 333, aff'd A-740-80T1 (App. Div. Nov. 2, 1981). In citing *LaFronz, Crifasi, Cole* and *N.J.S.A.* 10:4-8d, the State Board of education stated that "nothing in the OPMA requires an

individual notice to any particular individual who may be affected by a contemplated board action." *Id.* at 333.

On the other hand, where a board of education discusses personnel matters in a closed session pursuant to *N.J.S.A.* 10:4-12b(8), reasonable notice may have to be given to affected individuals. *Rice v. Union Cty. Reg. High School Bd. of Ed.,* 155 *N.J. Super.* 64, 72-74 (App. Div. 1977), certif. den. 76 *N.J.* 238 (1978); *Dudek v. Willingboro Bd. of Ed.* (N.J. Law Div., Nov. 13, 1979, L-56650-78) (unreported), at 6, aff'd (N.J. App. Div., Dec. 11, 1980, A-1596-79) (unreported). The purpose of requiring reasonable advance notice when the personnel exception to the OPMA is involved is to enable an affected person to (1) make a decision on whether to request a public discussion and (2) prepare and present an appropriate request in writing. *Rice* at 73; *Dudek* at 6. However, courts have held that where the personnel exception under *N.J.S.A.* 10;4-12b(8) applies, actual notice to an affected employee is not required, and adequate notice under the OPMA can be established based on all the circumstances in the case. *Oliveri v. Carlstadt - E. Rutherford Bd. of Ed.*, 160 *N.J. Super.* 131, 135-136 (App. Div. 1978); *Jamison v. Morris Sch. Dist. Bd. of Ed.*, 198 *N.J. Super.* 411, 416 (App. Div. 1985).

Therefore, a board of education is not required to give personal notice to an affected individual of the board's proposed action at a scheduled public meeting. If a board intends to discuss personnel matters at a closed session, advance reasonable notice may have to be given to the affected employee. Nevertheless, actual notice is not required; adequate notice can be found based on all of the circumstances in cases involving the personnel exception under the OPMA.

I **FIND** that the Board had no intention to exercise the OPMA exception to go into private session. It merely scheduled the August 29 meeting as a public meeting at which it would and did in fact act. I **FURTHER FIND** that a board of education is not required to give personal notice to an affected employee of its proposed action at a scheduled public meeting.

I **CONCLUDE** that the Petition of Appeal shall be and is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

7 June 1989
Date

WARD R. YOUNG, ALJ

Receipt Acknowledged:

June 9, 1989
Date

DEPARTMENT OF EDUCATION

Mailed to Parties.

JUN 12 [redacted]
Date

OFFICE OF ADMINISTRATIVE LAW

al

JOANN MC GRATH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner relies on the post-hearing brief submitted to and reviewed by the ALJ with respect to petitioner's allegation that the Board violated the Open Public Meetings Act (OPMA) when it voted at a public meeting on August 29, 1988 to reduce her to a 4/5ths music position as support for her contention that the ALJ erred in concluding the Board did not violate the OPMA.

Petitioner also takes exception to the ALJ's finding that the Board acted to reduce its force for valid educational and economic reasons consistent with law and without abuse. (Initial Decision, ante) She avers that the testimony and evidence at hearing was largely undisputed in connection with the numbers of students who participated in the instrumental music program and the reasons for the problems with student participation. She also contends that the evidence and testimony revealed that the students participating in the instrumental music program in the current school year far exceeded the number so participating in the past. Petitioner likewise avers that the problems inherent in the instrumental program in the past have been eliminated primarily through the efforts of the instrumental music teacher who testified, inter alia, that since administrative action was taken to mandate student release from class for instrumental music, the number of students participating has dramatically increased. (Petitioner's Exceptions, at p. 2)

Petitioner further maintains that the Board made its decision to reduce the instrumental music program based upon a flawed survey, e.g., it did not take into account the fact that students might continue to participate if they changed instruments. She also points out that the survey projected only 54 students would participate in the instrumental music program for the 1988-89 school year, while current student participation is 90 students.

Upon review of the record in this matter, the Commissioner agrees with the findings and conclusion of the ALJ both as to the allegation of violation of the OPMA and the substantive issue of whether the Board's action in reducing petitioner to a 4/5ths position was arbitrary and unreasonable.

The ALJ's analysis of the OPMA issue is accurate. The Board did not take action in closed session to reduce petitioner's position which would have required reasonable notice. Rice v. Union Co. High School Teachers Association, 155 N.J. Super. 64 (App. Div. 1977), cert. den. 76 N.J. 238 (1978)) As correctly pointed out by the ALJ, the reasonable advance notice required by Rice is to afford the affected staff member the opportunity to make a decision on whether to request a public discussion and to submit such request in writing as required by N.J.S.A. 10:4-12b(8).

In the instant matter the Board's action was taken in public session and it is stipulated that all notice requirements under OPMA were complied with by the Board. (Initial Decision, ante) As correctly determined by the ALJ, a board of education is not required to give personal notice to an affected employee of its proposed action at a scheduled public meeting. (Cole, supra)

Further, the Commissioner agrees with the ALJ that petitioner has not borne her burden of proof that her tenure rights were violated when the Board acted to reduce her position by 1/5th. (Initial Decision, ante) The record establishes by a preponderance of the credible evidence that at the time the Board reduced the position its action was based on valid educational and economic reasons. That more students opted to participate in the instrumental music program than the survey revealed is not proof that the Board's action was arbitrary and unreasonable. The Board was clearly concerned about the instrumental music program and the record demonstrates that a variety of initiatives were recommended to improve that participation during the 1988-89 school year which have apparently had beneficial effects on student participation. (Exhibit P-5) None of this, however, renders the Board's action prior to commencement of that school year arbitrary and unreasonable.

Accordingly, the recommended decision of the Administrative Law Judge is adopted as the Commissioner's final decision in this matter. Therefore, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 21, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6263-88
AGENCY DKT. NO. 228-7/88

KATHI L. SAVARESE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,
Respondent.

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

Nathanya G. Simon, Esq., for respondent
(Schwartz, Pisano, Simon, Edelstein, and Ben-Asher, attorneys)

Record Closed: 3/31, 1989 Decided: 6/9, 1989

BEFORE **OLIVER B. QUINN, ALJ:**

STATEMENT OF CASE

Petitioner alleges that her tenure and seniority rights give her an entitlement to teach the district's family living course. Petitioner holds a teacher of Home Economics Certificate issued on December 19, 1985, and has previously taught the family life course.

The person retained by the Board to teach the family living course holds a Secondary School Teacher of Social Studies certificate issued April 1970 and an Elementary certificate issued July 6, 1988, and has taught the family living course since 1976. Home Economics and Elementary certificates are authorized to teach family living courses, while Social Studies certificates are not. Petitioner argues that because the individual retained did not obtain the necessary certification to teach family living until after she lost her job due to a reduction of force ("RIF"), the Board's retention of him while terminating her employment violates her seniority rights. The Board defends its action by arguing that tenure and seniority rights do not apply to multidisciplinary family life courses, and that the retained person was properly certified on the effective date of the RIF.

PROCEDURAL HISTORY

Petitioner filed a verified petition with the Commissioner of Education on July 15, 1988. The Board filed its answer on August 5, 1988. On August 23, 1988, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on October 12, 1988, and a prehearing order was entered. The prehearing order set forth the following issues to be resolved:

1. Did the Board's action violate petitioner's tenure rights under N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10 et seq?

2. Did the Board's action violate petitioner's seniority rights under N.J.S.A. 18A:28-10 and N.J.A.C. 6:3-1.10 et seq?

3. Is mitigation of damages required?

A hearing was held on February 6, 1989, at the Office of Administrative Law in Newark, New Jersey. At the hearing, the parties agreed that the mitigation of damages issue was moot because petitioner was employed in another school district. The record was held open until March 25, 1989, for the submission of posthearing briefs. Due to illness and scheduled hearings, an Order of Extension was issued regarding the time limit within which this Initial Decision is filed.

FACTS

I FIND the following facts which have been stipulated by the parties:

1. Petitioner holds a Teacher of Home Economics Certificate issued in December 1975.

2. Joel Melitski holds a Secondary School Teacher of Social Studies Certificate issued in April 1970, and an Elementary Certificate issued July 6, 1988.

3. Both the Petitioner and Joel Melitski serve as teachers in the Bernardsville School System per the job description for teacher (Exhibit J-4). Both received and hold tenure as teachers in the Bernardsville School System.

4. The secondary schools of Bernardsville are organized into eight (8) departments with department chairpeople for each one as follows: Business; English; Foreign Languages; Mathematics/Computers; Science; Physical Education and Health; Related Arts; Social Studies.

5. The following subject matters are included under the Related Arts Department: Woodwork; Art; Technology Education; Drafting; Electronics; Home Economics; family living; Photography; Design; C.I.E.

6. Joel Melitski taught family living courses according to the schedule attached hereto for the 1976-77 school year through the 1988-89 school year (Exhibit J-6).

7. Kathi Savarese taught family living courses according to the schedule attached hereto for the 1976-77 school year through 1986-87 school year (Exhibit J-6).

8. During the 1981-82 and 1982-83 school years, the Bernardsville School System conducted a two-year project to develop a curriculum for family life education. A 17-member committee chaired by Joel Melitski was appointed by the Board to meet the State mandate in the area of family life education for all students from Kindergarten through Grade 12. The first time formal instruction was presented was during the 1983-84 school year.

9. Petitioner Savarese was on an approved maternity leave of absence for the 1986-87 and 1987-88 school years, with the leave concluding at the end of the 1987-88 school year.

10. During the 1986-87 school year, during the monitoring process, a question arose concerning the teaching of family life by Joel Melitski under his Social Studies Certificate. During the 1986-87 school year, the School District attempted to obtain certification for Mr. Melitski to continue teaching the family life courses. The State Department of Education denied such authorization. Joel Melitski applied for and was granted a sabbatical leave of absence by the Bernardsville Board of Education for the 1987-88 school year in order to further his education, fulfilling all of the academic requirements in order to obtain a certification (elementary) to teach the family life education courses.

11. At the Board meeting of April 25, 1988, the Board of Education voted not to issue a Contract of Employment to Petitioner Savarese for the 1988-89 school year because of a decline in enrollment and reduction in force.

12. Subsequent to receipt of notice of the Board action of April 25, 1988, Petitioner inquired as to her seniority rights to the family living courses assigned to Joel Melitski. A response was issued by the school district dated May 27, 1988 (Exhibit J-32).

13. Petitioner's salary for the 1985-86 school year was based on Level B, Step II, at the contractual rate of $25,641.00.

ARGUMENTS OF THE PARTIES

Petitioner's arguments:

Petitioner's counsel chose to rely on his brief and presented no witnesses at the hearing. In the brief, petitioner argues that Joel Melitski acquired no tenure or seniority rights as a teacher of family living because for all the years he taught the family living course prior to petitioner's RIF, he did not have one of the authorized certifications to teach that course. Petitioner cites Capodilupo v. W. Orange Tp. Bd. of Ed. 218 N.J. Super. 510 (App. Div. 1987) in support of her argument that a Board must measure tenure and seniority rights as of the date of the decision to "RIF" and cannot wait for the "RIF" to take effect. Here, the Board voted not to renew petitioner's employment for 1988-89 on April 25, 1988. Joel Melitski, the person retained to teach the family life course, was not issued an appropriate certificate until July 6, 1988. Petitioner argues that because he did not have an appropriate certificate to teach the family living course on the date the Board voted to "RIF" her, and she did have an appropriate certificate, Melitski's retention violated her tenure and seniority rights. Petitioner cited several other cases including Ledwitz v. Board of Education of Manalapan-Englishtown Regional School District, Monmouth County 1987 S.L.D. (Sept. 16, 1987) Aff'd, State Bd. of Ed. (Jan. 26, 1988); Carol Gundlah v. Bd. of Ed. Borough of Emerson, Commissioner's Decision (July 2, 1984), Blitz and Marshall v. Board of Education of Bridgeton, 1980 S.L.D. 825, aff'd, State Bd. of Ed., 1981 S.L.D. 1394. These cases all held that one cannot acquire tenure prior to acquiring the appropriate certification for the position at issue.

Petitioner's second argument is that because her tenure extended to family

living courses and the retained person was not tenured in family living, her tenure status entitled her to the position for which the other person was retained. Petitioner again relies on Capodilupo which held that tenure extends to all courses within one's certification. Petitioner argues that because she has a home economics certification, and home economics is one of the authorized certifications for teaching family living, her tenure as a home economics teacher makes her tenured as a family living teacher. Petitioner further argues that decisions denying tenure and seniority in the context of family living courses, such as Hart v. Board of Education, Borough of Ridgefield, Bergen County, State Bd. of Ed. (December 4, 1985), aff'd (N.J. App. Div., Nov. 7, 1986, A-82176-85T6) (unreported), cannot hold over published decisions such as Capodilupo or Bednar v. Westwood BOE, 221 N.J. SUPER. 239 (App. Div. 1987).

Petitioner's third argument is that she is entitled to prevail because she acquired seniority rights as a teacher of family living. She argues that because she taught family living with the proper certification, she is entitled to recognition of seniority in family living. Conversely, petitioner argues that while Joel Melitski taught family living for many years, he did so without a proper certification and is therefore not entitled to recognition of seniority in family living. Petitioner summarizes her argument as follows:

> In short (a) given the policies behind seniority as enunciated in Lichtman [infra, p.10], (b) the plain language of the regulation, (c) the previous decision construing the scope of seniority within the teacher's endorsement and (d) the previous cases considering seniority claims in cases where teachers with several endorsements, or no endorsement at all, are authorized to teach a subject, there is no valid basis to deny seniority acquisition in the field of family living, and therefore the previous agency decisions on this point should be abandoned. In this connection, Savarese points out that although this may require some change in the law, such change is in order, since the previous family living cases did not take into account the Supreme Court's decision in Lichtman or the recent Appellate Division decisions in Bednar and Capodilupo, which make clear the statutory basis for tenure rights, and implicitly, seniority.
>
> Petitioner's brief at p. 34.

Respondent's Arguments:

Respondent presented one witness at the hearing, Dr. William Librera, the Superintendent of the Bernardsville School District. Dr. Librera testified that petitioner was "RIFFED" because of declining enrollment at the district's high school. He said that Joel Melitski, a Social Studies teacher, was primarily responsible for the development of the district's family life course and taught it from its inception. Dr. Librera testified that the course is presently in the Related Arts Department only because he wanted the course to be supervised by the person who heads that department. He stated that petitioner previously taught the family living course and he did not question petitioner's qualifications to teach the course. However, he concluded that Mr. Melitski was more deeply involved in the development and growth of the course and, having been advised that seniority did not obtain in the family life course, he felt that the district would best be served by having Mr. Melitski teach the course. Dr. Librera sought an exemption that would allow Mr. Melitski to teach the family life course without obtaining one of the authorized certifications, but the request was rejected by the Department of Education. Melitski was then given a sabbatical for 1987-88, during which he obtained an elementary certification which authorized him to teach the family living course.

Dr. Librera testified that the district had two home economics teachers and that enrollment in home economics was not sufficient to warrant two full-time people. It was on that basis that petitioner was "RIFFED," because she had less seniority than the other home economics teacher.

The Board's first legal argument is that because of its interdisciplinary nature and structure, tenure and seniority do not apply to family living courses. It further argues that petitioner's reliance on Capodilupo and Bednar is misplaced because those cases

both address situations involving tenured and non-tenured individuals vying for a position; in the instant matter, both individuals are tenured within the school system. Respondent further argues that the Legislature and State Board of Education clearly established, in relevant statutes and regulations, an intent to allow family life programs to develop as interdisciplinary courses and that:

> . . .the decision of which teacher teaches in the family life program must remain within the discretion of the local board of education subject to certificate eligibility list as contained in N.J.A.C. 6:29-7.1(e). However, since family life clearly is not a separate category under seniority regulations, no teacher having eligibility to teach can claim entitlement to teach. Respondent's brief at p. 13.

LEGAL DISCUSSION

Family Life Education Programs are intended to develop an understanding of "the physical, mental, emotional, social, economic and psychological aspects of interpersonal relationships; the physiological, psychological and cultural foundations of human development, sexuality and reproduction at various stages of growth; the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now and aid in establishing strong family life for themselves in the future thereby contributing to the enrichment of the community," N.J.A.C. 6:29-7.1(a). The regulation authorized teaching staff members holding one of the following certificates to teach in the family life education programs: biology; comprehensive science; elementary; health education; health and physical education; home economics; nursery; school nurse; teacher of psychology; and special education. N.J.A.C. 6:29-7.1(e).

In the instant matter, petitioner held a home economics certification and argued that that certification, and the tenure and seniority she had acquired as a home economics teacher, extended to the district's family life course. In his brief, petitioner's counsel

analyzes both tenure and seniority case law in support of petitioner's claim to an entitlement to teach the family life course in lieu of being "RIFFED" as a home economics teacher. However, respondent correctly argues that tenure and seniority rights do not apply to family life courses because of their interdisciplinary nature. The determination of seniority rights is governed by N.J.A.C. 6:3-1.10 which permits the accumulation of seniority only within specific categories of certification. See, Lichtman v. Ridgewood Board of Education 93 N.J. 362, 366 (1983). Ordinarily, a course falls within an enumerated category and seniority is readily determined between individuals holding the appropriate certification. Family life education is unique in that it does not fall within the established categories of certifiable disciplines. Teachers holding any of 10 certificates are authorized to teach family life pursuant to N.J.A.C. 6:29-7.1(e). In Johnson v. Board of Education of the Borough of Glen Rock, Commissioner's Decision, (May 21, 1984) a tenured home economics teacher who was reduced to 3/10ths time challenged the retention of a nontenured teacher to teach a family life course. The Commissioner affirmed the administrative law judge's determination that a local Board was not required to accommodate seniority claims in determining who would teach a family life course. See also, Bartz v. Greenbrook Tp. Bd. of Ed., Commissioner's Decision (May 24, 1985) aff'd, State Bd. of Ed. (November 6, 1985). In Hart v. Ridgefield Bd. of Ed., Commissioner's Decision (June 7 1985), aff'd (N.J. App. Div., Nov. 7, 1986, A-2176-85T6), cert. den., 107 N.J. 137 (1987), the Commissioner identified the circumstance in which seniority might control a decision regarding teaching family life:

> [S]eniority comes into play in the assignment of family life teaching when a reduction in force occurs in a district wherein a board of education has designated a particular discipline (such as health or biology) as appropriate to teach a given level or sequence in its family life program. For example, when a reduction in force occurs in the district wherein the board has designated that specific portions of the family life education programs at the secondary level are to be taught by an individual with a biology endorsement, seniority would come into play in determining which biology teacher is to be

> assigned. Seniority would not come into play in terms of the board being compelled to assign a teacher with home economics to any portion of its family life program it has designated to be taught by a teacher with biology endorsement merely because N.J.A.C. 6:29-7.1 permits individuals with home economics endorsements to teach in the family life program. (Commissioner's Decision at pp. 14-15)

N.J.A.C. 6:3-1.10 limits seniority to specific categories. Family life education is not one of the specified categories. Therefore, I **CONCLUDE** that a tenured teacher cannot acquire seniority as a family life teacher even though the tenured teacher's certification may authorize the teaching of family life.

Petitioner's reliance on two significant tenure cases is inapposite. In the first case, Capodilupo v. West Orange Bd. of Ed. 218 N.J. Super. 510 (App. Div. 1987), the Appellate Division held that a tenured teacher "is entitled to retention as against a non-tenured teacher under the tenure law," Capodilupo at 515. In Bednar v. Westwood Board of Education 221 N.J. Super. 239 (App. Div. 1987), the Appellate Division held that tenure rights applied to all subjects within the scope of the tenured teacher's endorsements. In the instant matter, petitioner argues that she has an entitlement over Mr. Melitski to teach the family life course based on (1) her seniority; and (2) on the fact that since Melitski did not have an appropriate certification, he should not be given credit for any of the years in which he taught the family life course prior to 1988. However, I agree with respondent's argument that neither Capodilupo nor Bednar apply in the instant matter. Both cases resolved disputes arising in categories in which the petitioner could accrue seniority pursuant to N.J.A.C. 6:3-1.10. Family life is not such a category. As respondent's attorney stated at page 13 of her brief:

> ... as a matter of legislative design and State Board of Education

> intent, the decision of which teacher teaches in the family life program must remain within the discretion of the local board of education subject to the certificate eligibility list as contained in N.J.A.C. 6:29-7.1(e). However, since family life clearly is not a separate category under the seniority regulations, [N.J.A.C. 6:3-1.10], no teacher having eligibility to teach can claim entitlement to teach.

Petitioner's attorney argued in his brief that "the Board asserts that Melitski was tenured and had seniority. Indeed he did. However, his tenure and seniority status did not extend to those courses that he had never taught under proper endorsement, as of the date of the RIF, here family living." In other words, petitioner avers that she was RIFFED on April 25, 1988, the date on which the Board voted not to issue a contract of employment to her for the 1988-89 school year (Exhibit J-29). Melitski, the person retained to teach the family life course, taught the course from 1976 through 1987 without proper certification. On July 6, 1988, Melitski was issued an elementary certificate which authorized him to teach the family living course. Petitioner cites several cases in support of her position that one cannot acquire tenure or seniority unless one possesses an appropriate certificate. Ledwitz v. Bd. of Ed. of Manalopan-Englishtown Regional School District Momouth County, Carol Gundlah v. Bd of Ed. of Emerson, Blitz and Marshall v. Bd. of Ed., Bridgetown. Specifically, petitioner argues that on April 25, 1989, when the Board voted not to renew her contract, Melitski had not yet been issued the certificate authorizing him to teach family living. However, the Board's action clearly stated that it was to be effective for the 1988-89 school year. Petitioner remained employed by the Board from April 25, the date of its vote not to renew her contract, through the end of that school year. In the interim, Melitski obtained the necessary certification. I CONCLUDE that Melitski possessed the proper certification to teach the

family living course when petitioner's RIF became effective. Because the only limitation on the Board's discretion to determine who would teach the family life course is the listing of authorized certifications, the Board's action in deciding that Melitski rather than the petitioner should teach the course was an appropriate exercise of its discretion.

ORDER

It is **ORDERED** that the Board's action in not renewing petitioner's contract for the 1988-89 school year, and in retaining Joel Melitski to teach its family life course rather than petitioner, is affirmed.

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** this Initial Decision with **Saul Cooperman** for consideration.

6/7/89
DATE

OLIVER B. QUINN, ALJ

6/12/89
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUN 13 1989
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

vcb/e

KATHI L. SAVARESE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET 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 were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner avers that the ALJ erred when concluding that tenure cannot be obtained as a teacher of family living because it is not a seniority category. As to this she maintains that the ALJ confused the concepts of tenure and seniority as discussed in the initial decision, ante, and that he erred in his conclusions because "both the State Board and Appellate Division have recognized that tenure rights are broader than seniority rights, that seniority rights cannot override tenure rights, and that a teacher may have a tenure claim to a position, even if she does not have seniority in the position." (Petitioner's Exceptions, at pp. 1-2) Capodilupo v. West Orange Bd. of Ed., decided by the Commissioner May 3, 1985, aff'd/rev'd St. Bd. September 3, 1988, 218 N.J. Super. 510 (App. Div. 1987), cert. den. 109 N.J. 514 (1987); Bednar v. Westwood Regional, 221 N.J. Super. 239 (App. Div. 1987), cert. den. 110 N.J. 512 (1988); and Mirandi v. West Orange Bd. of Ed., Essex County, decided by the Commissioner September 15, 1988, aff'd State Board April 5, 1989.

Petitioner also avers that the ALJ erred in concluding in the initial decision, ante, that because Melitski obtained certification during the summer of 1988, his tenure and seniority rights extended to the areas where he had previously been improperly assigned. Petitioner relies on her post-hearing brief, pages 6-14, in support of this position, as well as Grossman v. Bd. of Ed. of Ramsey, Somerset County, decided by the Commissioner November 7, 1988, aff'd State Board March 1, 1989 wherein it was made clear by the Commissioner that belated acquisition of certification cannot result in an individual acquiring tenure and seniority in a course or assignment. (Petitioner's Exceptions, at p. 2)

Petitioner likewise maintains that the ALJ's decision failed to give sufficient weight to the recent State Board Decision in Mirandi, supra, wherein the educational reasons test was discarded in light of the Appellate Division's decision in Bednar, supra. As to this she argues that:

> there is no legally valid reason for denying tenure and seniority rights in family living, particularly where an individual is certified to teach the course, has taught the course under proper certification, the course is placed within that individual's department, and the individual's certification is sufficient to teach all aspects of the course. (emphasis in text)
> (Id., at p. 3)

Upon review of the record in this matter, the Commissioner is in full agreement with the ALJ's thorough analysis of the law on the issue of entitlement to teach family life (Initial Decision, ante) and his conclusion that "a tenured teacher cannot acquire seniority as a family life teacher even though the tenured teacher's certification may authorize the teaching of family life." (Id., at p. 11)

As indicated by the State Board in its recent decision in Hart v. Bd. of Ed. of the Borough of Ridgefield et al., decided by the Commissioner June 7, 1989 :

> ***family living*** is not an assignment within a tenurable position to which a teaching staff member may claim entitlement on the basis of seniority, but, rather, represents a multi-disciplinary course that may properly be assigned to any teacher whose certification authorizes teaching the subject.***
> (Slip Opinion, at p. 8)

However, the Commissioner does not agree that the Board acted properly when in April 1988 it acted to dismiss petitioner, a tenured teacher, upon abolishment of her position, while assigning a full-time teaching position for which she was qualified to teach to another tenured teacher*, Joel Melitski, who was not authorized to teach the subject as shall be explained below.

Initially, the Commissioner rejects the ALJ's belief that the effective date of a reduction in force (RIF) has bearing on any determination as to an individual's tenure and seniority rights. As decided by the State Board of Education in Thomas Marshall v. Bd. of Ed. of Neptune, Monmouth County, January 8, 1986, aff'd New Jersey Superior Court, Appellate Division, March 10, 1987, it is when a

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* The record indicates that Joel Melitski commenced service with the Board in 1964. Exhibit J-2 indicates a permanent instructional certificate with an endorsement as a secondary school teacher of social studies was issued in 1970. Exhibits J.6 and 7 indicate that Melitski taught social studies related courses up through the 1982-83 school year, at least by, if not earlier, tenure as a teacher was acquired on or about September 1, 1974.

reduction in force occurs, not the effective date of the RIF, that an affected teacher's seniority rights, if any, are triggered.

In the instant matter, in April 1988 when the reduction in force occurred, petitioner had no seniority rights to the full-time family life position although she was authorized to teach it and had actually taught it. As set forth in Capodilupo, supra, and Bednar, supra, however, the inquiry into petitioner's rights does not end at this juncture. The State Board in Capodilupo has ruled that:

> ***because the tenure laws are designed to provide some measure of security in their positions to teaching staff members after years of service, Lingelbach, supra; Viemeister, supra, we conclude that the consequences of a reduction in force must be closely scrutinized where an allegation is made that tenure rights have been impermissibly abridged by the manner in which an otherwise valid reduction in force has been effectuated. (emphasis supplied)
>
> (Slip Opinion, at p. 15)

See also 218 N.J. Super 510, at 512 and State Board decision at 18.

As was true in Capodilupo, petitioner is not challenging the legitimacy of the Board's action to reduce its staff, what she is challenging is the Board's act to terminate her from her tenured position as teacher in favor of an individual not authorized to teach the disputed full-time assignment which she was qualified to teach and had taught. Melitski was not authorized to teach family living at any grade level in April 1988 when the Board acted to terminate petitioner in favor of Melitski. Moreover, Melitski was not authorized to teach the full-time family life assignment for 1988-89 school year even after having obtained the elementary endorsement in July 1988 because the disputed family life assignment was for courses/classes which were for students above grade eight. Exhibits J-5, J-7 J-11, J-12, J-16 and J-17 (Family) Life Skills-A and B are courses for which graduation credit is granted.

While N.J.A.C. 6:29-7.1(e) authorizes a teacher with an elementary endorsement to teach family life, that authorization does not extend to teaching that subject above grade eight. In other words, the teaching of family life courses under an elementary endorsement is limited to those grades which the endorsement itself authorizes N.J.A.C. 6:11-6.2(a)6 authorizes an elementary endorsed teacher to teach in grades kindergarten through eight and common branch subjects such as reading, writing, arithmetic and spelling in secondary schools. The family life courses in grades 9-12 at dispute herein are not common branch elementary subjects within the intendment of that authorization.

Consequently, Melitski's elementary endorsement authorizes him to teach family life courses up through and including grade eight. It does not authorize him to teach family life courses in grades higher than grade eight for which high school graduation credit is awarded.

To rule that any of the endorsements contained within N.J.A.C. 6:29-7.1(e) allows an individual to teach family life beyond the endorsement itself would lead to the anomalous result of allowing nursery endorsed staff to teach family life in grades 9-12 or special education (teacher of the handicapped) endorsed staff teaching family life to teach non-handicapped students.

Accordingly, the ALJ's decision is reversed. Petitioner, as a tenured teacher, had the legal entitlement under N.J.S.A. 18A:28-5 to be retained to teach a full-time assignment for which she was qualified and had taught, albeit that she had no seniority rights to the assignment, when, as under the factual circumstances of this matter, the assignment was given to an individual not authorized to teach the family life courses at the given grade level. Consequently, the Board is directed to reinstate petitioner and to provide to her all salary, benefits and emoluments owing to her, less mitigation for monies earned during the period of her improper termination. Further, the Board is directed to assure that Joel Melitski, who by every indication in the record is a fine teacher of family life, be nonetheless limited to the teaching of family life courses grades kindergarten through eight pursuant to the authorization of an elementary endorsement.

COMMISSIONER OF EDUCATION

July 24, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9107-88
AGENCY DKT. NO. 351-11/88

ROBERT HERBERT,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,
Respondent.

Kenneth L. Nowak, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)
Howard M. Newman, Esq., for respondent (Kalac, Newman & Lavender, attorneys)

Record Closed May 18, 1989 Decided: June 12, 1989

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

Robert Herbert, petitioner, alleges and the Middletown Township Board of Education (Board), respondent, denies that the Board violated his tenure and seniority rights when it appointed another to the position of Supervisor of Special Services effective August 15, 1988.

This matter was opened before the Commissioner of Education and 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. Following a prehearing conference on February 14, 1989 the matter was set down for hearing on April 24, 1989 and was heard on that day at the Aberdeen Municipal Court.

STIPULATED FACTS

The parties submitted the following stipulation of facts:

1. Petitioner possesses administrative and supervisory certificates with endorsements as principal and supervisor, and a K-12 instructional certificate. Petitioner has a Masters Degree in Administration and Supervision.

2. Petitioner commenced his employment with the school district in July 1970.

3. In 1978-79, 1982-84 and 1985-89 petitioner served as a teacher.

4. In the summer of 1988 the school district informed the staff that a position, entitled Supervisor of Sepecial Services, was available. The posting for the position is attached hereto as Exhibit (J-1)

5. The position of Supervisor of Special Services has been filled by Marilyn Cohen, who does not possess tenure or seniority as a Supervisor or as Supervisor of Special Services.

RESPONDENT'S ARGUMENTS

Although the petitioner bears the burden of persuasion in this matter, I DIRECTED that the Board go forward to facilitate presentation of the case. N.J.A.C. 1:1-14.6(1).

The Board produced testimony from its Director of Pupil Personnel Services. This person supervises, among other things, child study teams, homebound instruction, school nurses and supplemental instruction. He previously served as Supervisor of Special Services. He vacated the controverted position on July 31, 1988 and assumed his present position on August 1, 1988.

The job description for Supervisor of Special Services (R-1) has not changed since the witness was employed in that capacity in March 1987. In July 1988, the Board advertised the position. The petitioner knew of the posting, but did not apply for the position. The Board sought a person with at least three years' experience in special education (R-1). A selection committee reviewed approximately forty candidates. The incumbent was selected for the position on August 15, 1988. By background and training she has qualified for the position. She holds Bachelors and Masters Degrees, the Learning

Disabilities Teacher-Consultant endorsement and 69 graduate credits. Her certificates and endorsements include teacher of the handicapped, supervisor and principal.

The petitioner holds a Bachelors Degree in secondary science and social studies. He has a Masters Degree in supervision and administration. He has no certificates or endorsements in special education.

The Supervisor of Special Services does not perform teaching duties. Approximately 20% of the supervisor's time is spent supervising teachers of special education. The balance is spent in securing private school placements for special education pupils, supervising the district's child study teams, developing new programs to bring children who are now in out-of-district placements back into the district, and administering federal and state guidelines dealing with handicapped children.

The district has approximately 1,500 classified pupils. The special education budget is approximately 7.2 million dollars.

The Board asserts there was a sound educational basis for appointing the incumbent supervisor. The issues in this case have not been addressed by the Commissioner, notwithstanding Mirandi v. West Orange Bd. of Ed., OAL DKT. EDU 47-87 (Aug. 2, 1988), adopted Comm'r of Ed. (Sept. 15, 1988), aff'd St. Bd. (Apr. 5, 1989) and the State Board warning that educationally based reasons should not be used in considering the rights of tenured persons in a reduction in force.

Herbert's claims do not result from a current reduction in force. Case law has developed in other areas in which the special expertise of the person selected has not been the overriding and predominant issue. In Mirandi and related cases, the use of the educationally based reasons theory was, indeed, questionable. Mirandi was a tenured assistant principal serving at the high school level. Rather than place him in the position of assistant principal at a middle school, notwithstanding his tenure and seniority as an assistant principal, the board appointed a nontenured person to the middle school position.

In Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), all of the competing parties were physical education teachers. This was an elementary versus secondary experience question. Ultimately, the fact that Capodilupo's teaching

certificate permitted him to teach physical education at both elementary and secondary levels and the fact that he enjoyed tenure prevailed.

Schaeffer v. South Orange-Maplewood Bd. of Ed., OAL DKT. EDU 5776-87 (Jan. 15, 1988), adopted Comm'r of Ed. (Mar. 14, 1988), reached a similar result as to a tenured junior high school and middle school supervisor of English whose position was abolished. At the same time, the board created a new position of Director of Language Arts/English K-8. It is not difficult to understand how a junior high school and middle school supervisor of English could competently serve in the new position.

These cases reveal situations in which the individual who was reduced in force had adequate and reasonable certification and experience to serve in the position that was not offered. In the present case, however, the Board should not be prejudiced by the fact that the Administrative Code does not provide a specific certification for the position of Supervisor of Special Services. Special education is a unique and specialized area. The petitioner is not certificated to teach in any of the areas of special education. That the administrative code does not provide a specific category for Supervisor of Special Services should not be determinitive.

Special education is laden with rules and regulations including the requirement of specific endorsements for teachers and child study team members. It is reasonable to conclude that supervisors in this area also must have a special education background. Given the opportunity, the State Board of Education should so hold and correct the oversight.

The area of special education is highly regulated, substantially complicated and experience in dealing with this area and interpretation of rules and regulations is essential. The Board concedes the petitioner's tenure rights. However, the public schools exist for the benefit of pupils, not teachers. Smith v. Paramus, 1968 S.L.D. 62. The Tenure Employees Hearing Law N.J.S.A. 18A:6-10 et seq., is designed primarily to insure educational quality and only secondarily to protect teachers:

> The Teachers Tenure Act is the enuciation by the Legislature of a public policy with regard to the employment and dismissal of teachers for the primary purpose of insuring the educational and welfare of children and only secondarily as a protection to teachers.

Dallolio v. Vineland Bd. of Ed., 1965 S.L.D. 18, 21.

Handicapped children need the services of specially trained teachers as the Administrative Code makes clear. Exhibit R-1 shows the functions of the Supervisor of Special Services involve supervising special education teachers only 20% of the time. If, arguendo, supervision is supervision and the petitioner's lack of experience in special education would not hamper his ability to supervise special education teachers, he still lacks the necessary background for the other 80% of the job. Pupil placement, as the record amply demonstrates, comprises the greater portion of the job.

The incumbent does not have tenure. She does have the credentials, the experience and the expertise to do the job. If the handicapped children in the district are to receive the services they require, the district must provide individuals who possess the abilities to provide them.

The Administrative Code gives the Board authority to designate the position of Supervisor of Special Services as a separate category. N.J.A.C. 6:3-1.10(l)10 directs that each approved supervisory title shall be a separate category and directs boards of education to adopt job descriptions for each. The job descriptions set forth the qualifications and specific endorsements required for each position.

The Board fashioned a separate category entitled Supervisor of Special Services. Exhibit R-1 is a carefully drawn job description for the position that requires a minimum of three years' experience in the area of special education. The qualifications, overall job goals and functions delineated show that the Board sought a person qualified and experienced in the area of special education. That the certification required is supervisor or administrator is explained by the absence of the specific job title in the Administrative Code listings.

The Board had no choice of certification requirements. However, it could and did fashion a job description that appropriately required certain experience. The Administrative Code requires a local board to draft a job description to fit particular needs. That has been done here. The Board needed a person who could handle the responsibilities of a complicated and specialized position. The job description reflects that. The Board should not be defeated from its intended purpose.

PETITIONER'S ARGUMENTS

The petitioner possesses an instructional certificate and an administrative certificate with an endorsement as supervisor. He served as a supervisor in the district from July 1970 - June 1981, except for the 1978-79 school year, in which he voluntarily served as a teacher. In 1982 he became a classroom teacher pursuant to a reduction in force. In 1985 the petitioner served as a supervisor for one year. He then was placed on a preferred eligibility list for supervisor positions.

The Board hired a Supervisor of Special Services in 1988. The person selected has several teaching endorsements and an administrative certificate with a principal endorsement and a supervisor endorsement. She has no tenure as a supervisor.

The Administrative Code governing administrative certificates provides for school administrator, principal, supervisor, assistant superintendent for business and school business administrator endorsements. There is no endorsement for the position Supervisor of Special Services. Similarly, the regulations and standards for certification lists all of the endorsements under the administrative certificate (P-3). They contain only one supervisory endorsement, that of supervisor. The authorization under this endorsement permits the holder to perform any supervisory position. The petitioner holds and has tenure under that certificate and endorsement. The incumbent holds that certificate and endorsement, but has no tenure.

The rights of tenure personnel as against nontenured personnel were clarified in Capodilupo, above, Bednar, above, and Mirandi above. In Capodilupo the Appellate Division ruled that the petitioner's tenure rights were violated when a tenured secondary school physical education teacher was reduced in force while a nontenured elementary school physical education teacher was retained. The court explained that the petitioner had tenure in all positions for which his certificate qualified him, even if he never served in, and thus did not earn seniority in, the position. A tenured teacher seeking reinstatement within the endorsements on his/her certificate is entitled to preference in a reduction in force over a nontenured applicant with the same certification. 218 N.J. Super. at 215. The appellate division did not rule on whether sound educational reasons could support a decision to retain a nontenured teacher.

In Bednar, above, the court ruled that the board acted improperly in retaining a nontenured teacher within the endorsement of the tenured teacher, even though the tenured teacher had never taught on the secondary level. The court observed that this approach might not represent sound educational policy, but was required by force of the Tenure Law. 221 N.J. Super. at 243.

More recently and more on point, the State Board of Education ruled on Mirandi, above. The issue was whether a tenured administrator who had been reduced in force two years earlier had a claim to a different supervisory position over a nontenured person. The Commissioner upheld the petitioner's claim to the position over the board's assertion that "educationally based reasons" required that someone with experience in the middle school level be appointed. The Commissioner also rejected the board's claim that Capodilupo did not apply because the vacancy and the reduction in force were not simultaneous as they had been in Capodilupo. The State Board affirmed the Commissioner's decision.

The State Board explained that it is well established that a tenured teaching staff member whose position is abolished has, by virtue of his/her tenure status, the right to retention in another assignment within the scope of his/her tenured position over a nontenured individual. This protection extends despite the former's lack of actual experience in the category applicable to the assignment. Slip opinion at 3. The State Board also concluded that the tenure rights provide protection despite a lapse between the reduction in force and the vacancy.

Although Mirandi did not have actual experience in the seniority category applicable to the assignment, the State Board ruled that the rights conferred by the tenure statute may not be dissolved by implementing regulations. And the State Board rejected the educationally based reasons argument in assessing the rights of tenured individuals in a reduction in force. Slip opinion at 9.

In the present case, the petitioner has a valid claim to the position of Supervisor of Special Services. He holds an administrative certificate with supervisor endorsement. That endorsement qualifies him to be Supervisor of Speicial Services. No other specific endorsement covers the position. The petitioner has tenure as a supervisor; the incumbent does not. Thus, even though the petitioner has not served as a Supervisor of Special Services and has no seniority in that position, he has a valid tenure claim to the position.

As the line of cases discussed above makes clear, the tenure law grants the tenured teaching staff member a right over a nontenured teaching staff member to any position for which the tenured staff member qualifies him or her. The tenure laws do not contain any exemptions or exceptions. The Legislature has determined that a person who obtains an endorsement is qualified for all positions under that endorsement. To allow subjective educational reasons to override the tenure law is to ignore the law and is clearly inpermissible.

The incumbent undoubtedly is qualified for the position. The Board may believe that she would perform better than the petitioner as Supervisor of Special Services. But the law gives the petitioner an unequivocal right to the position. He cannot be deprived of his tenure rights by virtue of the Board's impression that the incumbent would do the job better. This approach may not be the best educational policy, but it is the law, and only the Legislature can change the law. That the position in this case may differ from the petitioner's prior positions more than the positions at issue in Bednar or Mirandi does not alter the outcome. The tenure laws cannot be modified by a board's belief that a particular position is somehow unique. The point of Bednar and Mirandi is that the tenure laws must apply despite the particular experience or inexperience of the person involved. Not only is there no measurable way of determining when a position is unique to a degree that would allegedly exempt it from the strictures of the tenure law, the law simply does not permit that type of analysis or exemption.

The petitioner is entitled as a matter of law to the position held by the nontenured incumbent. He must be instated, with retroactive seniority, to that position with all back pay.

DETERMINATION

As the Board correctly observes, the petitioner's claims do not result from a current reduction in force. That, however, is of no legal import. Nor is it significant that the petitioner did not apply for the controverted position in the summer of 1988. His right to the position is by force of law and he has no duty to apply for that position. Camilli v. Northern Highlands Reg'l High School Dist., OAL DKT. EDU 5752-84 (Nov. 14, 1984), adopted Comm'r of Ed. (Jan. 3, 1985), aff'd St. Bd. of Ed. (May 1, 1985).

The Board's argument that special education is, indeed, special is an attractive one. Counsel has both the right and the obligation to put forward a good faith argument for the extension, modification or reversal of the existing law when he reasonably believes that there is a basis for doing so. R.P.C. 3.1. The Education of the Handicapped Act, as amended, 20 U.S.C.A. §1400 et seq., bespeaks the Congress' concern with the needs of all handicapped children. The New Jersey Administrative Code governing special education, N.J.A.C. 6:28-1.1 et seq., may not be inconsistent with the federal regulations implementing the Act. Any inconsistent state regulations or policy statements are superseded by relevant definitions contained in federal regulations. T.G. on Behalf of D.G. v. Bd. of Educ. of Piscataway, N.J., 576 F.Supp. 420 (D.C.N.J. 1983), aff'd 738 F. 2d 425 (3rd Cir. 1984), cert. den. 469 U.S. 1086 (1984).

A review of the federal regulations reveals nothing directive or even instructional to the present case. Therefore, this tribunal must look to New Jersey law.

A comparison of petitioner's and incumbent's professional experiences with the job description of Supervisor of Special Services suggests that the incumbent's background more nearly matches the job description. However, the petitioner is merely less qualified, not unqualified. The cases cited above provide clear instruction in matters such as this. Seniority is not a question. It is well settled that seniority does not exist until tenure is achieved. See, e.g., Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509 (1982). When a position lies within the scope of the certifications of two teaching staff members, one of whom is tenured and the other is not, the tenured teacher prevails.

Having considered the parol and documentary evidence and the arguments of the parties I FIND:

1. Robert Herbert enjoys tenure and seniority as a supervisor in the Middletown Township Public Schools.

2. Posting of the position of Supervisor of Special Services placed upon the Middletown Township Board of Education a responsibility to determine those persons on preferred eligible lists entitled by virtue of their certifications and endorsements to first consideration for the opening.

3. The petitioner, therefore, had no responsibility to apply for the position.

4. The incumbent does not enjoy a tenure status.

I **CONCLUDE** that, although the incumbent is eminently qualified for the position of Supervisor of Special Services, the Middletown Township Board of Education has violated the tenure rights of Robert Herbert by employing a nontenured teaching staff member to perform the functions of a position within the scope of Herbert's certifications and endorsements. Accordingly, I **ORDER** Robert Herbert instated to the position of Supervisor of Special Services retroactive to August 1, 1988. I further **ORDER** all back pay and other emoluments of employment, including but not limited to, adjustment of all Teachers' Pension Annunity Fund payments.

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.

12 JUNE 1989
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

June 13, 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 14 1989
DATE

Jacqueline A. Venetia
OFFICE OF ADMINISTRATIVE LAW

km

ROBERT HERBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Board's exceptions are a resubmission of its post-hearing submission. Similarly, in response to the Board's resubmitting its post-hearing submission, petitioner resubmitted his post-hearing brief as reply exceptions. Both such documents are incorporated herein by reference.

Having conducted a careful and independent review of the record, the Commissioner adopts as his own the initial decision for the reasons expressed therein. In so doing the Commissioner notes that the exceptions raise no new issues, and that the ALJ's disposition carefully considered the arguments addressed by the parties' briefs.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law instating petitioner to the position of Supervisor of Special Services retroactive to August 1, 1988, for the reasons expressed in the initial decision. He further directs payment of all back pay and other emoluments due and owing Petitioner Herbert.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 25, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1794-88
AGENCY DKT. NO. 19-2/88

DORETHA BROWNLEE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent.

Reba Carmel, Esq., for petitioner
(Oxfeld, Cohen, Blunda, Friedman, Levine and Brooks, attorneys)

Marvin L. Comick, Esq., for respondent

Record Closed: May 30, 1989 Decided: June 9, 1989

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

Petitioner, a tenured teaching staff member and supervisor with seniority in the categories of administrative supervisor and supervisory monitor, seeks reinstatement as an administrative supervisor, including the position vacated by Dr. Daniel Gutmore and one currently held by Dr. John P. Duggan, nothwithstanding that the title of that position has been changed from Administrative Supervisor to Director of School Operations, which she alleged is substantially the same as the position of administrative supervisor previously held by Dr. Gutmore. She also alleged she was improperly denied a promotion to a principalship as well as a sabbatical leave because of political animus.

The Board denied petitioner's allegation and entitlement to any position other than her current assignment as Supervisor of Special Projects.

The matter was transmitted to the Office of Administrative Law as a contested case on March 18, 1988 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on May 27, 1988 at which the matter was set down for plenary hearing in October 1988. On the first day of hearing on October 4, determinations made on the record resulted in an Amended Prehearing Order and further hearing was delayed because of conflicts of each party and a maternity leave of the Board's counsel. The hearing was continued on April 24, 25, 26, 27 and 28, 1989, and the record closed on May 30, 1989 with the completion of post-hearing submissions.

BACKGROUND

Petitioner was employed as a science teacher from 1974-82, served in the position of supervisory monitor from September 1982 to November 1983 and the position of administrative supervisor from November 1983 to the end of the 1983-84 school year. On September 5, 1984, she was involuntarily assigned by the Board to the position of high school science teacher with a reduction in salary. She appealed to the Commissioner of Education (OAL DKT. NO. EDU 8642-84, AGY DKT. NO. 452-11/84). The Commissioner rendered his decision on September 27, 1985 and said at 12 and 13:

> Dismissal resulting from the reduction in force must be made upon the basis of seniority. N.J.S.A. 18A:28-10. Thus, at the time petitioner's position was abolished in the category of administrative supervisor, the Board had a responsibility to determine the seniority status of those employees in that category and a preferred eligibility list developed containing the names and seniority credit of any individual who had insufficient seniority for employment in that category. If petitioner had insufficient seniority in the administrative supervisory monitor category. If she had insufficient seniority for employment in that category, she should have been placed upon the preferred eligibility list of that category and only at this point would she have reverted to the next category in which she held employment immediately prior to that of supervisory monitor. N.J.A.C. 6:3-1.10(i) and (j).

> Consequently, if at the time petitioner's position was abolished she had greater seniority than any individual filling a position in the supervisor categories in which she has seniority entitlement, she is to be reinstated together with back pay and emoluments, less mitigation as directed by the judge. If the Board herein has not determined the seniority entitlements and preferred eligibility status of those individuals affected by the reduction in force, sub judice, it is ordered to do so immediately pursuant to N.J.A.C. 6:3-1.10.

Upon receipt of the Commissioner's decision the Newark Board of Education complied and reassigned petitioner to the position of Supervisor of Special Projects, which she currently holds.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

Dr. Gutmore, an administrative supervisor with greater seniority in that category than petitioner, was promoted to the position of Assistant Executive Superintendent of Educational Services in or about February 1988, thereby vacating the position of administrative supervisor.

Petitioner requested she replace Gutmore in a letter to the Executive Superintendent under date of February 18, 1988. See, P-3. The Executive Superintendent responded under date of March 4, 1988 and advised "that there has been restructuring of the Department of Academics. An advertisement for the position of Director of Operations will be posted soon. You may apply for this position if you feel you meet the necessary qualifications." See, P-4. The position was advertised. Petitioner applied and was interviewed. Dr. Duggan was appointed to the position of Director of Operations, an unrecognized title approved by County Superintendent Scambio. See, R-1.

Scambio reenforced petitioner's claim to fill a vacancy in the position of administrative supervisor in a letter under date of June 4, 1987 and said: "You have tenure and seniority in the position of administrative supervisor, and would be appointed upon the occurrence of a vacancy." See, P-8.

There were nine administrative supervisor positions in 1985-86, 1986-87, 1987-88 and also at least up to April 1989 when this matter was heard. The position vacated by Gutmore has remained vacant since his promotion to Assistant Executive Superintendent in February 1988, and had not been abolished by the Board through April 1989.

Petitioner testified at length in support of her contention that the position of Director of Operations held by Duggan is another administrative supervisory position with a different title, notwithstanding separate job descriptions for each. See, P-1 and P-5. A plethora of testimony from witnesses for petitioner as well as the Board was convincing that petitioner's contention is without merit. The tasks listed in job descriptions are not written in concrete, but do provide guidelines for the assignment of responsibilities.

Administrative supervisors are line positions that have direct involvement with assigned schools and are perceived as trouble shooters, notwithstanding that they may be called upon to deal with school-wide issues on occasion, such as redistricting. The position of Director of Operations is a staff position geared to central office rather than individual school administration, and pays a salary of approximately 25% more than administrative supervisory positions. The positions are not the same or equal. **I SO FIND.**

The above are adopted herein as **FINDINGS OF FACT.**

CONCLUSION

It cannot be disputed that petitioner was and is entitled to reassignment to the position of administrative supervisor from the preferred eligibility list pursuant to the Commissioner's decision whenever a vacancy occurred and that position has not been abolished.

Petitioner does not seek the position held by Gutmore in this dispute. She merely seeks compliance with the Commissioner's decision to reassignment to the position of administrative supervisor vacated by Gutmore. **I CONCLUDE** she is entitled to fill that position as long as it exists.

The Board is hereby **ORDERED** to reassign petitioner to the position of administrative supervisor and compensate her for salary differential between her ten-month position as Supervisor of Special Projects and the salary and emoluments she would have received in the 12-month position of administrative supervisor since it was vacated by Gutmore. In the event the Board has in fact abolished this position since the plenary hearing in April, petitioner is entitled to the salary and emoluments differential up to the time of abolishment.

SABBATICAL LEAVE AND THE PRINCIPALSHIPS

Petitioner processed a request for a four-month sabbatical leave of absence at half-pay under date of September 29, 1987 to be effective February 1, 1988. See, P-9. It was rejected by a staff member due to an erroneous interpretation of the negotiated agreement and/or an improper identity of the bargaining unit under which petitioner applied. See, P-10, P-11. Nevertheless, a reapplication to be considered by the Board at its January 1988 meeting was filed. See, P-12. The purpose of the sabbatical request was to permit petitioner to meet the residency requirement for a doctorate. The Board did not grant the sabbatical request, presumably because of fiscal restraint. Petitioner testified she filed a grievance on that matter in February 1988, but has heard nothing from that process since. Petitioner did meet her residency requirement through a leave without pay for two months in the Fall of 1988.

In the event peititioner were to prevail on this issue, it is my considered judgement that her entitlement would be limited to pay for one-month (one-half of her two month leave). Administrative remedies had not been exhausted in April 1989, however, which may provide a result favorable to petitioner. Nevertheless, I **FIND** that petitioner has not met her burden of proof by a preponderance of credible evidence that the failure of the Board to grant her request was due to political animus.

It is stipulated that petitioner is qualified to hold the position of principal and that she applied for appointment to any of seven vacancies on October 19, 1987. Her applications were acknowledged. She reapplied on December 18, 1987 and February 11, 1988. She was never interviewed.

One partially qualifies for a principalship by possessing the certification required. There is no requirement known to me that each applicant must be granted an interview. Although there is an entitlement to a challenge to the selection process, petitioner carries the burden of proof by a preponderance of credible evidence. She attempted to meet this burden by alleging that staff members who were Salley (former Executive Superintendent) appointees were swept out by successor Campbell, and further that Corino supporters were 'taken care of'. It is noted that petitioner testified that Dr. Duggan, Director of Operations, was a Salley appointee.

Allegations are insufficient to meet a burden of proof, and I **FIND** that petitioner has not met that burden.

SUMMARY

The Newark Board of Education is **ORDERED** to reinstate petitioner to the position of Administrative Supervisor with back pay from the date of the Gutmore promotion, and in the event the Board has abolished the position since the hearing in this matter, to compensate petitioner up to the date of abolishment.

The issues related to alleged political animus and the failure of petitioner to receive a sabbatical leave or appointment as principal are **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 Commissioner 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.

9 June 1989
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

June 16 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 14 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board's reply exceptions, however, were untimely.

Petitioner excepts to the ALJ's conclusion that petitioner's contention that the Director of Operations position is an administrative supervisory position with a different title is without merit. She avers, contrary to the ALJ's finding, that administrative supervisors in Newark are staff and not line positions. "Those administrative supervisors traditionally assigned to the Deputy Superintendent's Office act as [liaison] between the office of secondary operations and elementary operations and the administrative supervisors assigned to those offices." (Exceptions, at p. 1)

Petitioner claims that before his promotion, Dr. Gutmore was not assigned to any individual, and she claims Mr. Duggan has acted in the same capacity as Dr. Gutmore. She also avers that the position of Director of Operations is not a staff position as found by the ALJ. "While most directors have numerous staff people, the only staff person assigned to Mr. Duggan is an Assistant Director of Attendance." (Id.) Further, contrary to the ALJ's conclusion, petitioner posits the position of Administrative Supervisor pays more than a Director of Operations, by approximately 10%. She adds that the Administrative Supervisor position is a confidential position and therefore is not part of any bargaining unit.

Petitioner claims "[a]ll this testimony was offered by the petitioner and the witnesses called by the petitioner. This testimony must be contrasted with the stark testimony offered by the lone board witness of Dr. Foti." (Id., at p. 2)

For the above reasons, petitioner submits that the ALJ's decision should be affirmed in general but that the specific finding concerning the position of Director of Operations should be reversed.

Upon a careful and independent review of the instant matter, which it is noted does not include a transcript of the hearing below, the Commissioner adopts the initial decision for the reasons expressed therein, as modified below.

From the job descriptions and the ALJ's recitation of facts, it is evident that the positions in question are not so similar as to be equal. Although it appears that the position of Administrative Supervisor provides authority to those holding that title to evaluate teaching staff members, it cannot be said that such position was a line position, as suggested by the ALJ, because the administrative supervisors could only undertake such responsibility upon request for assistance from the building principal. See initial decision, ante. See also P-1 in evidence where it is stated: "***The Administrative Supervisor will not assume the responsibility of the principal.***" Thus, the Commissioner rejects that conclusion of the ALJ found in the initial decision, ante, suggesting that the role of Administrative Supervisor was a line position.

The Commissioner does accept the ALJ's finding, however, and rejects the Petitioner's contention to the contrary that the position of Director of Operations is a staff position, for the reasons expressed in the initial decision, ante. In so determining the Commissioner finds no basis in the record before him to credit petitioner's contention that the position of Director of Operations is paid 10% more than that of an Administrative Supervisor. Rather, he adopts the ALJ's finding, supported by the two job descriptions in question, P-1 and P-5 which indicate that the position of Director of Operations carries with it a salary some 25% higher than that of an Administrative Supervisor.

Thus, the Commissioner finds and determines that both positions are staff positions, but with largely different responsibilities. As found by the ALJ, the position of Administrative Supervisor entailed direct involvement with assigned schools, guided by the needs advanced by the school principal and appropriate deputy executive superintendent. See P-1 in evidence. On the other hand, the role of Director of Operations is one emphasizing planning and policy development under the aegis of the Deputy Executive Superintendent. See P-5 in evidence.

Accordingly, for the reasons expressed by the ALJ in the initial decision, as modified above, the Commissioner adopts as his own the initial decision in this matter. The Commissioner notes, in so doing, that petitioner continues to be on a preferred eligibility list for any vacancy for a position of Administrative Supervisor, including the position vacated by Dr. Gutmore, if the Board has not taken formal action to abolish such positions, consistent with the Commissioner's earlier decision in such regard. However, insofar as this decision adopts the ALJ's finding that the positions of Director of Operations and Administrative Supervisor are not equal, petitioner is not entitled to assume any such position as a Director of Operations. Further, for the reasons expressed by the initial decision, the Commissioner finds that petitioner has failed in her burden of demonstrating by a preponderance of the credible evidence that the failure of the Board to grant her request for a sabbatical leave of absence was attributable to political animus. Similarly, the Commissioner concurs with the ALJ's determination that petitioner has failed to meet her burden of persuasion that she was improperly denied a promotion to a principalship due to political animus.

Consequently, for the reasons expressed by the ALJ in the initial decision, the Board of Education of the City of Newark is hereby directed to reinstate petitioner to the position of Administrative Supervisor with all back pay and emoluments due from the date of Dr. Gutmore's promotion, if any such positions exist, having not been formally abolished by the Board. In the event the Board has abolished all such positions, the Board is directed to compensate petitioner up to the date of said abolition, for failure to follow the directives of the Commissioner's decision in said matter dated September 27, 1985.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 27, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 100-89
AGENCY DKT. NO. 382-12/88

C.D., BY HIS MOTHER
R.D.,
Petitioner,
v.
BOARD OF EDUCATION OF
MONROE TOWNSHIP,
GLOUCESTER COUNTY,
Respondent.

R.D., petitioner, pro se

Walter L. Marshall, Jr., Esq., for respondent (Hannold, Caulfield, Marshall & McDonnell, attorneys)

Record Closed: May 22, 1989 Decided: June 21, 1989

BEFORE NAOMI DOWER-LABASTILLE, ALJ:

R.D. claims that the dismissal of her son C. from the Junior Varsity (j.v.) soccer team was arbitrary and unreasonable, contrary to an athletics contract, contrary to Board policy and procedurally defective. She sought retroactive reinstatement which would qualify her son for a team award, and she sought the expungement of any adverse reference to the matter from her son's pupil record file. On January 9, 1989, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on March 1, 1989. Hearings were held on April 25 and 26, 1989, in Franklinville. The record closed on May 22, 1989. A list of exhibits entered into evidence is appended to this decision.

Petitioner called several school officials to testify as part of her direct case. These included Emil Gionti, president of the Board of Education of Monroe Township (Board); Robert LaPorta, Superintendent of Schools; Alvin J. Greczek, school principal; James V. Ranniello, school athletic director, Michael R. Hingston, head soccer coach; and Frederick Powell, Jr., the j.v. soccer coach. She also presented Arthur Sheppard, an experienced soccer official with a Grade E coaching license whose Grade D license was pending, as an expert witness. Concerning the events which led to C.'s dismissal, petitioner called C. and his close friend, D.R., to testify. The Board elicited testimony from coach Fred Powell and from J. Michael Shaw, one of the two referees for the Pitman soccer game on October 3, 1988 during which C.D. was expelled ("red carded"). Petitioner pointed out that NJSIAA rules require that the official make a report of such an incident to the Association within 24 hours. Shaw explained that, at the time, he was of the belief that for j.v. soccer, the incident was to be reported to the school, which he did by telephone the following day. The report he subsequently wrote was supplied at the request of the Board for the purpose of this litigation. The fact that he did not report to the Association in no way affects his credibility as a witness.

Part of petitioner's questioning and testimony was aimed at discrediting the actions and testimony of j.v. coach Powell. Petitioner believes that he was biased against C.D. and that Powell was inexperienced whereas C.D. was highly experienced due to his participation in soccer competition since early childhood. C.D. related that he had been assigned to Powell's class for eighth-grade homeroom and social studies and that Powell had punished him for talking by seating him in the far corner of the classroom, facing the wall, for the entire year. Powell testified that he recognized C.D.'s name as that of a student in his classes in the past but that he had no recollection at all of the incident described by petitioner. Had there been a continuing dispute of year-long duration it would seem impossible for Powell to have forgotten it. C.D. and his mother believed that a continuing punishment was taking place, but clearly Powell was not aware of a continuing dispute. Thus, I believe Powell's testimony that he had no recollection of

seating C.D. in a corner of the room and that, after that one incident, he forgot about it. It follows that, if Powell did not even recall C.D. in his classes, he could not have been biased against C.D. due to events prior to his j.v. team activity.

Petitioner's attempts to show Powell's lack of experience had several purposes. One was to show that Powell was not a good coach and that he did not understand or appreciate C.D.'s "aggressive style" of playing. Even if that were true, it would have little relevance because it would not excuse a team member's failure to follow directions, his tendency to get into arguments, or his display of disrespect. C.D.'s testimony suggested that C.D.'s failure to adhere to the rule that a player (except for the captain) may not talk to an official was understandable and excusable because in past practice, members had not been penalized. The inference offered was that Powell, being inexperienced, just was not aware that talking to or talking back to an official had been a normal course of conduct in the past. I reject that inference because the Board's testimony supported findings that the team members were told, at the beginning of the season and at least as often as at every game, not to talk to the officials. Petitioner inferred through questioning and testimony that Powell was incompetent and therefore undeserving of respect. It is regrettable that C.'S mother appeared to support such a view, since parental opinions can contribute to children's "attitude" problems.

The facts concerning the "red card" incident when C.D. was expelled from the game were disputed. C.D.'s version was not the same as that of the official. J. Michael Shaw, or of Powell. In addition to his understandably biased view of what occurred, there is a second reason to find C.D.'s version less credible. It was brought out at hearing that C.D. has poor eyesight, and he was unable to say with certainty which of the two officials took certain actions because he did not wear glasses while playing. Finally, on the subject of C.D.'s credibility, he had a manner of speaking which was quite difficult to understand. Probably because of this problem, it appeared that his mother had gone over the questioning and testimony with him to a noticeable degree. Both C.D. and his friend D.R. showed indications of having been coached in their direct testimony. D.R. answered much more candidly when the ALJ or Board counsel questioned him. D.R. clearly heard what C.D. said before he was red carded. Petitioner's argument that what he said could not have been heard is thus unsupportable.

In light of my credibility determinations, my findings on disputed facts will be based principally on testimony of Board witnesses. Much of the testimony elicited by petitioner was, in my view, irrelevant to the operative facts. Nevertheless, I allowed it so that this pro se petitioner could lay a foundation for her theories of the case, which were twofold. One theory attacked the procedures leading to C.D.'s dismissal from the team. Petitioner's argument is that team membership is so important to children and their future that no child should be suspended or dismissed from a team prior to notice to a parent of the problem and an opportunity to correct it. Petitioner considers suspension or dismissal from a team to be disciplinary action, and she argues that the denial of notice and due process is contrary to policy since it permits imposition of a sanction without involving the parents in a meaningful way. Petitioner argues that the Board must first schedule a conference or hearing before the school authorities before making a dismissal from a team. C.D.'s mother has been a teacher for 26 years, serving at every grade level, and she feels that sound educational policy mandates parental involvement before any sanction. Since this is one of petitioner's legal theories as to why C.D. should be reinstated, I include in my findings chronological events subsequent to C.D.'s dismissal.

I also include background material in the findings, since the second prong of petitioner's argument is that dismissal from the team was stringent punishment which is appropriate only for the most extreme misbehavior, that it is contrary to the athletics contract, and that there were no ongoing behavioral problems which justified dismissal: she argues that the extreme penalty exhibited Powell's bias against C.D. It is therefore necessary to describe C.D.'s conduct and attitude during his team activities and some of the reasons for his conduct and attitude, if such reasons are discernable.

FINDINGS OF FACT

1. C.D. played soccer on a "Select 73" team, which is a group of better players in the 10- to 13-year-old bracket of youth soccer. His coach was named Ferro and Arthur Sheppard assisted Ferro.

2. Coach Ferro, who had a grade F coaching license or better and 16 years of experience, never had any real problems with C.D.

3. C.D. was chosen to try out for a State-level "select team" under the sponsorship of the Soccer World Federation, and he worked out with this group for six months under coaches from Europe, South America and the United States, learning special strategies and drills.

4. In ninth grade, C.D. played freshman soccer for the school. He was an excellent player and "controlled the whole field for us," according to his fellow team member and close friend, D.R. C.D. had no behavioral problems with coach Cardello, his coach at the time.

5. On September 1, 1988, C.D. and his mother, R.D., signed Williamstown High School's interscholastic contract (R-1) so that C.D. could "apply for the privilege of trying out" for the j.v. soccer team in his sophomore year, 1988-89. The contract consists of four pages. The first page contains the student's promise and parent's waiver, which are signed; the second contains the school's statement of the meaning of team membership as a privilege, the conduct expected and the standards for selection of candidates; the third page contains NJSIAA eligibility rules and student behavior and training rules; and the last page lists infractions and penalties, the effect of school suspensions and school attendance requirements.

6. The following language of the contract is relevant to the issues:

> I recognize my responsibilities if I try out for the above sport. I will make it to a point to so govern myself that my association with this sport will bring honor to it and the school, and expect to be asked to withdraw from the team in case I do not.
>
> If extended the above privilege I will:
>
> A. Train consistently as advised by the coach
> B. Abide by all training rules
> C. Make a serious endeavor to keep up my studies
> D. Make it a point to abide by the rules and regulations of the student body
> E. So conduct myself, at all times, that I will bring credit to my team
>
> I promise on my word of honor to do the above.

. . . .

TO THE STUDENT-ATHLETE

IT'S YOUR PRIVILEGE

One of the good things about interscholastic athletics is that it is a completely voluntary program. You are not obligated to take part in any interscholastic sport. Participation is not required for graduation nor do you need athletic credits for college entrance.

. . . .

However, even though interscholastics are voluntary, those participating do represent their student bodies. Therefore, the standards must be kept high. This includes academic requirements, school citizenship and sportsmanship. The dignity of your school program is reflected through Interscholastic Athletics which is why you and your teammates must conduct yourselves in a manner that is above question

Selection of candidates is necessary. It must not be based upon athletic performance alone, but also upon attitude, conduct, cooperation and an earnest and sincere desire to represent the student body in a manner which compliments the school and the community.

. . . .

As a result you find special standards for those who represent schools as members of interscholastic teams. It is not too much to expect an athlete to be a good school citizen.

. . . .

Because it is a privilege to represent a school in athletics, it follows logically the school or coach must have the authority to revoke the privilege when the athlete does not conduct himself in an acceptable manner. Not only does this responsibility exist while he is on the field, the court or the track, but good conduct shall be required of him/her at other times and most certainly while he/she is at school. As a member of the school team he brings attention to himself and to the student body. [emphasis added]

. . . .

INFRACTION PUNISHMENT

Unexcused absence from game or practice See student handbook for excused absences. Athlete or parent should call and notify coach as to reason for absence that same day.	Prior to first game: 1st offense - 2 day suspension 2nd offense - 1 week suspension 3rd offense - not eligible to earn an award
Fighting of being *ejected from a contest Abusive language or unsportsmanlike conduct of a flagrant nature.	After season starts: 1st offense - 1 game suspension (next game) 2nd offense - 2 game suspension (next games) 3rd offense - not eligible to earn an award

*N.J.S.L.A.A. Rules now make it mandatory that any student athlete disqualified from an interscholastic event for flagrant or violent verbal or physical misconduct (unsportsmanlike conduct) will be subjected to disqualification from the next regularly scheduled game or meet. In soccer, such penalty will include the coach'

7. C.D. was not happy when he learned that Frederick Powell would be coaching the j.v. soccer team, because two years earlier, when C.D. had been assigned to Powell's class for homeroom and social studies, in the first week of school Powell seated C.D. in a corner of the room because he talked to his friends too much. Powell did not change C.D.'s seat for the rest of the year. On another occasion, for a school bus trip, Powell seated C.D. in the front of the bus, away from his friends.

8. Powell has at least a hundred students in his classes each year and does not remember them unless they stand out due to behavior problems, excellence, or some other reason. When Powell saw C.D.'s name on the j.v. soccer list, he remembered the name as that of a student who had previously been in his classes, and he remembered only that C.D. had been an average student with no particular problems.

9. Powell had been told that C.D. had played midget soccer, but he had no knowledge that C.D. had special training or had played for years. Powell himself had played soccer in high school, but he had only coached for a year

and he did not hold a special license for coaching, since none is required for j.v. soccer by the Department of Education in New Jersey.

10. At practice before the season began, Powell did not discipline C.D. other than speaking to him, but he noticed that, although C.D. was a good player, he did not seem to care about the rest of the team. He was self-centered and would object if he did not like Powell's drills or instructions, whereas the other players did not verbalize objections and responded positively to instructions. C.D. "always had something to say" in response.

11. For the 1988-89 season, the NJSIAA gave notice that only the playing captain on the field would be permitted to speak to an official. This rule, among others, was announced by the officials at the beginning of each game. It was also announced by the coaches at the beginning of the season. At Williamstown High, both chief soccer coach Michael Hingston and Powell had previously adhered to this precept as a team rule, and they would never tolerate players' speaking to the officials in an argumentative way.

12. At the first game of the season, on September 16, 1988, C.D. and one other player reported in grey shorts instead of the required blue shorts, and they were benched for the first quarter.

13. During play in the first game, C.D. said to an official, "Excuse me, Mr. Referee, could you please watch the elbows?" He was yellow carded and temporarily removed from the game. After the game, the official told Powell that he could very easily have given C.D. a red card for offensive language.

14. C.D. had talked to officials one or two times while playing freshman soccer and he had not been yellow carded. He was aware of a general rule on talking to officials, but he believed it was not enforced and he could not recall having been told about any change for the 1988-89 season.

15. At the end of the first game, although Williamstown lost, Powell spoke to the team at the net about the behavior that was expected of them and the need to work as a team. Powell began to explain to C. that he was not allowed to talk to an official, but C. insisted he did have the right and would not let Powell finish. Powell told C. to go away and come back when he was ready to listen and get his attitude straightened out. C. told his parents about Powell's talk when he got home.

16. Powell spoke to head coach Hingston about C. Powell told Hingston that C. would not listen to him and that C. had problems following directions. Hingston said that he would talk to C.

17. Hingston spoke to the team as a whole and told them that they were not to speak to officials who might have made a mistake, but that they should prepare themselves for the next play instead. "Let the officials do their job and you do yours," he said. He told them that talking to officials was not acceptable in varsity play. Hingston observed C. "giggling and smirking," so he spoke to him individually. He warned C. that he would be dismissed from the team if he could not abide by the rules, but he also told C.D. that he was a good player and that he would be on the varsity team if he kept his nose clean. He told C. that C. had to demonstrate his ability to handle the situation in terms of his conduct on the field and with the officials. The talk had a positive effect, and this was reflected in the next several games.

18. Neither coach considered speaking with C.'s parents. Hingston felt that coaches could handle the problem. Powell had never met C.'s father and was therefore unaware that he attended the games. Powell also felt that since team membership was a privilege, not a right, the regular classroom disciplinary rules requiring parental contact did not apply. Both Powell and Hingston felt that team members should be treated like young men who are responsible for their actions.

19. Powell had no serious problem with C.'s conduct for the next several games and practices after Hingston's talk with C., but he had some concerns with repetitive, characteristic conduct. He felt that C. showed a lack of respect because he would not sit still and listen, but instead tended to make a mockery of Powell's team talks. Other team members, especially L.H., were following C.'s lead. Others had to be spoken to and Powell felt that team morale and philosophy were being undermined.

20. C.'s rationale for his conduct was that Powell didn't like his style of soccer because it was too aggressive. C. admitted that he was known to have a bad temper. He seemed proud of this. C. felt "frustrated" playing under Powell's direction.

21. On October 3, 1988, Williamstown played Pitman. Late in the first half there was a shouting match which nearly became a fight. One official, Larry Kuyler (sic), red carded two players.

22. Later in the game, official Michael Shaw observed C. charge into a Pitman player in the close, rough match. Shaw felt that C. had charged into the player maliciously and yellow carded him.

23. As C. walked off the field he said, loud and clear, "what fucking kind of call is this, man?" with his back to the official. D.R. said, "Be quiet, the ref heard you." C. replied "I don't care." The referee then said, "Here's your card. Get out of here." He handed C. a red card and C. said, "I don't believe this." Referee Shaw remembered the incident well because it was the only red card he gave out in 25 or 30 games.

24. After C. was red carded, he went to the bench area and continued to make loud comments that the officials were not doing their jobs. Powell told him to sit down. C. talked to one of the players' mothers, who was in the stands and she came down and yelled at coach Powell. She told C. that it was not his fault, and she said that the two officials would never referee for Williamstown again. After the game, Powell said he would talk to the team the next day.

25. A red card is given for flagrant or violent verbal or physical misconduct (unsportsmanlike conduct) under NJSIAA rules, and it disqualifies a team member for the game in which it is given and from the next regularly-scheduled game. This is a State rule which mandates a minimum penalty. It does not limit any penalty a coach may feel is appropriate under the circumstances.

26. That evening, after the game, Powell, Hingston and athletic director James Ranniello got together. Powell told them about the red card incident and they discussed C.'s continuing attitude problem and his history of misbehavior. Powell sought input from the others because he was fairly certain that C. should be dismissed from the team. Powell said that C. had been warned and that he had thought C.'s attitude had been improving but that the problem had started again and had worsened.

27. Ranniello and Hingston concurred that Powell would be justified in dismissing C. Ranniello said he would support the coach in dismissing C.D. It was his opinion that such action is up to the coach under the athletic contract and that it is not controlled by school disciplinary policy.

28. The next day, Ranniello and Powell spoke to the team about their conduct at the games. Two players were giggling and playing around during the talk. One of them was C.D. Ranniello told them to knock it off and pay attention.

29. Despite Ranniello's warning, C.D. continued to clown around by sitting in the net, giggling, and not listening while Powell spoke. Powell had intended to have a talk with C.D. after talking with the team, but C.'s conduct during the talk was the last straw. He concluded that C.'s general conduct and insubordinate attitude were such that more talk would not cure the problem. Powell was concerned about team morale, and he wanted to preclude the recurrence of unsportsmanlike conduct during the game. Powell told C. that he was tired of his conduct and directed him to clean out his locker and turn in his uniform.

30. C. mumbled, "I can't believe this" and went into the locker room, where he told J.K. J.K. said it was not fair and that C. should sue Powell. C. came back out and said to Powell, "I'll see you in court. You ain't jerking me around"

31. After C. was dismissed, Powell had no more problems with the team for the rest of the season.

32. Since C.D. did not think his dismissal was fair, he decided to talk to coach Hingston the next day and got on the bus with the team. He brought his father with him. Hingston told C. to get off the bus because he was not a member of the team. At first he refused, complaining that he was getting "jerked around."

33. On the same day, October 5, C.D.'s mother asked to meet with Alvin Greczek, principal of Williamstown High, who agreed to meet with her the next day. Ranniello and Hingston were present. R.D. argued that she should have been contacted first about any problem severe enough to merit dismissal and that she should have had an opportunity to correct it, since C. was only 14. She also stated that C.D. did not understand Hingston's warning of dismissal, but instead believed that Hingston was merely telling him that he would not make the varsity if he did not improve his conduct.

34. Greczek advised R.D. that the athletic contract contained an appeals procedure. After receipt of a copy, R.D. called Greczek and asked him to reinstate C.D. on grounds that the contract had no provision for dismissal. Greczek stated that he did not have the authority to reinstate a player.

35. R.D. filed her appeal, which was heard by the Athletic Appeal Committee on October 14. R.D. and her husband were not permitted to tape-record the meeting. The reasons given for C.'s dismissal were essentially the same as those given earlier: profanity directed at officials. Hingston recalled that the reasons given to the D.'s were C.'s general conduct, his lack of respect to officials and his insubordination to the coach.

36. R.D. subsequently asked Superintendent LaPorta to reinstate C. He had reviewed the action and found it appropriate, but he suggested that she could appeal to the Board of Education. The Board heard the appeal on October 18, considered the report of the Athletic Appeal Committee, and voted to uphold the dismissal.

37. The Board followed, in all substantial respects, its own Athletic contract appeal procedure as stated on a page attached to the interscholastic contract (P-2).

38. No student records and no records of the athletic department make any mention of C.'s dismissal from the soccer team. The only documentation concerning it are the documents used in this litigation, which can be destroyed after a final decision.

39. The High School Handbook contains a disciplinary policy which was adopted by the Board on August 18, 1987 (P-11, pages 1, 2 and 3; portions relied on by C.D. are highlighted). The manual lists types of behavior which will result in disciplinary action (P-11, next to last page). None of them specifically refers to interscholastic team infractions.

40. The disciplinary policy requires consideration of all pertinent facts, including individual behavior patterns, educational programs and home environment, and states that disciplinary action "shall always attempt to meet the following criteria.

A. Counseling is provided explaining what behavior is considered nonacceptable.

B. The action is fair to the individual in view of the nature of the offense.

C. The action is fair to all other students involved.

D. The action is fair with respect to the student body as a whole.

E. Proper notice is given as to what form of punishment to expect if the undesirable behavior is not corrected.

F. The disciplinary action is progressively stern.

G. The disciplinary action is commensurable to the value of the offense.

41. The procedures for teachers, as stated in the disciplinary policy, include conferences with the parents as a suggested first step, and the policy notes that minor offenses are not a legitimate reason to send a student out of the classroom or to the office. Administrators are given the duty to confer with parents when a student is sent to the office for continual misbehavior or for a major offense. Penalties are to be commensurate with the nature and seriousness of the offense, and include detention, conferences, demerits, out-of-school suspensions, and Saturday detentions. "Telephone calls, conferences and letters should be used to inform parents of their child's behavior as a preventative as well as an informative discipline measure." Reports must be filed and records of incidents kept (R-11, at 2-3).

42. The interscholastic contract infractions listed as "Fighting or being ejected from a contest" and "Abusive language or unsportsmanlike conduct of a flagrant nature" are written in such a way as to follow the NJSIAA rules (P-12). The contract does not reflect the November 1988 notice of NJSIAA's more severe penalties for the 1988-89 season; these new penalties required that a player disqualified from an event be disqualified from the next <u>two</u> regularly-scheduled games, rather than only from the next game. The Association document includes clarifications:

CL1 Flagrant is a glaring action by a player or coach which is excessive physical play or unacceptable conduct as adjudged by the game/meet official(s).

. . . .

CL4 . . . An official may not have a "change of mind" after the disqualification has been enforced; there is no such condition as "the act was not serious enough for

the player to be disqualified from additional game(s)."

. . . .

CL5 Disqualification is a judgement call; appeals/protests will not be considered under any circumstances.

CONCLUSIONS AND DISPOSITION

Petitioner argues that, because coach Powell is a teacher as well as a coach, he was at all times required to follow the procedures set forth in the Board's disciplinary policy and that he or Hingston violated that policy by warning the boy directly of a serious problem and by dismissing him without first contacting his parents and applying a less-stringent penalty. The Board's position is that the interscholastic athletic contract is controlling, that it is within the coach's discretion whether or not to contact parents, and that a special appeals process provides checks and balances.

A principle of law exists which strongly suggests the answer to the legal and factual question of which Board adoption applies. Smith v. Twp. of Livingston, 106 N.J. Super. 444 (Ch. Div. 1969), aff'd, 54 N.J. 525 (1969), holds:

> Where there is any conflict between a general and specific statute covering a subject more minutely and definitely, the latter will prevail over the former and will be considered an exception to the general statute.

The athletic contract specifically applies to extracurricular, interscholastic athletic team membership. The general school disciplinary policy does not address that activity. I need not base a conclusion solely on that principle of law, however. The entire context of the school disciplinary policy indicates that it was meant to address ordinary academic and classroom activities, as noted by its directives to teachers clarifying the proper times to send a child to the office and its definition of the responsibility of an administrator when such action has been taken. The broader view of the disciplinary policy contemplates circumstances in which education is a right rather than a privilege. On the other hand, the athletic contract signed by the D.s emphatically declares that team membership is a

privilege, not a right, and that a higher standard of conduct is required: "teammates must conduct [themselves] in a manner that is above question." I CONCLUDE that the contract is controlling.

Team membership is selective: it is based on "attitude, conduct, cooperation and an earnest and sincere desire to represent the student body in a manner which compliments the school and the community." The contract states that the school or coach has the authority to revoke the privilege when the athlete does not conduct himself in an acceptable manner. From the beginning of the season, coach Powell made it abundantly clear that C.D. had an attitude problem. C.D. had a habit of not listening. He heard Hingston's warning, just as he heard the officials' calls and the words of dismissal, but he did not want to understand them. Thus, he made remarks about the officials' calls and tried to get on the bus after having been dismissed from the team. Powell had no preconceived bias against C. He did not even remember the boy, except for his name. Whether or not C.D. was superbly skilled, whether or not coach Powell was inexperienced, and whether or not an official made a bad call are all completely irrelevant questions. The coaches and the athletic director believe that the educational purposes of interscholastic sports are best served by treating team members like young men responsible for their own actions. Team sports are inherently competitive, as is much of the real world. Not every boss is brilliant, experienced and appreciative of a worker's talents; not all coworkers are equally skilled. Notwithstanding such truths, appropriate responses to the leaders' directives, cooperation and sportsmanlike respect for those engaged in the joint enterprise are required for exemplary team action. In this philosophical context, the coach exercised his discretion reasonably when he dismissed C.D. without seeking contact with his parents to cure the problem.

The dismissal action was also reasonable, since the facts proved that C. had been addressed by Powell, then by Hingston, and finally by the athletic director, none of whom he listened to. At least two officials pronounced judgment on C.'s conduct on the field, but he would not accept their calls and still does not. He sees nothing inappropriate about stating to a referee, albeit politely, "Excuse me, Mr. Referee, could you please watch the elbows." In this statement, the 14-year-old j.v. team member was telling a referee how to do his job. The statement implied that the referee had missed a call. The

coach's observations of a continuing attitude problem were amply supported by the facts, right down to the final incidents when C. would not accept the fact of dismissal and got on the bus with the team. I do not believe that, had Powell spoken with C.'s mother, C.'s attitude would have changed. The problem appears too deep-seated to be solved with a few well-chosen words. A stronger response was needed and may be effective.

The athletic contract says very clearly that because team membership is a privilege "it follows logically the school or coach must have the authority to revoke the privilege when the athlete does not conduct himself in an acceptable manner." It does indeed "follow logically," and the argument that C. cannot be dismissed because the penalty list does not mention dismissal is without merit. C. was not dismissed because he was red carded, that is, because he used abusive language once and was disqualified. Such an infraction is covered in the contract penalties. Rather, he was dismissed for not conducting himself in an acceptable manner and for failing to meet the standards of selection which are clearly stated in the contract. I CONCLUDE that the penalty of dismissal was not arbitrary or unreasonable.

Petitioner argued that the procedures surrounding C.'s dismissal were violative of due process and that the school disciplinary policy was not followed. Petitioner's position is that sound educational policy mandates parent contact before disciplinary action. No one disputes that this is true with respect to substantial disciplinary actions in a classroom setting; it was for that reason that the Board adopted a disciplinary policy. Petitioner argues, however, that there must be notice and hearing, and that procedural due process protections apply to dismissal from a team. Several cases support the precept that participation in co-curricular activities in the public schools is a privilege and not a right: Dennis v. Bd. of Ed. of Holmdel, 1977 S.L.D. 388 (1977), and Leyton v. NJSIAA and Carteret Bd. of Ed., EDU 8764-83, (Feb. 14, 1984), aff'd, Comm. of Ed. (Mar. 30, 1984), are among them. The highest courts of other states have so concluded. (See citations in Leyton at 11 for Illinois, North Dakota and Oklahoma cases.) Petitioner's team membership depended upon his adherence to all rules and to the standard of conduct stated in the athletic contract. I have found that C. did not meet these standards.

The contract does not mandate parental contact before dismissal. The contract appeals process description is devoid of any provision for parental contact before penalty. Even when a student is penalized with a short suspension from regular classroom activities (less than ten days), due process requires only an informal proceeding. The student, not the parent, must be told what the charges are against him and, if he denies them, he must be given an opportunity to present his side of the story to the administrator. Oral statements to the student are sufficient. There need be no delay between the time "notice" is given and the time of hearing. Goss et al. v. Lopez et al., 419 U.S. 565 (1975). A Board of Education is not statutorily or constitutionally required to conduct a hearing in such cases. I have concluded that the athletic contract — rather than Board policy for disciplinary actions — applies. The contract requires no parental notice and opportunity to cure before action. An appeals process was provided and used. Furthermore, C.D. was given notice several times that his insubordinate attitude and speech were unacceptable.

The only remaining legal theory upon which the Board's action could be overturned is that of arbitrariness. Administrative actions by a Board of Education are accompanied by a rebuttable presumption of correctness. Quinlan v. Bd. of Ed. of North Bergen Twsp., 73 N.J. Super. 40 (App. Div. 1962). I have concluded that the action of dismissing C.D. from the team was not unreasonable or arbitrary, based on my findings of fact.

It is therefore **ORDERED** that the petition of R.D. on behalf of C.D. be **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.

DATE June 20, 1989

NAOMI DOWER-LABASTILLE, ALJ

JUN 22 1989

DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUN 26 1989

DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

ct

C.D., by his mother, R.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions are recited verbatim below:

> I hereby enter my objection to the "Initial Decision" for Dismissal of my petition in behalf of my son, on the following grounds:
>
> 1) Coach Powell testified he did not recall the very negative events of my son's experience in his class. As a teacher, he admitted that he was able to remember individual students who were prominent for some reason. As a teacher myself, I do not believe he would have forgotten a student who was seated in the corner of the room, away from the other students, facing the wall, for the entire year during twenty minutes of homeroom and fifty minutes of Social Studies on a daily basis.
>
> I find it incredible that his testimony of no recollection of this situation, or of conferences with me regarding it, was believed by the Court to be true.
>
> I contend this constituted bias on his part against my son.
>
> 2) During testimony, Coach Powell admitted only two incidents of difficulty which led to dismissal. He did not cite others as contributing factors. If they were in fact, that, my contention of deserving notification of difficulties is even more justifiable.

3) I object to the Court's assumption of me having coached the student witnesses in their answers. Had the Court inquired of them, or me, under oath, all three of us would have stated that no coaching or review of answers took place.

4) CD's manner of speaking does make it difficult for him to be understood. He is a mutterer. This I found supportive of his contention that the official most likely was unable to hear and/or understand what he said as he was walking off the field with his head down.

5) My belief remains that athletics, as a school-sponsored extra-curricular activity, ought to be governed by Board Policy, above and beyond the separate athletic contract. Further, that the individuals in charge of those activities are Board employees, responsible to the Board and are bound first by Board Policy, and second by the athletic contract. If the athletic contract does, in fact, supersede Board Policy, it should not.

6) If there were ongoing problems with my son, I deserved to be notified, whether such notification was stipulated in the contract or not. Common courtesy and concern for that "problem" student should have led someone to call me and request my assistance with the "problem."

7) The Monroe Township Board of Education, prior to this hearing, revised the athletic contract to include stipulation for parent notification (See attached). Had this type of contract been in place, or had I been notified of problems with my son, whether notification was specified by contract or not; my son, the team, the coach and the school would have gained far more from the 1988 Soccer Season.

I hereby request my petition be granted. (emphasis in text)

(Petitioner's Exceptions, at pp. 1-2)

The Board's reply exceptions are set forth verbatim below:

1. With regard to the alleged bias of Coach Powell, the Administrative Law Judge heard the testimony of all parties relating to that subject and in her findings of fact under paragraph 8 properly deals with the subject.

2. Again, respondent submits that the Court has properly dealt with the subject of Coach Powell's alleged bias.

3. The respondent asserts that the Court is fully able to state its opinion regarding the appearance of the witnesses testifying at the time of trial. In any event, the findings of the Judge and the conclusions and disposition do not contain any reference to the coaching of witnesses or reviewing of answers and, thus, petitioners argument is not relevant to the decision in this matter.

4. The Court has properly dealt with the issue in commenting on C.D.'s manner of speaking. In any event, the Court's findings and conclusions are appropriate.

5. The Court has properly dealt with the question of the Athletic Contract and its relation to Board policy. Respondent asserts that the Court's conclusions and disposition as to this issue [are] proper and should be upheld.

6. Petitioner's argument with regard to notification is, again, properly dealt with by the Court in its decision.

7. The Athletic Contract set forth by petitioner and attached to the exceptions is irrelevant and improperly brought forward at this time. It was not part of the exhibits at the time of trial and should not be considered.

Based upon the above, respondent asserts that the decision by Judge Naomi Dower-Labastille is proper and should be upheld.

(Reply Exceptions, at pp. 1-2)

Upon a careful and independent review of the instant matter, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law for the reasons expressed in the initial decision. In so doing, the Commissioner notes the absence of a transcript of the proceedings below, from which he might make credibility determinations different from those found by the ALJ. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987) Notwithstanding that fact, on the record before him, the Commissioner finds that petitioner's argument suggesting bias on the coach's part is pure supposition on her part, a search to place the blame for her son's intemperate actions upon someone else. It is clear from the record that the disciplinary actions taken against C.D. were because he demonstrated a recalcitrant, insubordinate, defiant attitude. In no way, then, can the Commissioner find a reason for declaring the Board's action in sustaining the coach's disciplinary measures arbitrary, capricious or unreasonable. In this regard, he concurs with the ALJ's findings as found in the initial decision.

As to the Board's policy concerning sports participation, it is noted that the Commissioner has not considered that athletic contract attached to petitioner's exceptions in that such document was not made an exhibit at the time of hearing and is, thus, inappropriately brought before the Commissioner by way of exception. Notwithstanding such finding, the Commissioner stresses that the Board's action in this matter was in no way violative of any due process or any constitutional right of parent or student, as explained by the ALJ. The fact that the Board may since have adopted a policy which calls for parental notification of disciplinary action related to sports participation does not serve to provide petitioner with any right or claim because no such notification right existed at the time of the Board's action against C.D.

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

COMMISSIONER OF EDUCATION

August 4, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7845-87
AGENCY DKT. NO. 312-10/87
OAL DKT. NO. CRT 3005-89
AGENCY DKT. NO. EQ06WE-25989-E
(CONSOLIDATED)

ROSEMARY ARAGONA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,
Respondent
and,
ROSEMARY CUNNINGHAM ARAGONA,
Complainant,
v.
BRICK TOWNSHIP BOARD OF EDUCATION, DR. ARAGONA, SUPERINTENDENT,
Respondents.

Jay G. Trachtenberg, Esq., for petitioner-complainant (Barbara A. Nyquist, Esq., on the brief)
Jay C. Sendzik, Esq., for respondents

Record Closed: May 12, 1989 Decided: June 23, 1989

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner-complainant (petitioner) alleges, among other things, that the action by the Board of Education of Brick Township (Board) to transfer her from the position of high school principal to the position of elementary school principal within the Board's school district was arbitrary, capricious and/or unreasonable and that she was unlawfully discriminated against because of her marital status and of her sex. Petitioner seeks an order from the Commissioner of Education (Commissioner) restoring her to her former position of high school principal together with, but not limited to, compensatory damages for economic loss, humiliation, mental pain and suffering. The Board answers the petition and complaint and sets forth seven separate defenses asserting, among other things, that petitioner's transfer was within the Board's managerial prerogative and in accordance with the laws of the State of New Jersey.

PROCEDURAL ASPECTS

On or about October 7, 1987, petitioner filed her Petition of Appeal before the Commissioner. The Board filed its Answer to the Petition and Separate Defenses on November 25, 1987. Thereafter, 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. On January 13, 1988, Wayne J. Oppito, Esq., consented to the substitution of Jay G. Trachtenberg, Esq., as attorney for petitioner. On January 27, 1988, a prehearing conference was held at which, among other things, the issues before the Commissioner were set forth by the parties and hearing dates were established for June 27, 1988 through July 8, 1988. It was also agreed that all discovery was to be completed on or before May 16, 1988. Petitioner failed to complete her discovery by the established date. The hearing dates of June 27 through July 8, 1988 were adjourned because of petitioner's failure to complete her discovery.

Hearing dates were therefore established for October 3 through October 31, 1988. Prior thereto, respondent filed a Notice of Motion for Summary Decision and Compelling Discovery. On October 3, 1988, the record was opened in the herein matter on respondent's motion. It was revealed that petitioner had failed to

complete her discovery, which was to have been completed on May 16, 1988. This tribunal entered an Interim Order dated October 4, 1988, wherein, among other things, the Board's motion was held in abeyance with regard to summary decision and granted with respect to compelling petitioner to complete discovery. In addition the Interim Order established ten hearing dates commencing in December 1988 and continuing into January 1989. Two additional days were added to the hearing schedule which concluded on January 25, 1989.

On December 29, 1988, petitioner filed an amended verified complaint before the Division on Civil Rights (the original complaint having been filed on December 9, 1987). Pursuant to petitioner's motion to consolidate the matters before the Commissioner and the Division on Civil Rights, the undersigned entered an Order to Consolidate, dated December 13, 1988, holding that the Commissioner had the predominant interest in the conduct and outcome. The Commissioner affirmed, by way of Decision on Motion dated January 19, 1989, and the Acting Director of the Division on Civil Rights concurred by letter dated January 23, 1989, that the matters should be consolidated and predominant interest lies with the Commissioner.

The parties requested and were granted leave to submit posthearing memoranda. The record closed on May 12, 1989, upon receipt of the last submission.

ISSUES

The issues to be determined at the prehearing conference were as follows:

1. Whether the Board's action to transfer petitioner from the position of high school principal to the position of elementary school principal was arbitrary, capricious and unreasonable and was made for reasons other then education and/or fiscal?

2. Whether the Board failed to give petitioner her *Rice** notice of its action to terminate as required under N.J.S.A. 10:4-12 of the New Jersey "Open Public Meetings Act"?

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* *Rice v. Union County Reg. H.S. Bd. of Ed.*, 155 N.J. Super. 64 (App. Div. 1977).

BACKGROUND FACTS

Based upon the testimony adduced at the hearing together with certain documents accepted into evidence, the following are backgrounds facts which are adopted, by reference, as **FINDINGS OF FACT**.

Petitioner, Rosemary Cunningham Aragona, is presently married to and living apart from Dr. Louis Aragona, Brick Township Superintendent of Schools. A divorce action is pending. Petitioner began her teaching experience as a second grade teacher in the Point Pleasant, New Jersey, public schools in September 1966 and remained until June 1969. She did not achieve a tenure status with the Point Pleasant Board. In September 1969, petitioner was employed by the Board to teach history at the Brick Township High School. In or about 1974, petitioner was awarded a Masters of Arts in Teaching (MAT) degree from Monmouth College.

In or about 1974, Louis Aragona was the Board's Director of Personnel and petitioner sought his advice with respect to career choices in the area of history and/or school administration and supervision. Upon the advice of Louis Aragona, petitioner enrolled in graduate courses in administration and supervision of the public schools at Monmouth College between 1974 and 1979.

In or about August 1979, petitioner was interviewed for the position of supervisor of Brick Township High School Social Studies Department by the then Director of Personnel, Phillip Pagano, High School Principal Bart Brooks and Assistant Superintendent Joseph Mayer. In August 1979, Louis Aragona was the Board's Superintendent of Schools, however, he did not interview petitioner for the supervisor position. Petitioner was the successful candidate and commenced the 1979-80 school year in the position of Supervisor of the Social Studies Department, grades 9 through 12, at Brick High School, the only high school in the school district at that time. In the early 1980's, about the 1981-82 school year, the Board opened its second high school, the Brick Memorial High School (Memorial). Petitioner divided her supervisory time between the two high schools with her office located at Memorial beginning in September 1983.

In June 1984, the job title of the high school supervisors was changed to vice principal. Petitioner was interviewed by Superintendent Aragona and Assistant Superintendent Mayer to elicit petitioner's preference as to the school to which she wished to be assigned. Petitioner requested that she be assigned as vice principal to Memorial High School because of her expertise in curriculum and also because Memorial principal James DeFabio requested her assignment. Petitioner was appointed by the Board to the position of vice principal at Memorial on July 12, 1984. On July 13, 1984, she had a meeting with DeFabio concerning her duties prior to DeFabio leaving for a vacation. DeFabio died of a heart attack on July 31, 1984.

Two vice principal's, James Wolfersberger and Gerald Bittenbinder, assumed the responsibility for the administration of Memorial as a consequence of DeFabio's untimely death. On a date not specified on the record, Superintendent Aragona summoned petitioner to his office to discuss the goals and objectives for Memorial High School. At that informal meeting, the Superintendent advised petitioner that he would consider her as the replacement of the deceased principal, DeFabio, at Memorial. Thereafter, petitioner, along with other interested candidates, was interviewed for the position of principal at Memorial by Superintendent Aragona and Assistant Superintendent Mayer. On August 30, 1984, Assistant Superintendent Mayer telephoned petitioner to advise her that Superintendent Aragona was to recommend petitioner for the position as principal of Memorial to the Board that evening. On August 30, 1984, the Board accepted the Superintendent's recommendation and appointed petitioner to the vacant position.

At the time of petitioner's appointment as principal at Memorial, there were no other female school principals' in the Board's employ. There were, however, four female vice principals; i.e., one at Brick High School, one at the Board's middle school and two at elementary schools in the district.

Messrs. Wolfersberger and Bittenbinder served as twelve month vice principals at Memorial. As a consequence of petitioner's appointment as Memorial principal, a vacancy for a ten month vice principal occurred. Petitioner conferred with the Superintendent and Assistant Superintendent Mayer with regard to the vacancy. In December 1984, George Rao was appointed to the ten month position of vice principal at Memorial.

During the 1984-85 school year, petitioner's professional contacts with the Superintendent increased as a consequence of her duties and responsibilities as a first-year high school principal. In the Spring of 1985, the relationship between petitioner and Superintendent Aragona changed from strictly professional where it became personal and social. The Superintendent invited petitioner to dinner and she accepted on two occasions in March 1985. The social and personal relationship between the two ceased and they maintained a professional relationship throughout the 1985-86 school year. In or about August 1986, the social and personal relationship resumed between petitioner and the Superintendent. Superintendent Aragona was approximately 45 years of age and divorced, with two grown children from the former marriage. Petitioner was approximately 42 years of age, single, and had never married. Petitioner lived with her widowed mother and younger sister, Maureen Cunningham.

Maureen Cunningham was an experienced classroom teacher with approximately 16 years experience with the Toms River Regional Board of Education in 1985-86. She had acquired tenure status and seniority rights with the Toms River Board. In or about September 1986, Ms. Cunningham resigned her Toms River position and commenced employment with the Brick Board as a classroom teacher.

On or about December 14, 1986, petitioner and Superintendent Aragona were married in a Roman Catholic Church in the State of New York. On or about January 9, 1987, petitioner left the marital home. Petitioner returned to her husband on or about January 12, 1987 and again left him on January 14, 1987 for a permanent separation. Petitioner returned to live in her mother's home.

Commencing on or about January 14, 1987, Superintendent Aragona filed a Complaint for Annulment and Summons against petitioner in Superior Court of New Jersey, Chancery Division, Family Part. There followed petitioner's Answer and Counterclaim for Divorce.

Petitioner continued to perform her professional duties and responsibilities in January and February 1987 until the latter part of February when she was admitted to a local hospital for surgery. Petitioner was discharged from the hospital in March 1987, some ten days following the surgery. Petitioner was on medical leave from her

duties until the latter part of March 1987, when she was permitted to resume limited duty at Memorial.

In or about March 1987, under advice from her then legal counsel, petitioner began to tape record certain telephone conversations made to her at her home. The majority of these taped conversations were as a result of telephone calls made to petitioner by Superintendent Aragona (P-15 through P-21 and R-1 through R-6).

On March 12, 1987, the Board adopted a resolution not to employ 21 nontenured teaching staff members, one of whom was Maureen Cunningham. The Board's secretary gave notice to Ms. Cunningham on March 17, 1987, pursuant to N.J.S.A. 18A:27-10, that the Board took the formal action not to renew her contract for the 1987-88 school year (P-30).

In or about April 1987, petitioner returned to full time duty at Memorial from her medical leave. She had little or no professional contact with Superintendent Aragona since their matrimonial separation. Superintendent Aragona assigned Assistant Superintendent Mayer and Board Secretary Stutts the responsibility for supervising petitioner and Memorial during the pending divorce action.

On May 15, 1987, Assistant Superintendent Mayer sent petitioner a memorandum wherein he criticized petitioner for removing a pupil's sculpture from exhibit at Memorial's main office (P-7). On May 26, 1987, petitioner respondent to Mayer setting forth her reasons for removing the pupil's art work. Petitioner asserted, among other things, that some staff members had remarked that the pupil's sculpture reminded them of the Superintendent (Aragona) and Deputy Superintendent (Warren Wolf) which, petitioner believed, were demeaning to the two men. Therefore, she had the sculpture removed from Memorial's main office (P-7).

Petitioner organized and supervised the Memorial graduation exercises for the pupils of the class of 1987. Subsequent thereto, Board member James Stites wrote a memorandum, dated June 29, 1987, to Superintendent Aragona wherein Stites criticized the lack of decorum at the Memorial graduation program by comparing it with the reserved and dignified manner in which the Brick High School

graduation was performed (P-10). Petitioner objected to Board member Stites' characterization and criticisms.

On March 13, 1987, petitioner was in receipt of her salary notice from the Board for the 1987-88 school year, effective July 1, 1987, in the amount of $54,915.00 (P-25).

Petitioner organized, scheduled and maintained the Board's summer school at Memorial during the month of July and part of August 1987. She requested, but was denied, the assignment of additional administrative staff to carry out this function (P-9).

On August 13, 1987, the Board approved the "Teacher Grade and Administrative Placement list for the 1987-88 school year..." This placement list, as incorporated by the Board's action, assigned petitioner to Memorial High School as its principal for the 1987-88 school year. In accordance thereto, petitioner attended an Administrative Council meeting conducted by Superintendent Aragona on August 26, 1987 (P-27).

On August 27, 1987, John J. Boyle, principal of the Board's Midstreams Elementary School, submitted a handwritten note to the Superintendent wherein Boyle tendered his resignation and retirement from the Board's employ, effective October 1, 1987 (P-3). Mr. Boyle had advised the Superintendent and Board Secretary but not the Board, the officials of the Teachers' Pension and Annuity Fund (TPAF) nor the Social Security System of his plan to retire prior to August 27, 1987.

On August 27, 1987, at approximately 11:15 a.m., Deputy Superintendent Warren Wolf telephoned petitioner at her office in Memorial High School requesting that she meet with him in the Special Service Office at Brick High School. Petitioner immediately went to Brick to meet with Wolf who informed her of Boyle's retirement. Deputy Superintendent Wolf advised petitioner that he had met with the Board's Personnel Committed and had subsequently talked with all Board members who agreed that petitioner should be transferred from Memorial High School to the Midstreams Elementary School. The Deputy Superintendent advised petitioner that her performance as Memorial principal was not at issue and that her transfer was effective as of September 4, 1987 (P-28).

On August 28, 1987, the Board met in special session at 6:30 p.m. at which it adopted a resolution accepting Boyle's retirement and approved the transfer of petitioner from Memorial High School to Midstreams Elementary School, effective August 31, 1987, at no change in her salary (P-2).

Petitioner reported for duty at Midstreams as directed by the Board and has continued to perform her responsibilities as principal there during the course of this litigation.

TESTIMONIAL EVIDENCE

Petitioner

Petitioner contends that prior to her marriage and separation from Superintendent Aragona she had established a good working relationship with the Board and the Superintendent. During her first year as principal at Memorial her goals and objectives were surpassed with a significant increase in Memorial pupil's High School Proficiency Test (HSPT) scores. She asserted that Memorial's HSPT scores continued to improve in the subsequent years she served as Memorial's principal. In addition, petitioner asserts that she was instrumental in causing changes in the school's English curriculum, acquiring additional computer terminals to be installed and the implementation of an intergenerational outreach program for senior citizens in the school-community. During the period in which petitioner served as its principal, Memorial was accredited by the Middle States Association of Colleges and Secondary Schools (Middle States). Petitioner asserted that her proposals concerning Memorial were well received by the Board and Superintendent.

Petitioner testified that subsequent to her separation from Superintendent Aragona, there was a dramatic change in her working relationship with the Board and the Superintendent. By way of example, petitioner proposed a change in the mathematic curriculum with a course in "Practical Mathematics" which, she asserted, was rejected by the Superintendent because he did not like the course title and believed it was inappropriate. In another situation, petitioner's recommendation of a candidate for the position of business department chairperson at Memorial was rejected in favor of another candidate. Petitioner refers to two criticism she received

as evidence of the change in her working relationship with the Superintendent and the Board; i.e., one incident involved petitioner's decision to remove a pupil's artwork from Memorial's main office for which she was criticized, and the other incident concerned Board member Stites criticism of the 1987 graduation exercises.

Petitioner avers that the Superintendent did not want her to be identified by his last name. She contends that as a consequence of her refusal to grant Superintendent Aragona an annulment of the marriage (rather than a divorce) the Superintendent attempted to avoid having petitioner's married name to be used in conjunction with the Superintendent's name. Among other things, petitioner refers to the Brick Memorial Booster Club which publishes seasonal sports schedules for the high school. The 1984-85 Winter and 1985 Fall sports schedules (P-13, 12) lists, among others, Superintendent of Schools - Dr. Louis Aragona and Principal - Rosemary Cunningham. The 1987 Spring Sports Schedule does not include the names of the Superintendent or the Principal (P-14). The Booster Club is not under the direct control of the Board or its agents. Rather, it is an adjunct or auxiliary organization providing support and services to the high school athletic programs. Petitioner refers to minutes of the Board dated June 4, 1987 (P-22) where petitioner's name, Rosemary Aragona, is not listed under the "A" column for approved payment vouchers but, rather, her name is with the "C" column, presumably for "Cunningham" petitioner's maiden name. Finally, petitioner asserts that subsequent to her transfer to Midstreams, she has been in receipt of mail from the Department of Education, Ocean County College and Ocean County Superintendent of Schools all of which is addressed to Miss Rosemary Cunningham, Principal-Midstreams Elementary School.

Petitioner asserts that beginning the day after their marriage her husband, Superintendent Aragona, threatened petitioner with bodily harm and threatened to cause a disaster or disruption on her job as Memorial's high school principal. She contends that Aragona repeatedly threatened to cause her sister, Maureen Cunningham, to lose her teaching position with the Board. Petitioner alleges that Superintendent Aragona made threats concerning her job on at least six occasions between the dates of December 15, 1986 and June 24, 1987. She contends that four of the alleged threats occurred prior to her admission to the hospital in February 1987. These threats, petitioner testified, were written after the fact, in a diary she kept where she described her "feelings." Although petitioner referred to these

diary entries during her testimony at the hearing; the diary was not in petitioner's possession at the hearing, nor was it offered as an exhibit.

Petitioner relies upon transcripts of the surreptitiously recorded telephone conversations between herself and Superintendent Aragona to support her claim of additional threats made to her by him. Superintendent Aragona was unaware that his conversations with petitioner were being recorded. Petitioner, with full knowledge that the conversations were being recorded, was in the position of directing the course, flow and topics of the discussions.

Petitioner testified at length as to her "feelings" and perceptions of Aragona's remarks to her. She asserted on the record that she perceived certain of the Superintendent's remarks to be threats to her job. She testified that no one was present when Aragona allegedly made threats to her except on January 12, 1987. On that occasion, petitioner's sister was present when Aragona was alleged to have said something to Maureen Cunningham which, petitioner testified that, "I took it as an indirect threat" to petitioner's continued employment with the Board (TR. January 6, 1989, p. 84, l. 23). Petitioner admitted that the Superintendent, on this occasion, said nothing to petitioner threatening her employment where she testified, "not to me directly. To my sister." (TR. January 6, 1989, p. 85, l. 3).

As to the taped conversations between petitioner and Superintendent Aragona, petitioner testified that at no time was her transfer or demotion of position ever mentioned or discussed.

Petitioner alleges that she has been reduced in salary as a consequence of her transfer from a high school principalship to the position of elementary school principal. She asserted that she had earned $51,365. pursuant to Board policy, during the 1986-87 school year, her last year of service as Memorial principal. Petitioner testified that she anticipated earnings of $54,915 for the 1987-88 school year as a high school principal and, in fact, earned $54,915 as an elementary school principal for the 1987-88 school year. Petitioner claims that she anticipated the salary of $58,065 for the 1988-89 school year as a high school principal while she was paid at an annual salary of $56,065 as an elementary principal for the 1988-89 school year. Petitioner claims that not only did she suffer a reduction in salary because of the Board's action to transfer her from a high school principalship but, moreover,

the impact of such salary reduction will be felt upon her retirement due to lower salary upon which the TPAF will compute her highest average salary.

The Board

The five members of the Board who testified in these proceedings deny that they conspired against petitioner in reaching the Board's decision to transfer her from Memorial to the Midstreams Elementary School. The Board members and school administrators who testified assert that Superintendent Aragona played no part in petitioner's transfer and had no reason to want her reassigned. The Board members testified that petitioner's and Superintendent Aragona's marital status played no role with regard to the Board's decision to transfer petitioner. Board president Robert J. Roblenski testified that when he learned of petitioner's and the Superintendent's separation and possible divorce, he adamantly informed Superintendent Aragona that the marital situation was not to become a school district problem, nor was it to impact upon the Board or become a Board problem. Board President Roblenski asserted that Superintendent Aragona assured the Board President that the Superintendent would remove himself from contact with Memorial High School and that he had directed Assistant Superintendent Mayer to assume the Superintendent's responsibilities of direct supervision over the school.

Board member William C. Readel testified, credibly, that he had concerns about petitioner in her position of principal of Memorial as early as 1984, prior to petitioner's marriage to the Superintendent. Readel asserted that he regularly attended school functions at Memorial and Brick high schools. While attending Memorial school activities he was often accosted by parents, pupils and members of the community who complained about petitioner and her administration of the school. Readel described petitioner as undignified, unfeeling, inflexible, intransigent and creating a prison-like atmosphere at Memorial where there was a lack of morale and spirit. Readel contended that the criticism of petitioner was of such a degree that because of it, he reduced his attendance at certain school sponsored events.

Board member Carol Benton testified, among other things, that during petitioners entire tenure as principal of Memorial, Ms. Benton received complaints from constituents who were not satisfied with the manner in which petitioner

handled problems. Ms. Benton concluded that petitioner needed to improve her interpersonal relationships and recommend to the Superintendent and Assistant Superintendent Mayer that petitioner became involved with an in-service program or other instruction to improve this area.

Board member Joan DeConde testified that her reasons for petitioner's transfer were because of the lack of student and staff morale and spirit at Memorial, coupled with the financial savings to be realized by the transfer.

Board member James Stites testified to a number of concerns he had with regard to petitioner and her administration of Memorial High School. Stites asserted that it was he who generated a memorandum critical of petitioner's handling of graduation exercises. This memorandum, P-10, was addressed to Superintendent Aragona who duplicated and forwarded a copy to petitioner. Petitioner complained that the criticism was unfair and unwarranted and that Stites did not discuss it with her nor did he respond to her calls concerning the event.

Board member Stites testified that the 1987 commencement exercises was the third such event he had attended under petitioner's supervision. He asserted that during the program the students were unruly and the students and parents were noisy to such an extent that those on the dais could not hear the proceedings. At one point, the students on opposite sides of the dais began to chant a popular beer commercial; i.e., alternately, "less filling"--"more taste." Stites was embarrassed, upset and distressed at this conduct because his daughter was a participant of the commencement and he had had relatives and family members in the audience. Stites was embarrassed for his community because the conduct at graduation reflected poorly on the school and the Board. He advised Board member Richard Williamson, that "if this occurs next year I will walk off the podium. It was under those conditions that I wrote the memo." (Tr. January 24, 1989, p. 16, ls. 23-25).

Board member Stites testified that he received a variety of complaints about petitioner's administration of Memorial; all of which he reported to the Superintendent. The complaints came from parents, students and staff members and included, among other things, petitioner's lack of cooperation with extracurricular activities; the attitude of the school was one of a convent; and low staff morale. He testified that the Board had made a mistake in placing petitioner as

the principal of the Memorial High School. Upon the retirement of Mr. Boyle, it appeared to Stites and other Board members that petitioner's strengths would be better served in an elementary principalship. Stites, who was the chairperson of the Board's Personnel Committee, recommend petitioner's transfer from Memorial to Midstreams based upon the proposition of financial savings and the best utilization of its staff. His recommendation was not affected by the marital situation between petitioner and the Superintendent.

The Board members who testified in these proceedings asserted that Superintendent Aragona vigorously defended petitioner when she was criticized by Board members. The Superintendent's defenses of petitioner was just as vigorous and supportive after their marital separation as it was prior thereto. Board member Stites testified that the Superintendent's attitude toward and defenses of petitioner, even when she was in error, created a conflict between the two men.

The Board asserts that it has experienced a savings of a minimum of $55,000 per year as a consequence of its action to transfer petitioner from Memorial to Midstreams. Upon Mr. Boyle's retirement, the Board transferred petitioner to Boyle's former position and transferred Daniel Regan from the position of Assistant Principal of Brick High School to the position of principal of Memorial. Subsequent to these transfers, the Board did not fill the position at Brick vacated by Regan, therefore, realizing an initial savings of $55,000 for the 1987-88 school year. By not filling the vacant position in subsequent school years, the savings to the Board is compounded by virtue of one less administrative salary together with other emoluments required to be paid by the Board.

FINDINGS OF FACT

Having carefully reviewed and considered the entire record in this matter and having given fair weight thereto; and having observed the demeanor of the witnesses as they testified before me and having assessed their credibility, I **FIND** the following **FACTS**:

Petitioner alleges that Superintendent Aragona threatened to cause a disruption or disaster on her job as principal of Memorial High School. Petitioner testified extensively with regard to these alleged threats by the Superintendent

contending that the threats commenced within twelve hours after their marriage. In support of petitioner's contention, she introduced into evidence, six tape cassettes of telephone conversations she held with her attorney, a Board member and Superintendent Aragona (P-15 through P-20). The Board member and Superintendent were unaware that their telephone conversations with petitioner were being tape recorded.

I have listened to a replay of all of the tape recordings. I **FIND** there is no basis in fact to support petitioner's allegations that Superintendent Aragona threatened to cause a disruption or a disaster to petitioner on her job as high school principal at Memorial. Too the contrary, I **FIND** that it was petitioner who was threatening to Aragona for the following reasons:

The telephone calls to petitioner by the Superintendent were for the purpose of resolving their marital problems. The Superintendent was seeking a reconciliation with petitioner or, alternatively, a divorce to end the failed marriage. Petitioner, however, insisted in one of the conversations that there would be no reconciliation or divorce until her sister's (Maureen Cunningham) job status was resolved. In another conversation, petitioner demanded job protection and security of the Superintendent in her position as Memorial high school principal which, Superintendent Aragona rightly asserted, he could not give. The "disaster" to which petitioner alleges the Superintendent asserts he would cause does not indicate that it had anything to do with petitioner's job but, rather, the "disaster" was to their personal lives as a consequence of the failed marriage.

I **FIND** no evidence of threats to petitioner or her job by Superintendent Aragona on the surreptitiously taken tape recordings of petitioner's and Aragona's telephone conversations between May 30, 1987 and July 11, 1987 (P-16 through P-21). I do **FIND**, however, that petitioner's behavior, as reflected by the tape recorded conversations, was threatening to the Superintendent through the withholding of a decision to reconcile or grant the divorce.

Petitioner admits, and I so **FIND**, that at no time did the Superintendent mention or discuss petitioner's transfer or demotion to another position in the school district.

I **FIND** there is no basis in fact to support petitioner's allegation that the Board and its administrators conspired against her as a consequence of her marital status. Petitioner, in particular support of this allegation, complains that Board member Stites criticism of the conduct of the 1987 graduation exercises was too harsh and unwarranted. Petitioner introduced into evidence three video tape recordings of commencement exercises for the classes of 1985 (P-45), 1986 (P-46) and 1987 (P-11). I have viewed the video tapes and concur with Boardmember Stites' assessment. A review of the evidence demonstrates a lack of proper decorum for such a ceremony where the student's procession is casual and undisciplined with many chewing gum, waiving their hands and talking. Throughout the entire proceedings there is a high level of noise emanating from the student body and audience. Many students are either talking or appear to be disinterested in the proceedings. In one segment of the video tape, petitioner can be observed in conversation with a boardmember while the commencement speaker is delivering his address to the graduates and audience. This total lack of respect for an invited guest as exhibited by the principal invites a similar behavior by the student body and cannot be condoned. Petitioner's conduct in this instance, together with the student's behavior at the 1987 graduation, warrant criticism. Boardmember Stites was genuinely embarrassed by the behavior exhibited at the 1987 graduation exercises. His testimony was credible with respect to his embarrassment for the Board, the community and family members who attended the event.

Petitioner's complaint that Boardmember Stites addressed his criticism of the 1987 commencement exercises (P-10) to the Superintendent rather than to her is without merit. Boardmember Stites followed the orderly procedure by making his complaint to the chief administrative offices of the school district who is vested with the responsibility of the overall administration of of the schools. Had Stites done otherwise; i.e., address his criticism directly to the principal, Stites could well be criticized for interfering in the orderly administrative process of the schools and of usurping the Superintendent's authority.

Petitioner complains that it was unfair of Assistant Superintendent Mayer to criticize her for her decision to remove a student's art work from the main office of Memorial. On May 15, 1987, Mayer addressed a memorandum to petitioner wherein he stated:

> Your decision to remove [G.D.'s] sculpture from the exhibit of students' art work displayed in the main office denied the student of an opportunity for deserved recognition.
>
> While I can appreciate your concerns about the reaction of staff members to the piece, I don't believe the future offended anyone to the extent that removal was warranted. The student put a great deal of time and effort into creating the caricature. It was only fitting that his work hang on display along with the other pieces of art that were entered in competition at the Teen Arts Festival at Ocean County College. Glen deserved such consideration.
>
> In the future please consider carefully the implications of such decisions before making them, particularly when they affect the best interests of students (P-7).

In her written response to Mayer's memorandum, petitioner's statement of her rationale was, in part, conflicting and contradictory where she said:

> Fact #2: This Principal was not concerned "about reactions of staff to the piece and at no time ever believed the figure **offended** anyone to the extent that removal was warranted."
> The rationale behind such removal was as follows:
> a. Main Office personnel brought to my attention that some staff members while signing out had remarked that the sculpture reminded them of Central Office Personnel--Mr. Wolf and Dr. Aragona. The piece dealt with a man's head and fist coming through a wall. I, then, made the decision to take the piece off the Main Office Wall....(P-7).

Petitioner asserts that she was not concerned about the reactions of staff members yet, her rationale to remove the student's artwork was brought to her attention by staff members who reacted that the sculpture reminded them of the Superintendent and Deputy Superintendent. Petitioner continues her rationale to explain that she was concerned that the remarks made by staff members, where others could hear, were demeaning to the Superintendent and Deputy Superintendent and that such comments could reflect adversely upon the student and his artwork (P-7).

The student artwork removed from the Memorial main office by petitioner was the only one of several student artworks on display. These student artworks had been in competition at the Ocean County Teen Arts Festival. Subsequent to

petitioner removing the student artwork of G.D., petitioner suggested that the sculpture could be exhibited in a conference room or the Art classroom. G.D., however, chose to remove his artwork from the school and take it home (P-7).

Under such circumstances, I **FIND** that the Assistant Superintendent's criticism of petitioner's action and decision to single out student G.D.'s artwork and remove it from a display where other student artwork was being displayed to be appropriate and within the scope of his authority.

Petitioner also complains that the actions of the Superintendent, Assistant Superintendent and Board to reject her recommendations for a mathematics curriculum course of study and department chairperson constitute a conspiracy against her because of her marital status. I **FIND** no basis in fact to support this allegation.

Assistant Superintendent Mayer reviewed the mathematics curriculum course of study proposed by petitioner and the Memorial Mathematics Department. The Assistant Superintendent assumed the proposed course "Practical Mathematics" was designed for 50 to 60 students. After discussions with petitioner and Mr. W. Dutton of the Mathematics Department, Mayer learned that the course was to be offered to 120-140 students. The Assistant Superintendent discussed the proposal with the Superintendent who shared the notion that the students should take the most challenging mathematics program. The two administrators believed that by offering the proposed course of study, the students would elect the easy course rather than the more challenging one. Therefore, the proposal was rejected.

Under such circumstances, I **FIND** the school administrators formed an educationally sound basis for its rejection of the mathematics course of study and does not constitute a conspiracy against petitioner because of her marital status.

I **FIND** there is no basis in fact to support petitioner's allegation that she either lost salary or was reduced in salary as a consequence of her transfer by the Board. The facts demonstrate that petitioner earned $51,365 for the 1986-87 school year as principal of Memorial High School. Prior to her transfer from Memorial to Midstreams in August 1987, petitioner was issued a salary notice stating that she would receive the amount of $54,915 as Memorial High School principal, pursuant to

the negotiated agreement between the Board and the Brick Township Association of School Administrators (BTASA) (P-25). The record clearly shows that subsequent to her transfer to the Midstreams Elementary School, petitioner suffered no reduction in salary but, rather, was paid at the rate of $54,915 for the 1987-88 school year. The 1987-88 salary was calculated by including all of the factors to which petitioner was eligible to receive as a twelve month high school principal; i.e., base salary by step on the salary guide, adjustment for twelve months position, longevity adjustment, etc.

The facts show that petitioner neither consulted with BTASA nor filed a grievance, as provided by the Agreement between the Board and BTASA, concerning an alleged loss or reduction in salary.

The facts also demonstrate that petitioner's salary as an elementary principal will be less than the salary of a twelve-month high school principal.

I **FIND** that the Board and its central administrative staff were aware of morale problems at Memorial among the faculty, staff and student body. Subsequent to petitioner's transfer from Memorial, morale improved significantly under the leadership of Memorial Principal Regan (R-7, R-8).

The herein record demonstrates and I so **FIND**, that petitioner's overall performance as Memorial principal was rated as "satisfactory." In the opinion of Assistant Superintendent Mayer, petitioner had a limited, task-oriented, parochial view of her job. Mayer was petitioner's evaluator who opined that she lack the vision for leadership in the role of high school principal. The record also discloses that petitioner was unable to accept criticism of her performance.

LEGAL ARGUMENTS

Issue #2. Whether the Board failed to give petitioner her Rice notice of its action to terminate as required under N.J.S.A. 10:4-12 of the New Jersey "Open Public Meetings Act"? (*Rice v. Union County Reg. H.S. Bd. of Ed.*, 155 N.J. Super. 64 (App. Div. 1977).

Petitioner's Position

Petitioner argues that her transfer to Midstreams Elementary School is voidable because the August 28, 1987 meeting of the Board, at which her transfer was approved, was held in violation of the Act, N.J.S.A. 10:4-6, et seq. Petitioner argues that the provisions of the Act require strict compliance and may not be satisfied by substantial compliance. *Polillo v. Dean*, 74 N.J. 562 (1977); *Precision Industrial Design Co., Inc., v. Beckwith*, 185 N.J. Super., 9 (App. Div. 1982) cert. den. 91 N.J. 545; *Dunn v. Mayor and Council and Clerk of Borough of Laurel Springs*, 163 N.J. Super. 32 App. Div. 1978).

Petitioner cites N.J.S.A. 19:4-9a., which provides in pertinent part that:

> Except as provided by subsection b. of this section, or for any meeting limited only to consideration of items listed in section 7.b. [section 10:4-12b] no public body shall hold a meeting unless adequate notice thereof has been provided to the public.

The "adequate notice" that is required by N.J.S.A. 10:4-9a is defined in N.J.S.A. 10:4-8d. as:

> .....written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and (3) filed with the clerk of the municipality when the public body's geographic boundaries are coextensive with that of a single municipality,.....

Petitioner observes that the Board minutes of the August 28, 1987 meeting recite that the Board caused notice of the meeting to be published in accordance

with the Act (P-2). The Board's minutes state that notice of the meeting to be published as to the date, time and place was posted on August 26, 1987 at the Board Office bulletin board, Asbury Park Press, Ocean County Times-Observer, Municipal Clerk and the Brick Town News.

Based upon this representation appearing in the Board's minutes, petitioner observes that at least facially, the August 28, 1987 Board meeting complied with the Act. However, petitioner refers to P-33, which is a letter from the Advertising Director of the Ocean County Observer who states, in response to a subpoena duces tecum, that "...no legal advertising was placed regarding this matter." (P-33). Petitioner also refers to P-32 in evidence which is a reproduction of the Public Notice which appeared in the Asbury Park Press, dated August 28, 1987, and included the advertisement of the Board's special meeting called for 6:30 p.m., August 28, 1987.

Petitioner asserts that the Board's failure to present any evidence that the 48 hour advance notice of the August 28, 1987 special Board meeting was given to at least two newspapers designated by the Board as required by N.J.S.A. 10:4-8d. and 10:4-9a, leaves this tribunal with no option but to find that the August 28, 1987 Board meeting violated the New Jersey Open Public Meetings Act. Petitioner contends that even the notice to the Asbury Park Press was not in compliance with the Act. She argues that when a public body knows that a newspaper cannot publish a notice at least 48 hours in advance of the meeting, there is no compliance with the Act. *Worts v. Mayor and Council of Upper Twp.*, 176 N.J. Super., 78 (Ch. Div. 1980). Petitioner asserts that her transfer to the Midstreams Elementary School, as a consequence of the Board's action at that August 28, 1987 meeting, is voidable because there was no valid notice of the meeting in violation of the Act.

Petitioner argues that the retirement of Mr. Boyle as principal of Midstreams did not create a matter of such urgency and importance that a short delay for the purpose of providing 48 hour adequate notice, as defined in N.J.S.A. 10:4-8d. would likely result in substantial harm to the public interest. Mr. Boyle's retirement was not effective until October 1, 1987. The Midstreams school would not be without a principal when the 1987-88 school year started. The determination of whether the exigencies of the situation justify the failure to comply with the adequate notice provisions of the act must be determined in light of the reality of the situation and

not just the mere appearance of an emergency. *Jenkins v. Newark Bd. of Ed.* 166 N.J. Super. 357 (Law Div. 1979), aff'd. 166 N.J. Super. 300 (App. Div. need year 1979).

Petitioner contends that in the event of an emergency Board meeting without adequate notice being given, N.J.S.A. 10:4-9b(3) requires that the notice to the two newspapers required by N.J.S.A. 10:4-8d is to be given by telephone, telegram or by delivery by hand. The Board's failure to provide even untimely notice of the meeting to two newspapers violates N.J.S.A. 10P:4-9b, which applies to emergency meetings held without public notice. Petitioner argues that even if the Board is successful in alleging that its August 28, 1987 meeting was indeed an emergency meeting not requiring "adequate notice," said meeting does not comply with the provisions of N.J.S.A. 10:4-9b(1) or (3). Petitioner's transfer which occurred at that meeting is, therefore, voidable under the provisions of the Act.

The Board's Position

The Board moves for summary decision with regard to Issue #2, asserting that no "Rice" violation occurred. It seeks to dismiss petitioner's Count Two in its entirety.

The Board cites N.J.S.A. 10:4-12 which states, in pertinent part, that:

> a. Except as provided by subsection b. of this section all meetings of public bodies shall be open to the public at all times. Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public of any meeting.

The Board asserts the statute goes further allowing the public body to exclude the public in certain matters. Specifically relevant to the instant matter is subsection b (8) of N.J.S.A. 10:4-12, the personnel exception, which provides:

> (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely

> affected request in writing that such matter or matters be discussed at a public meeting.

The Board relies upon the matter in *Rice v. Union County Regional High School Bd. of Ed.*, 143 N.J. Super. 64 (App. Div. 1977) where the Court dealt specifically with N.J.S.A. 10:4-126(8) and an employee's right to have discussion of their employment held in open public session. The Court observed, at 73, that:

> The plain implication of the personnel exception to the New Jersey Open Public Meetings Act is that if all employees whose rights could be adversely affected decide to request a public hearing, they can only exercise that statutory right and request a public hearing if they have reasonable advance notice so as to enable them to (1) make a decision on whether they desire a public discussion and (2) prepare and present and appropriate request in writing.

The Board contends that the so called "Rice" notice is merely a notification to an employee that the public body will discuss the employee in closed session unless the employee requests the discussion to be held in public. It asserts that no evidence was presented in this case to demonstrate that the Board discussed its action in closed session relative to petitioner's transfer. The Board minutes of its August 28, 1987 meeting makes no reference to a resolution for the Board to retire into closed session. In addition, the affidavit of Robert Stutts, Business Administrator/Board Secretary dated May 31, 1988, affirmatively asserts that the Board's discussion and action was conducted in open public session.

The Board now observes that petitioner presented evidence at the herein hearing alleging a 48 hour notice violation, contrary to N.J.S.A. 10:4-9; an entirely different issue than the alleged *Rice* violation raised in her Petition of Appeal and as set forth in the prehearing order. The Board contends that the alleged 48 hour notice violation was not an issue raised nor agreed to by the parties and did not appear in the Prehearing Order dated February 2, 1988. Nor, the Board observes, did petitioner seek to amend her pleadings to allege a 48 hour notice violation. The Board argues that the pleadings cannot be deemed to conform to this unexpected evidence due to the numerous and strenuous objections advanced by it.

The Board asserts that it is important to note that the petitioner originally alleged not that there was no public notice but, rather, that petitioner received no

notice. The only notice she was entitled to was a Rice notice if the meeting had been held in closed session. The evident intent of her pleading was crystallized in the Court's pretrial order. It would be improper to determine issues not raised by the petition. *A.A. v. Freehold Regional High School District*, OAL DKT. NO. EDU 6027-85 (February 10, 1985), aff'd. State Board July 2, 1986.

Had the Board been prepared to meet petitioner's new legal approach, it argues, several defenses might have been developed. First of all contrary to petitioner's conclusion, the Board is not required to request a newspaper to publish notice and does not request them to do so. Rather, the Board merely notifies the newspaper of its meeting. The decision to publish is strictly up to the newspaper. This is perhaps the reason the Ocean County Times-Observer had no ad placement or request to publish notice of the August 28, 1987 meeting. The Asbury Park Press apparently published notice on August 28, 1987. This again does not end the inquiry. The term "adequate notice" as used in N.J.S.A. 10:4-9 is defined in N.J.S.A. 10:4-8 in pertinent part as follows:

> "Adequate notice" means written advance notice of at least 48 hours giving the time, date, location and, to the extent known, the agenda of any regular special or scheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one place reserved for such or similar announcements, (2) mailed, telephoned telegrammed, or hand delivered to at least two newspapers...."

The Board contends that nothing in the law requires that there ever be actual publication. In *Houman v. Pompton Lakes*, 155 N.J. Super. 129, (Law Div. 1977), the Court interpreted "adequate notice" to mean that the public body merely post the notice in a public place and transmit the notice to the newspapers at least 48 hours in advance of the meeting. 155 N.J. Super. at 167. In another lower court decision, *Worts v. Mayor and Council of Upper Township*, supra., the Court took a slightly different approach holding that notice to the newspapers must be given in such time that the same could be published 48 hours in advance. While the respondent believes the interpretation in *Houman* is closer to the statutory language, neither case requires publication at all.

In the present matter, there are no proofs as to how much notice the papers needed to publish 48 hours in advance of the meeting, so it cannot be said that the Board failed to comply. In any event, all the evidence on this issue is hearsay. Absent some residuum of non hearsay evidence, this Court cannot make a finding of fact on this issue. See *Webster v. State*, 60 N.J. 36, 51 (1972).

Another defense the Board might have presented is the fact that prior to petitioner's second year, the Board took official action to assign her as principal of the Midstreams School. This second act remedies any defect in the first. A violation of the Open Public Meetings Act is only voidable not void, and a subsequent ratification relates back to earlier actions. *Houman v. Pompton Lakes*, 155 N.J. Super. 129, (Law Div. 1977). This also affects any remedy the Court may wish to grant. Petitioner lost no salary upon her initial transfer. Her only claim of loss is the result of lower increases in subsequent years. The Board approved her assignment in subsequent years. There is no showing that the subsequent acts were defective. As to the initial transfer, there was no loss of salary and therefore no salary can be awarded.

A final defense of the Board is the Statute of Limitations. Since petitioner never raised the issue of a failure to provide 48 hours notice until the hearing, she is barred by the 90 day limitations period. *Voll v. Board of Education of the Village of Ridgewood*, OAL DKT. NO. EDU 2772-85 (April 14, 1986).

In conclusion, the Board argues, the Court cannot find a violation of *Rice* nor a violation of the 48 hour notice requirement for the reasons state above.

DISCUSSION AND CONCLUSIONS
ISSUE #2

The evidence with respect to the alleged *Rice* notice violation demonstrates, among other things, that Mr. Boyle submitted a handwritten letter of resignation to the Superintendent on Thursday, August 27, 1987, effective October 1, 1987 (P-30). The Board met in special session on August 28, 1987, at which it accepted the retirement of John Boyle on the effective date of October 1, 1987 and approved the transfer of petitioner from Memorial to Midstreams, effective August 31, 1987 with her appointment as principal of Midstreams effective October 1, 1987 (P-2). The

Board minutes of August 28, 1987 special meeting also reflects that pursuant to the Open Public Meetings Act, it caused notice of the August 28, 1987 meeting to be published as to time, date and place posted on August 26, 1987 on the Board Office Bulletin Board, Asbury Park Press, Ocean County Times-Observer, Municipal Clerk and Brick Town News (P-2).

The Board's Business Administrator/Board Secretary asserted, under oath, that the special Board meeting held on August 28, 1987 was duly advertised pursuant to the Act (Affidavit of Robert K. Stutts, sworn and subscribed May 31, 1988). The affiant further asserts that the August 28, 1987 special Board meeting was not a closed session and that any and all discussion and/or actions taken by the Board relative to petitioner was conducted in open public session.

Petitioner presented evidence that no legal advertisement was placed with the Ocean County Observer regarding the August 28, 1987 special Board meeting (P-33). Petitioner presented evidence that the advertisement for the August 28, 1987 meeting appeared in the August 28, 1987 edition of the Asbury Park Press, Public Notices section (P-32).

The facts also demonstrate that the Board, its agents and Mr. Boyle were engaged in continual negotiations during the first part of the last week of August 1987. Mr. Boyle sought a favorable payment for his unused accumulated sick leave and continued health insurance benefits for himself and his wife subsequent to his retirement and up until the time he attains the age of 65 years. The negotiations were fruitful as evidenced by the Board's resolution to reimburse Mr. Boyle for his unused sick leave and provided him with the health insurance program he requested (P-2). The facts further demonstrate that the Board had, prior to 1987, engaged in negotiations for the early retirement of other of its school administrators for the purpose of saving tax dollars in the then present as well as future budgets.

The arguments of the Board are more persuasive, and supported by case law, than the arguments set forth by petitioner. First, as the Board observes, petitioner failed to set forth her position concerning the issue of the alleged violation of her "Rice" notice. As the Board argues, the "Rice" notice is triggered when the public employer intends to discuss the public employee in a closed session, under the N.J.S.A. 10:4-12 exception, and the employee is given the opportunity to request

that the discussion be held in open public session. In the instant matter, the Board acted in open public session with respect to all resolutions under consideration by it on August 28, 1987. There was no resolution or motion by any member present for the Board to go into closed session on August 28, 1987. Mr. Boyle's retirement and petitioner's transfer from Memorial to Midstreams was acted upon by the Board in open public session.

I **CONCLUDE**, therefore, given the facts of this matter, petitioner has failed to demonstrate affirmatively and by a preponderance of the credible evidence that the Board did commit a "Rice" violation when it discussed and considered petitioner's transfer in open public session on August 28, 1987.

I **CONCLUDE** that petitioner has failed to establish the truth of Issue No. 2, as set forth in the prehearing order, and, therefore, it is **DISMISSED**.

As the Board observes, in her brief, petitioner shifts attention from the alleged "Rice" notice violation, which is the stated issue to be resolved by this tribunal, to a non-stated allegation that the Board committed a violation of the 48 hour notice, contrary to N.J.S.A. 10:4-9. The herein record demonstrates that petitioner failed to amend her pleadings pursuant to N.J.A.C. 1:1-6.2 or the New Jersey Court Rules, R. 4:9-2. Notwithstanding petitioner's failure to amend and the Board's vigorous objections which places it at a distinct disadvantage, this tribunal is constrained to address the allegation.

The herein record shows that early in the last week of August 1987, Boyle was negotiating the terms and conditions for his voluntary early retirement with the Board's administrative staff. The Board's minutes of its August 28, 1987 special meeting specifically states that in accordance with the Open Public Meetings Act the Board caused notice of its meeting to be published on August 26, 1987 by having the date, time and place of the meeting posted at the Board Office Bulletin Board, Asbury Park Press, Ocean County Times Observer, Municipal Clerk and Brick Town News (P-2). Petitioner produced evidence that the meeting was advertised in the Asbury Park Press on August 28, 1987 (P-32). Petitioner also produced evidence that the August 28, 1987 special Board meeting was not published by the Ocean County Observer (P-33). However, the evidence does not show whether or not the Board requested the notice to be placed in the newspaper. Petitioner's evidence merely

shows that an ad was not published. Similarly, petitioner produced no evidence as to the posting of the notice at the Board Office Bulletin Board, the Municipal Clerk or the Brick Town News. Nor did petitioner produce any evidence as to the method the Board communicated with the news media. In the matter of *Houman v. Pompton Lakes*, 155 N.J. Super. 129 (Law Div. 1977) the court said, among other things, that "it is...reasonable to conclude that, once a public body has given 48 hours advance notice to the newspapers, it has made all reasonable effort to notify the public." Id. 167. The Court continued to state:

> The public body should not be penalized because a newspaper, over which it has no control, has failed to fulfill its civic duty to publish the public notice. The Court assumes that these considerations motivated the Legislature to only require 48 hours advance notice to the newspapers. 155 N.J. Super. at 167.

The *Houman* Court found support for its conclusions in the statement accompanying *Assembly Bill* 1030 and the New Jersey Department of State's *Guidelines on the Open Public Meetings Law*. Id. 167, 168. In accordance thereto, the *Houman* Court additionally concluded that "actual publication of the notices in the appropriate newspapers is not required by N.J.S.A. 10:4-8(d)."

I **CONCLUDE** that petitioner has failed to produce sufficient evidence for this tribunal to make a finding that the Board violated the Act's 48 hour requirement. N.J.S.A. 10:4-8(d); N.J.S.A. 10:4-9(a).

I **CONCLUDE**, therefore, that petitioner has failed to prove, by a preponderance of the credible evidence, that the Board violated the 48 hour notice requirement of the Act. Consequently, this allegation is **DISMISSED**.

Issue #1 Whether the Board's action to transfer petitioner from the position of high school principal to the position of elementary school principal was arbitrary, capricious and unreasonable and was taken for reasons other then education and/or fiscal?

Petitioner's Position

By virtue of her having filed a complaint against the Board and its Superintendent with the Division on Civil Rights, petitioner seeks to expand and modify the stated issue to include various job-related actions which the Board directed towards petitioner. Including but not limited to her transfer to Midstreams, petitioner claims the actions were arbitrary and capricious based upon her sex and/or marital status, contrary to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

Petitioner argues, among other things, that she has made out a prima facie case of discrimination based upon sex and her marital status by virtue of the facts which establishes that she was the only female principal in the Board's school district (sex) and that she was the only principal married to the Board's Superintendent (marital status). She submits that under the rule set down in *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55 (1978), petitioner is a female; i.e., a member of a protected class under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. As the only woman principal in the school district, petitioner was transferred from Memorial to Midstreams while all of the remaining male principals remained in their previously assigned positions. This, coupled with Deputy Superintendent Wolf's admissions that he never considered anyone for the position at Midstreams and that petitioner's academic credentials played no part in his determination to transfer her, compels a prima facie finding that petitioner was transferred because of her sex.

Similarly, petitioner argues, the facts established on the record make a prima facie case of discrimination against her because of her marital status. Petitioner contends that she was the only member of the Board's staff married to Superintendent Aragona. She was transferred to the position of principal of Midstreams while all other qualified personnel, none of whom were married to Superintendent Aragona, remained in their previously assigned positions. Here again, she contends, Wolf's admission that he did not consider anyone else for the position and that her academic credentials played no part in his determination to transfer her, compel a prima facie finding that petitioner was transferred because of her marital status.

Petitioner asserts that her transfer was merely one in a long line of discriminating actions that the Board and/or its employees directed toward petitioner because of her sex and/or marital status. She contends that simultaneous with her separation from Superintendent Aragona in January 1987, her recommendations began to be rejected by both the Superintendent and the Board; i.e., the curriculum proposal for the introduction of a "practical" mathematics course and a candidate for the position of business department chairperson at Memorial. She avers that this was the first time any of her staff recommendations had been rejected by the Board. Petitioner enumerates the alleged offenses and contends: That she was not provided with sufficient administrative help to conduct the 1987 summer school; That Board secretary Robert Stutts was assigned by the Superintendent to spy on her at Memorial and report back to the Superintendent; That the Superintendent had commandeered her Memorial office while she recuperated from surgery; That the Superintendent instructed Assistant Superintendent Mayer to investigate and criticize petitioner regarding her decision to remove a student's art work from display; That Board member Stites refused to respond to petitioner's calls to discuss Stites complaints concerning his criticism of the 1987 graduation exercises; That the Superintendent made a concerted effort to prevent petitioner's name from appearing in any kind of conjunction with his own name; among other allegations.

Petitioner argues extensively that the circumstances concerned with Mr. Boyle's retirement is suspect. She asserts that the inconsistency of the testimony of Board members and Board employees regarding the sequence of events of the week of August 24 (Monday) through August 28 (Friday) 1987 leads her to the conclusion that the mechanics and timing of the retirement happened in a way other than that alleged by the Board. Petitioner concludes that the terms of Mr. Boyle's retirement were agreed to prior to August 25, 1987 and that Boyle's submission of his resignation on August 27, 1987 constitutes almost incontrovertible evidence that Boyle was fully aware that the Board had agreed to his terms prior to his submission of his resignation. Petitioner alleges that "someone pulled some highly placed strings" to assure that Boyle's retirement application was approved by October 1, 1987, in order that Mr. Boyle lost no pay between the time he retired and the time his pension payments started (petitioners brief, not paginated). This assured Boyle's immediate retirement and provided a vacancy to which the Board could transfer

petitioner. The transfer, petitioner contends, is consistent with a pattern or arbitrary and capricious harassment of petitioner.

Petitioner, argues, among other things, that she was harassed on the job in response to the institution and the attempted prosecution of a divorce action by her against Superintendent Aragona. She contends that the Superintendent actually used his position of authority to remove her sister, Maureen Cunningham, from her teaching position as he had threatened to do. Petitioner further contends that Superintendent Aragona actually used his position and influence over his staff and with the Board to get them to continually, arbitrarily and capriciously harass petitioner on his job because of her sex and/or marital status.

Petitioner argues that Superintendent Aragona is the only individual who has knowledge of the truth or falsity of her allegations and, further, that he is the only person who could illuminate this tribunal regarding these matters. However, petitioner observes, Aragona opted not to testify at these proceedings notwithstanding his availability to testify. Because the Superintendent is a named party to these proceedings, petitioner argues that his failure to testify gives rise to a legal presumption that petitioner's allegations are in fact true. *State v. Clawans*, 38 N.J. 162, 170-171 (1962); *Van Bernum v. Van Bernum*, 140 N.J. Eq. 413, 416 (E. & A. 1974); *Robinson v. Equitable Life Assurance Society*, 126 N.J. Eq. 242, 247 (E. & A. 1939); *Wratchford v. Millburn Twp.*, 105 N.J.L. 657, 658 (E. & A. 1928).

The Board's Position

The Board observes that petitioner does not specifically address Issue #1 as set forth in the Prehearing Order. Respondents, therefore, consider the issue to have been abandoned by petitioner, however, they offer the following arguments in the event this tribunal wishes them to be addressed.

The Board observes that pursuant to N.J.S.A. 18A:25-1, Board of Education are conferred broad powers and authorities to transfer or reassign staff members. *Colella v. Elmwood Park Board of Education*, 1983 S.L.D. 149, 153. This power is an inherent managerial responsibility. Id.; *Downs v. Hoboken Board of Education*, 12 N.J. Misc. 345 (Sup. Ct. 1923), aff'd. Sub. Nom. *Fletcher v. Hoboken Board of Education*, 113 N.J.L. (E. & A. 1934); *Cheeseman v. Gloucester City*, 1 N.J. Misc. 318,

(Sup. Ct. 1923). Not only is a Board so empowered but it is under a "duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education." *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, 78 N.J. 144, 156 (1978).

"The power of a Board of Education to transfer teachers is limited only to the extent provided by the tenure law." *Howley v. Ewing Township Board of Education*, 1982 S.L.D. 1328, 1339. No violation of the tenure laws are alleged in this matter. The petitioner's claimed loss of future salary is likewise of no moment as she has no vested right in any future salary increases. This much was established in *Williams v. Plainfield Board of Education*, 176 N.J. Super. 154, 162 (App. Div. 1980) wherein the Court noted that a reduction in salary expectancy has no bearing on the validity of a transfer. The *Williams* case, as in the case at bar, involved the transfer of a tenured high school principal to an elementary principal position. In light of the *Williams* decision, it is certainly questionable as to whether the petitioner has suffered any cognizable harm even were she to prove her claims and allegations.

The petitioner bears a heavy burden of proof relative to her claim that the Board's transfer of her to an elementary position was arbitrary and capricious and therefore must be invalidated.

> For a teaching staff member who is transferred to establish that underlying reasons for such an action are improper or illegal requires substantial proof that the Board acted in a manner which was illegal or improper, and to be exclusion of all other bona fide reasons. *Bradley v. Freehold Borough Board of Education*, 1976 S.L.D. 591, 600 accord, *McQuillan v. Ocean Township Board of Education*, OAL DKT. NO. EDU 8629-82, Sept. 26, 1983.

In *McQuillan v. Ocean Township Board of Education*, OAL DKT. NO. EDU 8629-82, (September 26, 1983), the Court interpreted the above language as follows:

> Thus, according to the Commissioner, a petitioner claiming that he was wrongfully transferred has a two fold burden: first, he must demonstrate, by substantial proof, that the transfer was improper or illegal. Second, he must also demonstrate that no other valid reasons existed for the transfer. This, obviously is a substantial burden. Id. (Slip opinion at 17).

Likewise, in *Bigart v. Board of Education of the Borough of Paramus*, 1979 S.L.D. 123, the Court observed:

> In our system of jurisprudence, petitioner has the burden of proving that the underlying reasons for the Board's actions are improper. Such an allegation requires substantial proof that the Board acted improperly to the exclusion of all other bona fide reasons. Id. at 133.

The burden to exclude bona fide reasons for a transfer is an element of proof to be carried by the petitioner. This the petitioner has not done. Petitioner has done little more than rely on inference and innuendo to support her claim of improper activity. In this regard, it is important to evaluate petitioner's inferences and innuendoes in light of her overall inability to accurately perceive events. Her perceptions are apparently heavily clouded by her personal problems with Superintendent Aragona. This was graphically displayed in her testimony regarding alleged tape recorded threats made by Superintendent Aragona. In no instance could the petitioner point to what reasonable people would consider "job threats" despite her volumes of transcribed tape recordings. These recordings were made with the Superintendent's knowledge and petitioner was given ample time to cull through her transcripts at the hearing. The result was that the petitioner pointed out all manner of innocuous materials and claimed them to be job related threats.

This has to be balanced against the testimony of five Board members and six administrators who gave ample reasons for her transfer or set forth the factual circumstances related to it.

The Board asserts that the only attempt to rebut it's case was the petitioner's self serving testimony about her accomplishments. Unfortunately, no one was of the opinion that her efforts as high school principal were unacceptable. Had that been the case, this matter might have been a tenure hearing. The Board's action in this matter was directed toward benefiting the entire district. The wisdom of that action is the Board's determination and is not committed to the Commissioner of Education. See *Popovitch v. Board of Education of the Borough of Wharton*, 1977 S.L.D. 440. Moreover, the Board's action must be accorded a presumption of correctness. *Thomas v. Morris Township Board of Education*, 89 N.J. Super. 329 (App. Div. 1965).

In *Colella v. Elmwood Park Board of Education*, 1983 S.L.D. 149, the Court was faced with a similar situation when a high school principal was transferred to a vice principal's position. The parties agreed that she had done a satisfactory if not spectacular job, but the superintendent believed another qualified individual could do better as staff morale needed substantial improvement. Id. at 151. Likewise, it was estimated that the petitioner's strengths could be put to more effective use if she were a vice principal. The Court affirmed the transfer.

On the basis of the above, the considerable testimony of Board members and others regarding staff morale at the high school, more than sufficient reason to support a transfer exists. The Board members acted with independent understanding of the problems that existed at the high school. This Board was not simply rubber stamping administration recommendations. It would be improper for the Commissioner to interpose judgment contrary to that of the Board.

The Board now addresses the issue as to whether it impermissibly discriminated against petitioner in her employment on the basis of sex or marital status, contrary to N.J.S.A. 10:5-1 et seq. The Board observes that petitioner specifically claims a violation of N.J.S.A. 10:5-12(a) which prohibits an employer from discriminating against individuals on the basis of sex or marital status among other things in employment, compensation, terms, conditions or privileges of employment with certain exceptions. N.J.S.A. 10:5-21 makes it clear, however, that nothing contained in the law against discrimination shall prohibit "the termination or change of employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment, nor to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standard, ..." (emphasis supplied).

The Board further observes that initially and ultimately, the burden of proving discrimination rests with the petitioner. *Goodman v. London Metals Exchange Inc.*, 86 N.J. 19 (1981). *Peper v. Princeton University Board of Trustees*, 77 N.J. 55 (1978); *Kearney Generation Systems v. Roper*, 84 N.J. Super. 253 (App. Div. 1982). The petitioner has not even begun to establish a prima facie case. Even if we were to assume that her allegations are true, we are then compelled to conclude that she was transferred from one school to another as principal due to a divorce action

between herself and Superintendent Aragona. The allegation is not that she was transferred because she is a female or because of her status as a married person, but because she claims the Superintendent was doing this to somehow gain an advantage in the divorce proceedings. It is fundamental to petitioner's case that she demonstrate discriminatory motive or intent based on sex or marital status. See *Goodman v. London Metals Exchange, Inc.*, 86 N.J. 19 (1981). There is no evidence that the Board did not want married females in high school principal positions. The only claim by the petitioner is that the Board and Superintendent did not want her as a high school principal. The petitioner repeatedly states that she was the only female principal in the system. The fact of the matter is that this remains true. Had there been a demotion to a position below principal, she might be in a better position to claim that this fact is significant.

The petitioner also contends that she was the only principal married to Superintendent Aragona. The Board certainly hope this to be accurate. However, this fact does not establish membership in a protected class as required by the case law. *Goodman v. London Metal Exchange Inc.*, 56 N.J. 19 (1981). There is nothing in the statutes, legislative history or case law to suggest that persons married to Louis Aragona have been subject to a history of invidious discrimination and as such are entitled to be considered a protected class. The petitioner apparently believes that because she feels that she was treated differently than principals not married to the Superintendent that this qualifies as discrimination under N.J.S.A. 10:5-1, et seq.

The Board asserts that in addition to the above, the petitioner has shown no discriminatory act. She is still a principal. There was no reduction in salary. The only item of loss is future salary expectancy to which there is no legal right. *Williams v. Plainfield*. The Board suggests that "harassment" in the air simply will not do. In any event, an examination of the petitioner's so called "prima facie" case is in order. According to petitioner's brief, the "prima facie" case of sex discrimination is based on the following alleged facts:

1. Transfer of petitioner to another school;
2. Petitioner is the only female principal;
3. Petitioner was the only principal transferred;
4. Superintendent Aragona did not inform her of this transfer at an administration council meeting of August 26, 1987;

5. That Warren Wolf informed petitioner of her transfer and did not consider to academic credentials in recommending the same.

The Board concedes that items 1 and 2 of the above are true. As to item 3, the petitioner is technically correct as she was the only principal transferred for the 1987-88 school year. However, that hardly proves that transfers in the past of other male principals did not occur. As to item 4, the basic reason the Superintendent did not inform the petitioner is because he either knew nothing of her transfer or did not want any involvement with it. As to item 5, this simply is not a fair characterization of Mr. Wolf's testimony. He testified that he felt petitioner could go to the elementary division, that she had been an elementary school teacher and that she worked in curriculum areas as a supervisor (TR. p. 55, 1-20-89). He also testified as to qualifications of petitioner's successor, Daniel Regan, noting that Mr. Regan had the background experience and wherewithall to step into a large building such as Brick Memorial and had been overlooked in the past (TR. p. 54, 1-20-89). He also indicated teachers and parents had discussed situations at Brick Memorial under petitioner that caused him to support a change (TR. p. 55, 1-20-89).

Mr. Wolf's recommendation was based upon a reasonable comparison of staff members including background and conduct in the job therefore any discrimination resulting therefrom as between Mr. Regan and petitioner is permissible under the express language of N.J.S.A. 10:5-2.1 permitting discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standards.

The Board argues that the "prima facie" case set forth in petitioner's brief in no way suggests that the transfer of petitioner was based on her sex and must fail.

As to "prima facie" case of discrimination on the basis of marital status, the petitioner relies on the following:

1. Petitioner is the only principal married to Superintendent Aragona.
2. Petitioner was transferred while those not married to Superintendent were not.
3. Mr. Wolf did not consider petitioner's academic qualifications in recommending her transfer.

As to item 1, the Board contends that being married to Superintendent Aragona is not a protected classification. The petitioner might have tried to show that she was the only married principal but that is probably not true. The proof offered is clearly insufficient. As to item #2, this is correct but is not probative of discriminatory intent based on marital status. As to item 3, Mr. Wolf's testimony was already recounted above.

The Board argues that the proofs offered can not establish any "prima facie" case and, therefore, petitioner's claims of discrimination must be dismissed.

Even if the Court is inclined to find a "prima facie" case, the Board observes that petitioner admits in her brief the Board has met that case with sufficient evidence to shift the burden back on the petitioner. Petitioner observes as follows:

> In response to petitioner's "prima facie" showing that she was unlawfully transferred to the position of principal because of her sex and/or her marital status, the respondent Board of Education and respondent Louis Aragona, presented evidence that Midstreams Elementary principal John Boyle submitted his retirement letter on August 27, 1987. (TR. January 17, 1989, p. 111, p. 112, Exhibit P-31). There was a morale problem and various other problems at Brick Memorial High School where petitioner had been assigned as principal for several years. These problems indicated a change was necessary to correct them (TR. January 20, 1989, p. 107, p. 110). School was scheduled to begin shortly thereafter. Petitioner's transfer was made in response to this emergency situation which had arisen just prior to the beginning of school. Her transfer was accelerated so that she would be in her new position when school began, thereby facilitating the smooth opening of Midstreams Elementary School. Clearly, the respondent's presentation of these facts is sufficient to dispel the adverse inferences which arose from petitioner's "prima facie" showing that her transfer was unlawfully based on sex and/or on her marital status. Petitioner's brief at 24, 35 (emphasis added by writer).

The Board observes that despite petitioner's candor as set forth above, she contends there are details for this tribunal to consider. The Board enumerates each which are only described here as follows: (1) The rejection of a curriculum proposal for practical mathematics by the Superintendent is proof of discrimination; (2) The rejection of a departmental chairperson is evidence of discrimination; (3) The denial

of administrative assistance for the operation of the summer school is proof of discrimination; visits to Memorial by Board Secretary Robert Stutts is discriminatory notwithstanding that he had the responsibility to visit every school in the district on a frequent basis; petitioner's discovery of the Superintendent in her office at Memorial when petitioner was absent from duty and on sick leave for major surgery somehow constitutes discrimination; Assistant Superintendent's memorandum critical of petitioner's action to remove a student's art work was discriminatory; Board member Stites memorandum to Superintendent Aragona criticizing the 1987 graduation exercises at Memorial was discriminatory. The conclusions petitioner draws from her various complaints is that she was discriminated against due to her sex or marital status. The Board sets forth other conclusions that might be drawn from petitioner's allegations which are not recited here.

The Board's response to petitioner's allegation that Superintendent Aragona's failure to testify at these proceedings raises a legal presumption that her allegations are true is addressed here.

The Board argues that even the case law cited by petitioner fails to bear out her claim. *In Robinson v. Equitable Life Assurance Society*, 126 N.J. Eq. 242, 247 (E. & A. 1939), the Court noted in passing that such an inference would be factually permissible although not legally obligatory." Moreover whether such an inference is permissible requires consideration of the factual circumstances. In *State v. Clawans*, 38 N.J. 162, (1962), the Court observed:

For obvious reasons the inference is not proper if the witness is for some reason unavailable or is either a person who by his position would be likely to be so prejudiced against the party that the latter could not be expected to obtain the unbiased truth from him, or a person whose testimony would be cumulative, unimportant or inferior to what had already been utilized. Id. at 171 (emphasis supplied)

In this matter, anything Superintendent Aragona might say would be merely a rehash of what was already testified to by the administration and Board members who did testify. In fact, because he withdrew from decision making regarding the petitioner, his knowledge of why the Board did what it did or of why other administrators did what they did is far inferior to their own testimony. The

petitioner herself never testified as to anything that Superintendent Aragona did but only as to what she perceived as having in one fashion or another being procured by him. Her testimony as to his so called "threats" was inherently so unbelievable as to require no proofs in rebuttal. The grand conspiracy theory presented by the petitioner would require the Court to believe that Superintendent Aragona manipulated the five Board members who testified before the Court even though their testimony indicated otherwise, that he manipulated the administration despite their testimony to the contrary, that his influence affected the Brick Booster Club, the Ocean County College, County Superintendent of Schools, and the State Teacher's Pension and Annuity Fund.

There was little reason to rebut what had already been rebutted or to rebut the ridiculous. The petitioner's real objection to Superintendent Aragona's failure to testify is that she lost the opportunity to attempt to embarrass and harass Superintendent Aragona in public by requiring responses to outrageous accusations on cross examination in the presence of the press. This is something to which is was not necessary for him to submit.

It is also important to consider specifically what fact Superintendent Aragona could have testified to. As the Court observed in *Wild v. Roman*, 91 N.J. Super. 410, (App. Div. 1966):

> From the foregoing, it is obvious that the Court must determine as to each witness what it is reasonable to assume he could have testified to "in respect to the fact to be proved", and whether that testimony "as to specifically indentifiable facts" would probably have been "superior to that already utilized in respect to the fact to be proved." Id. at 415, 416.

DISCUSSION AND CONCLUSIONS

ISSUE # 1

The Board correctly observes that the statutes confer broad power and authority to local boards of education to transfer and reassign teaching staff members in the board's employ. N.J.S.A. 18A:25-1. The Commissioner and the courts have sustained this broad power as an inherent managerial prerogative, subject only to the tenure laws. *Colella*; *Downs*; *Ridgefield Park*; *Howley*. In the

matter of *Williams*, the State Board of Education reversed the Commissioner and held, among other things, that a local board of education had the discretionary authority to transfer a tenured high school principal, without her consent, to the position of elementary principal. The State Board reasoned that under the tenure laws, the two positions are of equivalent rank. The State Board further held that there is nothing in the statutes or court decisions which provides for future salary expectancy as a consequence of a transfer. The Appellate bench affirmed the State Board's decision and held, in part, "that future increases in salary or salary expectation, is not an appropriate factor to be considered when determining the validity of a transfer since tenured employees have no vested right in any future increases in salary." 176 N.J. Super. at 162.

I **CONCLUDE**, therefore, that the Board exercised its statutory authority when it adopted a resolution to transfer petitioner from the position of Memorial High School principal to the position of principal of Midstreams Elementary School. *Williams*.

I further **CONCLUDE** that a consequence of the transfer, petitioner suffered no loss or reduction in compensation. Nor is she entitled to be compensated on the high school principal salary guide in the future while serving as an elementary principal with the Board. *Williams*

With regard to petitioner's claim of discrimination, this tribunal observes that the New Jersey Legislature has enacted civil rights legislation known as the Law Against Discrimination (N.J.S.A. 10:5-1 et seq.) which is similar in many respects to the federal law under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.) Incorporated in New Jersey law is N.J.S.A. 10:5-12, which states that:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status or sex of any individual, or because of the liability for service in the Armed Forces of the United States, of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or

> in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise.

Due, in part, to the similarity of the state and federal laws, the Courts of New Jersey have adopted certain principles and standards set forth by the United States Supreme Court when called upon to determine whether or not an employer has engaged in an unlawful employment practice or committed unlawful discrimination under N.J.S.A. 10:5-4 and N.J.S.A. 10:5-12. A standard adopted by the New Jersey Supreme Court in *Peper v. Princeton Univ. Trustee Board*, 77 N.J. 55, 84 (1978) and to be applied in ruling on a challenge to employment practices on the basis of discrimination, were set forth in the matter of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (411 U.S. at 802).

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1. N.J.S.A. 10:5-4 provides, in pertinent part that:

> All persons shall have the opportunity to obtain employment... without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

Applying the *McDonnell Douglas* standards to the instant case, petitioner has demonstrated that she belongs to a gender minority. It is also clear that she is qualified for the position as high school principal by virtue of her holding the appropriate certification. There is little doubt petitioner was rejected for the position after having served in the position for three years. The position did not remain open, however, after her rejection but, rather, was filled by the Board shortly after it transferred petitioner from the position.

Petitioner has failed to affirmatively establish the fourth prong of the *McDonnell Douglas* test, therefore, she has not made out a prima facie case. Had petitioner done so, it would give rise to a presumption that the Board engaged in an unlawful employment practice and/or committed an unlawful act of discrimination. Consequently, the burden would then shift to respondent Board "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas* 411 U.S. at 802; *Texas Department of Community Affairs v. Burdine* 450 U.S. 248, 252 (1981); *Peper*, 77 N.J. at 83.

The Board has asserted that petitioner's academic credentials are not at issue. Rather, there was: a general displeasure with petitioner's administrative behavior which lead to the deterioration of staff and student morale at Memorial; her decision making (removal of student art work) or lack thereof (unruly graduation exercises); and, citizen criticism of petitioner's conduct. The Board also demonstrated that, as a consequence of petitioner's transfer, it has saved in excess of $100,000 because it has not filled an administrative vacancy created by Mr. Boyle's retirement and petitioner's transfer.

Had petitioner affirmatively established a prima facie case, the burden would then shift back to petitioner to demonstrate that the Board's proffered reasons were not the true reasons for its actions. This burden also merges with petitioner's ultimate burden of persuasion that she was, in fact, the victim of intentional unlawful discrimination. *Burdine*, 450 U.S. at 255. It is further understood that the ultimate burden of proving intentional discrimination rests with petitioner to establish, by a preponderance of the credible evidence, that unlawful discrimination, in fact, occurred. *Peper*, 77 N.J. at 80; *Burdine*, 450 U.S. at 257.

Our courts have held that in order for petitioner to sustain a claim of unlawful discrimination under N.J.S.A. 10:5-4, N.J.S.A. 10:5-12, there must be proof of an intent to discriminate for an unlawful purpose. In *Kearny Generating Sys., Pub. Serv. Div. v. Roper*, 184 N.J. Super. 253 (App. Div. 1982), the Appellant bench said, with respect thereto, that:

> For instance, if an employer is presented with a choice between two qualified applicants, selection of the least qualified because of greater experience or personal attributes which enhance the applicant's value to the prospective employer is perfectly valid and permissible. Traditional management prerogatives still have validity today. (184 N.J. Super. at 261).

The *Roper* Court continues by quoting, with approval at 261, from *Burdine* where the Supreme Court said:

> Title VII prohibits all discrimination in employment based race, sex and national origin. "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and...neutral employment and personnel decisions." *McDonnel* [sic] *Douglas*, supra [411 U.S.], at 801, 36 L.Ed.2d 668, 93 S.Ct. 1817 [at 1823]. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. [Citations omitted]. The statute was not intended to "diminish traditional management prerogatives." [citation omitted] It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. [450 U.S. at 259].

The *Roper* Court then observes, at 261, its holding in *Jones v. College of Med. & Dent. of N.J. Rutgers*, 155 N.J. Super. 232 (App. Div. 1977), cert. den. 77 N.J. 482 (1978), where it said:

> Discrimination involves the making of choices. The statute does not proscribe all discrimination, but only that which is bottomed upon specifically enumerated partialities and prejudices. Thus, we have held that in discrimination cases an intent to discriminate must be proved. *Parker v. Dornbierer*, 140 N.J. Super. 185, 189 (App. Div. 1976). Obviously, this means an intent to discriminate for the prohibited purpose charged. [at 236]

Having carefully considered the facts and the applicable law, I **CONCLUDE** that petitioner has failed to carry her burden that the Board or its agents discriminated against her in any manner.

I further **CONCLUDE** that petitioner's transfer from Memorial to Midstreams was within the Board's broad discretionary powers and an exercise of its managerial prerogatives, pursuant to law.

ORDER

Accordingly, it is hereby **ORDERED** that the Petition of Appeal before the Commissioner of Education and the Complaint before the Division on Civil Rights 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.

23 June 1989
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

JUN 26 '89
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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ROSEMARY ARAGONA, PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, RESPONDENT,	:	
AND	:	COMMISSIONER OF EDUCATION
ROSEMARY CUNNINGHAM ARAGONA, PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, DR. LOUIS ARAGONA, SUPERINTENDENT, RESPONDENTS.	:	

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

Petitioner excepts to both the findings of fact and the conclusions of law set forth in the initial decision. Averring that the ALJ's view of the evidence was "limited" (Exceptions, at p. 1), petitioner incorporates in her exceptions the Statement of Facts set forth in her post-hearing submission for the Commissioner's consideration of "a more accurate account of all the evidence presented in this matter, including but not limited to many facts taken directly from the testimony of witnesses for the Board." (Id.)

Petitioner states that the issue of the Board's failure to provide her Rice notice of its action to terminate her employment at Brick Memorial High School pursuant to N.J.S.A. 10:4-12 "***was abandoned by Petitioner upon determination that the action of the Board was not taken at a 'closed' session." (Id.) She then goes on to state, however, "that in actuality the August 28, 1987 Board meeting called to order at 6:30 P.M. and adjourned at 6:37 P.M. was a closed meeting, attended only by Board Members, Administration officials involved in the decision to transfer Petitioner and the Board Attorneys." (Id.) She cites Exhibit P-2 and P-33 in support of this proposition. In this regard, she also affixes to her

exceptions a newspaper clip describing Senate Bill S-03516, which she contends supports her position that she should have been provided written actual notice of any discussion or actions the Board planned to take affecting her rights. She claims she was provided no notice of the August 28, 1987 meeting, and that said meeting was planned to prevent her from making preparations to present any opposing arguments she may have had to the Board. She avers this action on the Board's part has violated the spirit, if not the letter, of the New Jersey Open Public Meetings Act (OPMA).

Petitioner further objects to the ALJ's conclusion that the Board committed no violation of the 48-hour notice provision in contravention of N.J.S.A. 10:4-9. In support of this, petitioner submits her argument set forth in Issue I of her Statement of Facts and Statement of Law. She adds in exceptions her objection to the ALJ's finding that the January 10, 1989 letter from the Ocean County Observer, stating that no legal advertising regarding the August 28, 1987 meeting of the Board was placed with it, is not sufficient to overcome the presumption that notice was sent to it as stated in the Board minutes. She claims such letter was sufficient to overcome the presumption that notice was given to the paper. Having submitted said letter, petitioner contends that the Board presented no evidence that the notice actually was delivered. Thus, she avers, the August 28, 1987 meeting was held in violation of the OPMA, and her transfer which was approved at that meeting is voidable.

Finally, petitioner excepts to the ALJ's conclusion that she did not establish a prima facie case of sex or marital discrimination in that the position from which she was transferred did not remain open after she was rejected for the position and transferred, but was filled by the Board shortly thereafter. Citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) and Peper v. Princeton Univ. Trustee Board, 77 N.J. 55, 84 (1978), petitioner recites that the fourth element she must show to establish her prima facie case of discrimination is that "after her rejection, the position remained open and the employer continued to seek application from persons of [complainant's] qualifications." (Exceptions, at p. 3, quoting McDonnell Douglas, supra, and Peper, supra)

Petitioner argues that the ALJ's conclusion in this regard makes it clear that she did successfully establish the fourth element by stating that the Board filled the position shortly after it transferred petitioner.

> Clearly, if the Board filled the position shortly after Petitioner's transfer, the position remained open after Petitioner was rejected for the position and transferred. It is equally clear that if the Board filled the position shortly after Petitioner's transfer, as Judge Law found, it continued to seek applicants from

> persons of [complainant's] qualifications after Petitioner was rejected for the position and transferred. (emphasis in text) (Id., at pp. 2-3)

Arguing that the ALJ thus erred in concluding that she did not meet the fourth element in establishing a prima facie discrimination case, she further contends that her having met her initial burden gives rise to a presumption that the Board engaged in an unlawful employment practice and/or committed an unlawful act of discrimination. She refers the Commissioner to Issue II of her Statement of Facts and Statement of Law in support of her contention in this regard.

Petitioner submits the initial decision should be reversed both because the August 28, 1987 Board meeting was held in violation of the OPMA and also because the proofs show by a preponderance of the evidence that the Board discriminated against her.

Initially, the Board corrects what it characterizes as a typographical omission in the initial decision, ante, submitting that the word "with" should be "without."

Thereafter, the Board replies to petitioner's exceptions by first citing N.J.A.C. 1:1-16.1(b). In replying to petitioner's general objection to the ALJ's "limited view" in making his Findings of Fact, the Board avers such an indefinite exception "is not within the parameters set forth by the Administrative Code." (Reply Exceptions, at p. 2) The Board contends a general objection to an ALJ's findings of fact was not contemplated by the authors of the Administrative Code. Moreover, the Board avers, "a general objection serves no purpose, as neither the Commissioner nor the respondents are afforded an opportunity to determine the validity of those objections or exceptions and reply thereto." (Id.) The Board further argues that if the Commissioner does decide to reply to petitioner's general objection to the ALJ's findings of fact, he should also review the Board's statement of facts as set forth in its brief. However, the Board submits that petitioner goes beyond the parameters of the Administrative Code in submitting her entire brief in exceptions.

As to the Rice notice argument petitioner advanced, the Board contends petitioner failed to inform both the ALJ and the Board that she abandoned the issue concerning her allegation that the Board failed to provide a proper Rice notice. Notwithstanding this statement, the Board argues:

> even after unilaterally abandoning the issue Petitioner proceeds to argue that the meeting held on August 28, 1987 was in fact a "closed" session. Petitioner argues this position despite the fact that Petitioner states in paragraph three of her exceptions that she determined "that the action of the board was not taken at a closed session." (Id., at pp. 3-4)

The Board contends this position is without any basis in fact, nor does petitioner provide testimony or documentation elicited at the time of trial to support such a position.

The Board further claims that petitioner's reliance on a newspaper article affixed to the exceptions dealing with a bill proposed by the Senate "is unfounded and appears to be a statement of what the Petitioner would like the law to be and not what the law was at the time nor is presently." (Id., at p. 4) It relies on its previous arguments as to adequate notice along with those set forth by the ALJ in this regard. As to petitioner's argument that because of the Board's alleged failure to give proper notice, she was not able to adequately prepare any opposing arguments to be presented before the Board, the Board states it is not obligated to listen to any opposing arguments by either petitioner or any other member of the public, as public participation is at the sole discretion of the Board.

Citing Peper, supra, the Board counters petitioner's argument that she has met the fourth prong of the McDonnell Douglas standard for establishing a prima facie case of discrimination by suggesting that the Peper standards made in reliance on McDonnell Douglas are "a starting point in actions brought under the law against discrimination or any other state proscription against discrimination and that it must be emphasized that this test is to be used only where and to the extent that its application is appropriate." (Id., at p. 5) The Board claims that the ALJ did address the Board's legitimate business considerations which inquiry in accordance with Peper, supra, (Id., at p. 6 quoting Peper, supra, at p. 84) is within his authority to do. It further argues that petitioner did not overcome the Board's proffered reasons, nor did she overcome her ultimate burden of proving intentional discrimination by a preponderance of the credible evidence that the Board unlawfully discriminated.

For the above reasons, the Board requests the Commissioner affirm the ALJ's initial decision.

Upon his careful and independent review of the record of this matter, the Commissioner affirms the initial decision substantially for the reasons expressed by the Administrative Law Judge, as clarified below.

The Commissioner would first note his accord with the Board's reply exception suggesting that a general objection to findings of fact adduced by the ALJ are not in conformity with N.J.A.C. 1:1-16.1(b). Moreover, case law has held that wherein a party objects to the findings made in an administrative tribunal, exceptions must include specific references to the factual findings contested, as well as specific transcript citations which relate to such contested factual findings. See In re Morrison, 216 N.J. Super. 143, (App. Div. 1987). Accordingly, the Commissioner adopts as his own the findings of fact set forth by the ALJ in the absence of specific exceptions from petitioner objecting to particular findings with transcript citations or documentary evidence presented in support of such objections.

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Moreover, the Commissioner notes the correction submitted by the Board citing the initial decision, ante. The Commissioner concurs with the Board that the ALJ inadvertently used the word "with" instead of "without." The record is hereby corrected to reflect such distinction.

On the issue of the Rice notice, the Commissioner concurs with the ALJ's determination that petitioner's arguments regarding the August 28, 1987 Board meeting did not address the Rice exception, which permits an employee whose status would otherwise be discussed in a closed session pursuant to N.J.S.A. 10:4-12, to request public session discussion. Moreover, the Commissioner finds no merit in petitioner's argument averring that the August 28, 1987 meeting was in fact a closed meeting for which she was not provided notice. First, Exhibit P-33, which petitioner cites in support of her contention, is a subpoena, which has no relevance to this issue. P-2 is a copy of the Board minutes of said meeting, which document in no way suggests a basis for arguing that the meeting was held in closed session. Moreover, in this regard, petitioner has admitted that the actions taken at said meeting concerning her status were conducted in an open session. See Exceptions at page 1. Further, the Senate Bill affixed to petitioner's exceptions is neither part of the record properly before the Commissioner in that such document was not received into evidence, nor is it supportive of petitioner's position because the bill does not represent the law at the time of the incident in question, nor is it the law now. Accordingly, such arguments are dismissed as being without merit. Finally, in regard to petitioner's argument concerning whether the notice sent to the local newspapers constituted adequate 48-hour notice, the Commissioner adopts as his own the findings and conclusions expressed by the ALJ below. Petitioner's exceptions in this regard rely on her post-hearing submissions, which were fully and correctly considered by the ALJ. Further, he agrees with the Board's exception that it had no obligation to hear rebuttal for petitioner at an open public meeting of the Board in that there is no provision in law allowing for such public argument.

Concerning whether petitioner has presented a prima facie case of discrimination based on marital status or sex, the Commissioner would first note that the Court in McDonnell Douglas, supra, at footnote 13 noted that "[t]he facts necessarily will vary in Title VII cases," and therefore the four prongs set forth in allocating the establishment of a prima facie case will vary according to the facts of the case at hand. Unlike the facts in McDonnell Douglas, the instant matter is not a hiring situation but, rather, a transfer which petitioner avers was a discriminatory action taken by the Board based on her singular status as the estranged wife of the superintendent or as the single female principal within the school district. While the Commissioner acknowledges that petitioner is indeed the sole female and the only such female married to the superintendent in the district, she has failed to establish that any form of adverse action has befallen her.

The record is plain that petitioner was transferred from a position as high school principal to that of elementary principal upon the retirement of Mr. Boyle, the former principal at Midstreams Elementary Schools. The Commissioner finds the ALJ's discussion and conclusions of Issue I in the initial decision, ante, as particularly cogent in suggesting that said transfer represents an inherent managerial prerogative, when the two positions in question are of equivalent rank. See Jeanette A. Williams v. Plainfield Board of Education, 176 N.J. Super. 154 (App. Div. 1980), cert. denied 87 N.J. 306 (1981). Moreover, the Commissioner agrees with the ALJ's conclusion, made in reliance upon Williams, supra, that petitioner suffered no monetary loss as a result of her transfer because future salary expectation "is not an appropriate factor to be considered when determining the validity of a transfer since tenured employees have no vested right in any future increases in salary." (See Initial Decision, ante, quoting Williams at 162.) Thus, although the Commissioner finds the four-pronged McDonnell Douglas test somewhat strained in application under the facts of this matter in that there was no new opening or promotion for which petitioner had applied and was rejected for, he determines that petitioner has failed in any event to establish a prima facie showing of sexual or marital discrimination in that pursuant to N.J.S.A. 18A:25-1 and applicable case law, petitioner's transfer from Memorial to Midstreams Elementary School was within the Board's broad discretionary authority and a legitimate exercise of its managerial prerogatives, for the reasons expressed by the ALJ.

Accordingly, for the reasons expressed by the ALJ, as clarified herein, the initial decision is adopted as the Commissioner's own for the reasons expressed in the initial decision. In conformity with the consolidation Order in this matter, the complaint before the Division on Civil Rights is likewise dismissed, with prejudice.

COMMISSIONER OF EDUCATION

August 9, 1989

EDU #7845-87 AND #3005-89 (consolidated)
C # 222-89
SB # 55-89

ROSEMARY ARAGONA,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	
RESPONDENT-RESPONDENT,	:	
AND	:	STATE BOARD OF EDUCATION
ROSEMARY CUNNINGHAM ARAGONA,	:	DECISION
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, DR. LOUIS ARAGONA, SUPERINTENDENT, OCEAN COUNTY,	:	
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, August 9, 1989

For the Petitioner-Appellant, Jay G. Trachtenberg, Esq.

For the Respondents-Respondents, Jay C. Sendzik, Esq.

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

John Klagholz opposed.
December 6, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6952-88
AGENCY DKT. NO. 260-8/88

BARBARA ELLICOTT,
Petitioner,
v.
BOARD OF EDUCATION, TOWNSHIP OF FRANKFORD,
SUSSEX COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner
(Klausner, Hunter & Oxfeld)

Frank N. D'Ambra, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross)

Record Closed: May 15, 1989 Decided: June 29, 1989

BEFORE **OLIVER B. QUINN, ALJ:**

STATEMENT OF CASE

Petitioner, a tenured employee alleges that the Frankford Township Board of Education (Board) violated her tenure and seniority rights by appointing a nontenured employee to a newly created full-time Learning Disabilities Teacher Consultant (L.D.T.C.) position for which she is certified and for which she applied. Respondent avers

that petitioner is not tenured in an L.D.T.C. position and alternatively, that petitioner was not riffed and cannot therefore assert a seniority based claim to the position.

PROCEDURAL HISTORY

This appeal was initiated by a verified petition filed on August 8, 1988 with the Commissioner of Education. An answer was filed on September 14, 1988. On September 22, 1988, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 29, 1988, and a prehearing order entered. Respondent filed a motion for summary decision on November 30, 1988. Petitioner filed a cross motion for summary decision on January 11, 1989. It was determined that summary decision could not be granted because material facts remained in dispute. The parties were afforded an opportunity to develop stipulations on the disputed material facts, which they did. The record was then closed on May 15, 1989.

FACTS

The following facts are undisputed and I **FIND:**

1. Petitioner holds an Education Services Certification with endorsements as a Learning Disability Teachers Consultant (L.D.T.C.) and a Speech Correctionist.

2. Petitioner was employed by the Board from March 1, 1981 to June 30, 1981, as a Speech Correctionist and L.D.T.C. for four days a week, as a substitute for a teacher on maternity leave.

3. For school year 1981-82, petitioner was employed by the Board as a Speech Correctionist and L.D.T.C. for four-days per week.

4. Petitioner was not renewed as an L.D.T.C. for the 1982-83 school year.

5. For the 1982-83 school year, petitioner was employed by the Board as a Speech Correctionist for three-days per week.

6. For the 1983-84 school year, petitioner was employed by the Board as a Speech Correctionist for four-days per week.

7. For the 1984-85 school year, petitioner was employed by the Board as a Speech Correctionist for four-days per week.

8. For the 1985-86 school year, petitioner was employed by the Board as a Speech Correctionist for four-days per week.

9. For the 1986-87 school year, petitioner was employed by the Board as a Speech Correctionist for two-days per week.

10. For the 1987-88 school year, petitioner was employed by the Board as a Speech Correctionist for two-days per week.

11. For the 1988-89 school year, petitioner was employed by the Board as a Speech Correctionist for two-days per week.

12. On or about June 15, 1988, petitioner received information that the Board was seeking to fill a full-time L.D.T.C. position for the 1988-89 school year.

13. On June 24, 1988, petitioner asserted a legal entitlement to the full-time

L.D.T.C. position.

14. On August 9, 1988, the Board advised petitioner that she would not be appointed to the full-time L.D.T.C. position.

15. The Board hired a nontenured employee to fill the newly created L.D.T.C. position for the 1988-89 school year.

16. The job duties of the full-time L.D.T.C. position at issue herein, are identical to those carried out by petitioner when she held the part-time L.D.T.C. position from March 1981 through the end of school year 1981-82.

LEGAL ANALYSIS

The first issue presented herein is whether petitioner is a tenured L.D.T.C. Teachers holding appropriate certificates acquire tenure after employment in a school district for three consecutive calendar years or three consecutive academic years, together with employment at the beginning of the next succeeding academic year. N.J.S.A. 18A:28-5. It is uncontroverted that petitioner holds an Educational Services certificate (N.J.A.C. 6:11-11.1) with an L.D.T.C. endorsement (N.J.A.C. 6:11-12.15) and a Speech-Language Specialist endorsement (N.J.A.C. 6:11-12.11). The Speech-Language Specialist endorsement was formerly called Speech Correctionist. 19 N.J.R. 75(a).

Three kinds of certifications exist in New Jersey: Instructional (N.J.A.C. 6:11-6.1 et seq.); Administrative and Supervisory (N.J.A.C. 6:11-9.1 et seq.); and Educational Services (N.J.A.C. 6:11-11.1 et seq.) See also, Howley v. Ewing Board of Education, 6 N.J.A.R. 509 (1982). References to single field "certifications" are actually single field "endorsements" on a certificate. Endorsements are not the object of tenure. Rather,

they are required for teaching assignments in specific fields. N.J.A.C. 6:11-6.1 (a). When one acquires tenure, that tenure is limited by positions within a certification. Once one acquires tenure in a position, he or she cannot be "dismissed or reduced in compensation" except for cause (N.J.S.A. 18A:28-5) after certification of charges and a full due process hearing (N.J.S.A. 18A:6-10) or as a result in a reduction in force (RIF) (N.J.S.A. 18A:28-9). When one acquires tenure, that tenure applies to all positions for which the tenured employee's certificate qualifies him. Capodilupo v. West Orange Township Board of Ed. 218 N.J. Super. 510 (1987).

In the instant matter, petitioner holds an Education Services certification with endorsements as a Learning Disabilities Teacher Consultant and a Speech Correctionist. She was employed by the Board from March 1981 to the present. I therefore **CONCLUDE** that she acquired tenure in March 1984, having been employed in the district by the Board for three consecutive calendar years N.J.S.A. 18A:28-5. Because the L.D.T.C. position is within the scope of petitioner's certificate, and because petitioner held the requisite endorsement for L.D.T.C., I further **CONCLUDE** that petitioner is tenured in the position of L.D.T.C..

The next issue to be resolved is whether petitioner can invoke seniority rights to establish an entitlement to the position she is seeking in the instant matter. Tenure and seniority are separate concepts. "Seniority is a concept which only applies to certain rights of tenured personnel and only has meaning when a reduction in force is necessary." Howley v. Ewing Board of Education 8 N.J.A.R. 509, 521. The concept of seniority arises from the tenure law. Notwithstanding tenure, boards of education have the right to "reduce the number of teaching staff members, employed in the district whenever, in the judgement 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 causes

upon compliance with the provisions of this article." N.J.S.A. 18A:28-9. Dismissals must be made "on the basis of seniority according to standards . . . established by the commissioner with the approval of the state board" N.J.S.A. 18A:28-10.

> The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both. N.J.S.A. 18A:28-13.
>
> The actual standards for determining seniority are found at N.J.A.C. 6:3-1.10.

In order to trigger seniority rights, petitioner must demonstrate that she was affected by a reduction of force. "It is undisputed that the Board of Education has the power to transfer teaching staff members." Williams v. Plainfield Board of Education 176 N.J. Super. 154 (App. Div. 1980) cert. den. 87 N.J. 306 (1981). The mere transfer from one teaching assignment to another within the teacher's certification, and which the teacher was qualified to teach under her subject matter endorsement, is not a reduction in force triggering seniority rights. Kinney v. Board of Education of Sparta Township, Sussex County OAL DKT. NO. EDU 6667-83 (December 19, 1983) adopted Commissioner of Education (February 1, 1984) at Commissioner's decision at 2.

In the instant matter, petitioner alleges that she was "riffed" when she was not renewed as an L.D.T.C. at the end of the 1981-82 school year. At that time, petitioner had been employed as a Speech Correctionist and L.D.T.C. for one and one-quarter years. Petitioner's counsel, at p.14 of his brief, argues that "What the Frankford Township Board of Education ignores is the fact that Barbara Ellicott's acquisition of tenure and subsequent RIF as a Learning Disabilities Teacher Consultant, resulted, pursuant to N.J.S.A. 18A: 28-12, in her placement on a district preferred eligibility list under the category of Learning Disabilities Teacher Consultant." Petitioner acquired tenure in

date. When the Board did not renew petitioner's contract as an L.D.T.C. at the end of school year 1981-82, petitioner had no statutory or regulatory protection. She was a non-tenured teacher and did not, at that time, have any entitlement to be placed on a preferred eligibility list for L.D.T.C. positions.

Petitioner cites several cases in support of her argument that, by virtue of her holding multiple endorsements, she has seniority rights to the newly created full-time L.D.T.C. position. In Walliczek v. Holmdel Township Board of Education OAL DKT. NO. EDU 3762-84 (April 24, 1985), Commissioner's decision (June 7, 1985), a tenured foreign language teacher alleged that the Board improperly reduced his full-time position as teacher of German to a part-time position while retaining or appointing another to a full-time Spanish teacher position, in violation of his tenure or seniority rights. Petitioners position was upheld in that matter. However, that matter is distinguishable from the instant matter in that Walliczek's full-time position was reduced, subsequent to his having acquired tenure. In the instant matter, no such reduction has been shown. Petitioner has worked two days per week as a Speech Correctionist since school year 1985-86. The creation of the full-time Learning Disabilities Teacher Consultant position did not reduce petitioner's position. Therefore, there was no reduction in force as to petitioner.

In Capodilupo v. West Orange Tp. Board of Education, 218 N.J. Super 510 (1987), petitioner, a tenured secondary school physical education teacher, successfully argued that he was entitled to an elementary school teaching position held by a nontenured teacher upon reduction in force of the teaching staff. Again, Capodilupo was decided in the context of a reduction in force, which does not exist in the present case.

Finally, petitioner cites Lichtman v. Ridgewood Board of Education 93 N.J. 362 (1983) as establishing that a tenured teaching staff member with proper certification can claim, as against a nontenured applicant, seniority rights in seeking appointment to a full-time position notwithstanding prior employment of the tenured employee on a part-

time basis. In Lichtman, a tenured part-time librarian successfully asserted an entitlement to preference over a nontenured teacher for appointment to a newly created full-time librarian position. Petitioner herein correctly argues that Lichtman rejected the artificial dichotomy between full-time and part-time service. However, Lichtman is distinguishable from the instant case in that, in Lichtman, petitioner's part-time librarian position was being eliminated. Thus in Lichtman, there was a RIF. In the instant matter, petitioner's position is not being elminated or reduced concomitant with the creation of the full-time L.D.T.C. position. Thus I **CONCLUDE** that the issue of a violation of petitioner's seniority rights in the instant matter is moot because no reduction in force occurred.

ORDER

It is **ORDERED** that the Board's motion for summary decision is granted. It is further **ORDERED** that petitioner's cross motion for summary decision is 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 this Initial Decision with Saul Cooperman for consideration.

6/29/89
DATE

Oliver Quinn
OLIVER B. QUINN, ALJ

Receipt Acknowledged:

JUL - 5 1989
DATE

Seymour Lewis
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 5 1989
DATE

Jacquelin A. Venuti/K.S.
OFFICE OF ADMINISTRATIVE LAW

veb

BARBARA ELLICOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner submits four exceptions, which are summarized in pertinent part below.

EXCEPTION ONE

> PETITIONER, BARBARA ELLICOTT, ACQUIRED TENURE AS A LEARNING DISABILITIES TEACHER CONSULTANT, IN ADDITION TO ACQUIRING TENURE AS A SPEECH CORRECTIONIST, PURSUANT TO N.J.S.A. 18A:28-5, IN MARCH OF 1984 AS A RESULT OF HER ACTUAL SERVICE WITHIN THE FRANKFORD TOWNSHIP SCHOOL DISTRICT AS A LEARNING DISABILITIES TEACHER CONSULTANT AND AS A SPEECH CORRECTIONIST.

Petitioner objects to the ALJ's finding that "mere possession of a Learning Disabilities Teacher Consultant endorsement was dispositive with regard to Petitioner's acquisition of tenure, in March 1984 as both a Learning Disabilities Teacher Consultant and as a Speech Correctionist." (Exceptions, at p. 2) Petitioner contends that she acquired tenure as both a Learning Disabilities Teacher Consultant (LDTC) and as a Speech Correctionist within the Board's district by virtue of her having served as both an LDTC and a Speech Correctionist.

EXCEPTION TWO

> JUDGE QUINN FAILED TO CONCLUDE THAT PETITIONER WAS THE SUBJECT OF AN ADDITIONAL REDUCTION IN FORCE EFFECTIVE DURING THE 1986-87 ACADEMIC SCHOOL YEAR.

Petitioner contends the ALJ did not indicate that petitioner was the subject of a RIF at the end of the 1985-86 school year when she was reduced from a four day a week Speech Correctionist position to a two day a week Speech Correctionist.

Thus, at that time her seniority rights should have been ascertained as both a Speech Correctionist and as an LDTC. Relying on her summary judgment brief, and given her alleged tenure status as both an LDTC and as a Speech Correctionist, petitioner claims she had a legal entitlement, as a matter of law, to any subsequently created full-time Speech Correctionist or LDTC position which was filled by a nontenured employee hired by the district.

EXCEPTION THREE

JUDGE QUINN FAILED TO CONCLUDE THAT THE FRANKFORD TOWNSHIP BOARD OF EDUCATION VIOLATED PETITIONER BARBARA ELLICOTT'S TENURE RIGHTS, PURSUANT TO N.J.S.A. 18A:28-5, BY THE BOARD'S REFUSAL TO APPOINT PETITIONER TO THE FULL TIME LEARNING DISABILITIES TEACHER CONSULTANT POSITION CREATED AS OF THE START OF 1988-89 SCHOOL YEAR WHICH WAS FILLED BY A NON-TENURED EMPLOYEE.

On this point, petitioner relies on Point Two of her summary judgment brief for specific legal arguments. From said brief, she quotes:

> If the arguments of the Frankford Township Board of Education were sustained in the instant matter, the Childs and Horun Appellate Division decisions would be ignored along with the Bednar and Capodilupo decisions. The distinctions between tenure and seniority rights would be eviscerated to the detriment of tenured educational personnel throughout this State. A hypothetical properly certified twenty year teacher of Latin (4/5's time) and English (1/5's time) could be the subject of a reduction in force in "year 1" as the result of the temporary elimination of Latin programs, resulting in only 1/5 time employment as an English teacher in "year 2" and be denied employment as a full-time Latin teacher (notwithstanding her 20 years of experience in the district) in "year 3" upon the re-establishment of the Latin program which position was offered to a newly-hired, non-tenured Latin teacher if the Frankford Board of Education's arguments are sustained in the instant matter. In both the Ellicott litigation and in the above "hypothetical" situation, dually certified tenured personnel would be denied full-time employment solely because they had been the subject of a reduction in force two or more years before, as opposed to the immediately preceding year, and non-tenured personnel would be offered the job security that their tenured counterparts were denied. THIS WOULD BE AN EXERCISE IN SOPHISTRY! (emphasis in text)
>
> (Petitioner's Brief, at pp. 11-12)

Petitioner also cites Vincent Mirandi v. Board of Education of the Township of West Orange, Essex County, decided by the Commissioner September 15, 1988, aff'd State Board April 4, 1989 in suggesting that if the ALJ's legal analysis as applied in the instant matter were applied to the Mirandi facts, Mirandi would have been dismissed on the theory that he was not the subject of a reduction in force from the immediately preceding academic year so as to trigger his employment rights to the position at issue or his tenure entitlement. In Mirandi, petitioner points out, Mirandi, who was the subject of a RIF at the end of the 1983-84 academic year, was permitted to assert his legal entitlement to the newly created assistant principal position at issue during the 1986-87 school year, notwithstanding his continued employment in a full-time capacity in another position within the West Orange School District.

EXCEPTION FOUR

> THE ADMINISTRATIVE LAW JUDGE FAILED TO CONCLUDE THAT BARBARA ELLICOTT'S SENIORITY RIGHTS PURSUANT TO N.J.S.A. 18A:28-11 and N.J.S.A 18A:28-12 WERE VIOLATED WHEN THE BOARD OF EDUCATION FAILED TO EMPLOY HER IN THE POSITION OF LEARNING DISABILITIES TEACHER CONSULTANT ON A FULL-TIME BASIS FOR THE 1988-89 SCHOOL YEAR.

In this regard petitioner refers to Point Three of her Summary Judgment Brief and also to Mirandi, supra.

In consideration of the above, petitioner seeks an order reversing the initial decision in this matter. She also prays the Commissioner find that the Board violated her tenure and seniority rights and that the Board be required to employ her in a five day per week LDTC capacity retroactive to the start of the 1988-89 school year, including being made whole for any losses in compensation including emoluments during the period of time at issue.

By way of reply, the Board raises four points which are summarized, in pertinent part, below.

POINT I

> JUDGE QUINN PROPERLY CONCLUDED THAT PETITIONER WAS NOT ON A PREFERRED ELIGIBILITY LIST FOR AN L.D.T.C. POSITION.

The Board cites the ALJ's conclusion at pages 6-7 of the initial decision that petitioner did not establish that she had been riffed subsequent to 1981-82. It further claims that petitioner's arguments raised in her motion papers confirm this position where she states

> Therefore, it is of no relevance that prior reductions in force affecting Barbara Ellicott may have occurred prior to the 1987-88 school year. (Reply Exceptions, at p. 21 quoting Petitioner's Brief, at p. 14)

Relying on this language, the Board argues that since petitioner has not made a showing that a RIF occurred in the years in question, she can demonstrate no seniority entitlement.

POINT II

JUDGE QUINN CORRECTLY DISTINGUISHED PETITIONER'S CITED CASES AND ARGUMENTS.

The Board avers the ALJ correctly distinguished the Walliczek, Capodilupo and Lichtman cases, supra, by finding that no RIF had occurred. Further, the Board argues that petitioner's hypothetical argument is also distinguishable because, as the ALJ noted, the Board did not renew petitioner's contract as an LDTC in 1982, she was a nontenured teacher and did not have any entitlement to be placed on a preferred eligibility list for LDTC positions. It quotes the initial decision, ante, in this regard and contends that because the ALJ properly held that petitioner's cases were inapplicable, the Commissioner should uphold the ALJ's findings.

POINT III

THERE IS A DISTINCTION BETWEEN PART-TIME AND FULL-TIME SERVICE.

The Board claims:

> ***Petitioner has not and indeed cannot cite a case in which a part-time teacher whose work time is reduced but not eliminated has made a successful claim to a newly-created full-time position. To allow such a claim would lead to a ludicrous result: a 2/5's teacher offered a 1/5's job would be entitled to a full-time position.*** (emphasis in text)
>
> (Reply Exceptions, at p. 3)

The Board believes that such a result is not intended by the seniority regulations.

POINT IV

ASSUMING ARGUENDO THAT PETITIONER HAS ANY SENIORITY CLAIM, SHE DOES NOT HAVE A CLAIM TO A FULL-TIME POSITION.

The Board avers that petitioner has never been more than a 4/5's teacher in its district and is currently serving on a 2/5's basis. Even if the Commissioner overrules the ALJ's decision, and finds that petitioner has a valid seniority claim, the Board argues that that claim would be limited to teaching an additional two days per week. "***It is absurd for Petitioner to claim a full-time position when she has never held such a position. A teacher cannot expect to obtain a superior position due to alleged violations of her seniority rights." (Id.)

Based on the above, the Board submits that the initial decision should be affirmed and that petitioner's claim be dismissed.

Upon a careful and independent review of the instant matter, the Commissioner adopts the initial decision dismissing the Petition of Appeal but for the reasons that follow, not those expressed by the ALJ.

The Commissioner observes that the threshold inquiry in this matter is a determination as to whether a position as LDTC, is separately tenurable from a position as a speech correctionist, notwithstanding the fact that both endorsements are on an educational services certificate. In the Commissioner's opinion, each is separately tenurable pursuant to N.J.S.A. 18A:28-5.

Case law has well established that when one who holds the appropriate endorsement serves as a teacher for the requisite period of time set forth in N.J.S.A. 18A:28-5, that individual becomes tenured as a teacher regardless of the subject matter taught because the activities conducted by a teacher are generic in nature. That is to say, the duties of a teacher functioning under an instructional certificate are to develop and to carry out instructional activities, be it under a mathematics, French or English endorsement. See Howley and Bookholdt v. Board of Education of the Township of Ewing, 1982 S.L.D. 1328, aff'd State Board 1983 S.L.D. 1554. See also Phillip Capodilupo v. Board of Education of the Town of West Orange, Essex County, 1985 S.L.D. _____, aff'd/rev'd State Board September 3, 1986, aff'd 218 N.J. Super. 510 (App. Div. 1987), cert. den. 109 N.J. 514 (1987).

However, persons serving under an educational services certificate carry out a multitude of activities and frequently perform entirely different activities representing distinct and separate disciplines, depending on the endorsement. For example, a psychologist performs entirely different functions from those of a nurse, social worker or librarian. A person who serves as a vice principal does so under an administrative certificate. Similarly, a vice principal serves under an administrative certificate. Yet, it cannot be seriously argued that in a RIF situation a tenured vice principal would be able to displace a nontenured principal in that the tasks performed and concomitant responsibilities vary significantly.

The difficulty in this area of school law over the years is due, in part, to the evolution of the use of the term "certificate." Prior to 1973, each position constituted a separate certification. Thus, if one were an English teacher, the certificate required to hold that position was a certificate in English. In 1973, however, the State Board created three certificates: instructional, educational services, and administrative, each with separate endorsements. Thus, currently, if one is an English teacher, the certificate required to hold such a position is an instructional certificate with an endorsement in English.

Yet, one cannot interpret the law to argue that any person who gains tenure under an educational services certificate would likewise obtain tenure in any endorsement within the educational services certificate, merely by virtue of having acquired that endorsement and having served under it. If such were the case, and using the same analogy as mentioned above, one holding an administrative certificate with an endorsement as a vice principal could lay claim to a superintendent's position. An absurd result would ensue, in that the duties of a vice principal are far removed, indeed, from those of a superintendent.

Therefore, the Commissioner finds and determines that each endorsement under an educational services certificate represents a separately tenurable position. In so finding, the record in this matter thus requires the Commissioner to find that the position of Speech Correctionist, while an endorsement under an educational services certificate, is a separately tenurable position from that of an LDTC position, albeit that the latter endorsement is also held on an educational services certificate.

In reviewing petitioner's employment history in respondent's district, it is first necessary to correct the ALJ's and petitioner's miscalculation of her tenurable service. The law is well-settled that employment as a substitute does not count toward tenure. N.J.S.A. 18A:16-1.1 Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976) aff'd o.b. 73 N.J. 37 (1977), but see also Sayreville Ed. Assn. v. Bd. of Ed. of Sayreville, 193 N.J. Super. 424 (App. Div. 1984). It is undisputed in the record of this case that petitioner's service from March 1 through June 30, 1981 as a Speech Correctionist and LDTC was as a substitute for a teacher out on maternity leave. (See Initial Decision, ante, undisputed Finding of Fact No. 2). Hence, such time is not countable toward petitioner's tenure status either as a Speech Correctionist or as an LDTC, contrary to the finding of the ALJ. Petitioner's tenurable employment as a Speech Correctionist, then, began with the commencement of the 1981-82 school year. She acquired tenure as a Speech Correctionist, pursuant to N.J.S.A. 18A:28-5, one day into the 1984-85 school year.

However, having found that petitioner's service as an LDTC is a separately tenurable position, petitioner has accumulated only one year's service under that endorsement, from September 1981 through June 1982. She is thus not tenured as an LDTC, having failed to satisfy the probationary period set forth at N.J.S.A. 18A:28-5 or N.J.S.A. 18A:28-6. Concomitantly, she has no seniority entitlement to the newly created position of LDTC in respondent's district since seniority rights flow from the acquisition of tenure.

Before leaving this case to rest, the Commissioner feels compelled to correct a misunderstanding on the Board's part regarding distinction between part-time and full-time service as it concerns tenure acquisition compared to seniority entitlement. Both parties and the ALJ correctly cite Lichtman, supra, for the proposition that no artificial dichotomy exists between full-time and part-time service in the acquisition of tenure. Thus, even though petitioner's service in this matter has always been less than

full-time, once she was no longer serving as a substitute, her time served toward acquisition of tenure must be calculated on the same basis as a full-time teacher's similar service, as per the dictates of N.J.S.A. 18A:28-5.

However, this calculation of time served toward tenure should not be confused with calculating seniority entitlement to a position following a RIF. For example, should an English instructor vacancy occur following a RIF, a teaching staff member who had served in a 5/10ths (half time capacity) as an English instructor for 10 years would be entitled to lay claim to said position over the full-time English instructor who had served for four years. While the Commissioner does not reach petitioner's arguments concerning whether she was riffed as an LDTC because she has not acquired tenured status in the role of LDTC, he would clarify that pursuant to Lichtman the Board is mistaken in suggesting that a part-time teacher whose work time is reduced but not eliminated cannot successfully claim a full-time position. Even if a tenured teaching staff member remains employed, although reduced to a lesser workload, he or she still acquires seniority that accumulates in favor of that individual over one with lesser seniority. Thus, to use the Board's example, a 2/5's teacher offered a 1/5's job could, if he held sufficient seniority, be entitled to a full-time position over an individual with lesser seniority or no seniority. Such result is not ludicrous as the Board suggests, but in fact is required by law. N.J.S.A. 18A:28-5, N.J.A.C. 6:3-1.10 et seq., Lichtman, supra Moreover, Bednar, supra, establishes that tenure may not be defeated by a seniority claim, and lays to rest any argument the Board might raise that a part-time tenured individual's claim to a position may be defeated by a nontenured individual with experience in the position in question.

Accordingly, for the reasons expressed herein, the Commissioner finds and determines that petitioner is not entitled to assume the newly created full-time LDTC position in respondent's district. Accordingly, the initial decision is adopted, for the reasons expressed herein not those of the ALJ. The Petition of Appeal is thus dismissed, with prejudice.

COMMISSIONER OF EDUCATION

August 17, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

185 Washington Street
Newark, NJ 07102
(201) 648-6087

James A. Ospenson
Administrative Law Judge

INITIAL DECISION

LAWRENCE CHAMMINGS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 7364-88
AGENCY DKT. NO. 287-9/88

EDWIN JOHNSTON, JR.
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 9366-88
AGENCY DKT. NO. 361-11/88

Robert M. Schwartz, Esq., for petitioner Chammings

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

Paul H. Green, Esq., for the Board
(Green and Dzwilewski, attorneys)

Robert Goldsmith, Esq., for intervenor Felicia B. Jamison
(Wiley, Malehorn and Sirota, attorneys)

Record Closed: June 9, 1989 Decided: July 11, 1989

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

Lawrence Chammings, a tenured teaching staff member employed by the Board of Education of the Township of Rockaway, Morris County, was assigned by the Board to a classroom teaching position for the 1988-89 school year. The Board had abolished the position he held during 1987-88 as assistant elementary principal and supervisor of reading/language arts on April 27, 1987, and he was appointed and served as supervisor of language arts only during 1987-88. In accordance with N.J.S.A. 18A:28-12, he was on a preferred eligibility list for the position of assistant elementary principal after the Board abolished all but one assistant principal position effective June 30, 1987. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on September 13, 1988, he alleged the Board currently and for the school years 1987-88 and 1988-89 was employing an assistant principal (intervenor Felicia B. Jamison) without tenure and/or with less seniority than he, contrary to his tenure and/or seniority rights under N.J.S.A. 18A:28-5, 6, 10 and 12 and N.J.A.C. 6:3-1.10. He sought instatement in the position of assistant principal, together with back pay, emoluments and such other relief as was just In an answer filed in the Bureau on October 3, 1988, the Board admitted petitioner's tenure and preferred eligibility for reemployment generally but contended it had abolished all assistant principal positions effective June 30, 1987, and had been obliged to appoint a non-tenured assistant principal at a middle school effective July 1, 1987, by an order of Director of the Division on Civil Rights, a circumstance affording that person superior entitlement to the position. In addition, the Board raised defenses of the bar of the limiting period of N.J.A.C. 6:24-1.2(b) and the bar of the doctrines of waiver and laches in that petitioner waived any claims to the remaining assistant principalship by accepting a supervisory position for 1987-88 without protest.

Edwin Johnston, Jr., a tenured teaching staff member employed by the Board, was assigned to the position of middle school head teacher for the 1987-88 school year and was reappointed in that capacity for the 1988-89 school year, after the Board abolished the tenured position he held during the 1986-87 school year as assistant elementary principal, on or about April 27, 1987. In accordance with

N.J.S.A. 18A:28-12, he was on a preferred eligibility list for the position of assistant elementary principal after the Board abolished all assistant principal positions except one assistant middle school principal position, effective June 30, 1987. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on November 18, 1988, he alleged the Board currently and for the school year 1988-89 employed an assistant principal (intervenor Jamison) without tenure and/or with less seniority than he, contrary to his tenure and/or seniority rights under N.J.S.A. 18A:28-5, 6 and N.J.A.C. 6:3-1.10. He sought instatement in the position of assistant middle school principal together with back pay, emoluments and such other relief as was just. In its answer filed in the Bureau on December 16, 1988, the Board admitted petitioner's tenure and preferred eligibility for re-employment generally but contended it had abolished all assistant principal positions effective June 30, 1987, and was obliged to appoint a tenured assistant principal at the middle school effective July 1, 1987, by a final agency decision of the Director of the Division on Civil Rights, a circumstance affording that person superior entitlement to the challenged position. In addition, the Board raised defenses of the bar of the limiting period of N.J.A.C. 6:24-1.2(b) and the bar of the doctrines of waiver and laches.

The Chammings petition was transmitted to the Office of Administrative Law by the Commissioner on October 6, 1988 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq The Johnston petition was transmitted to the Office of Administrative Law on December 22, 1988 for like determination. The two matters were the subject of prehearing conferences in the Office of Administrative Law on November 15, 1988 and February 24, 1989, respectively. The two petitions were consolidated by order of the administrative law judge, pursuant to N.J.A.C. 1:1-17.1, in the prehearing conference order of February 24, 1989.

The application of Felicia B. Jamison to intervene as a party in the consolidated matters, pursuant to N.J.A.C. 1:1-16.1 et seq., was granted by the administrative law judge on January 4, 1989. Her legal contentions mirror those of the Board.

The prehearing conference order of March 16, 1989 directed the parties to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact in chronological and sequential order, together with

documentation as necessary, which thereafter were to be filed in the cause for address and resolution of the issues as if on cross-motions of the parties for summary decision, in accordance with N.J.A.C. 1:1-12.5, on pleadings, admissions, stipulations, documentation and memoranda of law. Stipulations of fact were to include all issues raised; but the issue of respondent's defense of the bar of the limiting period of N.J.A.C. 6:25-1.2(b) was to be addressed first. Stipulations and memoranda of law having been filed, the record on motion closed.

As provided in prehearing orders, therefore, at issue presently is the legal effect of the Board's affirmative defense to the petitions, a defense joined in by intervenor Jamison, of the bar of the limiting period of N.J.A.C. 6:24-1.2(b), which requires petitioners to:

> . . . 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 case hearing.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following findings of fact:

1. The Rockaway Township School District is a K-8, type II district having five elementary schools for instruction in grades kindergarten through six and one middle school, named the Copeland Middle School, for grades seven and eight.

2. At its December 17, 1985 meeting, the Board adopted a resolution classifying grades seven and eight in the district as junior high school level, pursuant to N.J.A.C. 6:27-1.2(b). A copy of the pertinent portion of the Board minutes of December 17, 1985 is annexed hereto as Exhibit J-1.

3. Petitioner Lawrence Chammings has been employed by the Board as follows:

September, 1986 - June, 1971:	Teacher
September, 1971 - June, 1972:	Helping teacher
July, 1972 - June, 1975:	Assistant to the principal
July, 1975 - June, 1982:	Assistant principal
July, 1982 - June, 1987:	Assistant principal/supervisor (social studies, language/arts, and kindergarten)

Petitioner Chammings' service since September, 1971 has been at the district's Birchwood and K. D. Malone Elementary Schools.

4. Lawrence Chammings has been issued the following certificates by the New Jersey Department of Education:

   Elementary school teacher - issued July, 1968
   Principal/supervisor - issued May, 1975

5. Petitioner Chammings has attained tenure in the respondent school district as a teacher and as an assistant principal.

6. Petitioner Edwin Johnston, Jr., has been employed by the Board as follows:

September, 1963 - June, 1971:	Teacher
September, 1971 - June, 1972:	Helping teacher
July, 1972 - June, 1975:	Assistant to the principal
July, 1975 - June, 1982:	Assistant principal
July, 1982 - June, 1987:	Assistant principal/supervisor (science, research (microcomputer), music, art, physical education, library)
September, 1987 - present:	Head teacher

Petitioner Johnston's service from September, 1971 through June, 1987 was at the district's Stony Brook Elementary School. His service from

September, 1987 through the present has been at the Copeland Middle School.

7. Edwin Johnston also served as the director of the district's summer school for the 1988-89 school year. A copy of the pertinent portion of the Board's March 23, 1988 meeting, at which petitioner Johnston was appointed to such position, is annexed hereto as Exhibit J-2.

8. Edwin Johnston has been issued the following certificates by the New Jersey Department of Education:

Elementary school teacher - issued December, 1965.
Principal/supervisor - issued June, 1975.

9. Petitioner Johnston has attained tenure in the district as teacher and as assistant principal.

10. Intervenor Felicia B. Jamison has been employed by the Board as follows:

September, 1963 - June, 1970:	Teacher
September, 1970 - June, 1971:	Leave of absence
September, 1971 June 1979:	Teacher
September, 1979 - June, 1980:	Leave of absence
September, 1980 - June, 1981:	Leave of absence
September, 1986 - June, 1987	Teacher
July, 1987 - present:	Assistant principal

All Jamison's service in the district has been at the middle school level.

11. Felicia Jamison has been issued the following certificates and endorsements by the New Jersey Department of Education:

Secondary teacher: endorsements of biological science, art and general science - issued October, 1964
Principal/supervisor - issued December, 1974.
School administrator - issued October, 1983.

12. Felicia Jamison has not yet acquired tenure as an assistant principal in the district. The question of Jamison's tenure as assistant principal is presently before the Appellate Division on her cross-appeal.

13. Staff member Eleanor Halak has been employed by the Board as follows:

September, 1969 - November, 1982:	Learning disabilities teacher/consultant
November, 1982 - June 1987:	Assistant Principal/pupil services supervisor
July, 1987 - present:	Supervisor, special services

14. Eleanor Halak has been issued the following certificates/endorsements by the New Jersey Department of Education:

Teacher of the mentally retarded
Teacher of the socially and emotionally maladjusted
Teacher of the physically limited
Learning disabilities teacher/consultant
Principal/supervisor

15 Staff member Irene Benfatti has been employed by the Board as follows:

September, 1970 - June, 1986:	Teacher
July, 1986 - June, 1987:	Administrative assistant to the superintendent
July, 1987 - 9/30/88:	Supervisor, math/computers
10/1/88 - present:	Director of curriculum

16. Irene Benfatti has been issued the following certificates by the New Jersey Department of Education:

Junior high school teacher
Principal/supervisor

17. At a special meeting held on June 10, 1987, the Board voted to approve an administrative reorganization plan and to abolish, effective June 30, 1987, five assistant principal/supervisor positions, and one administrative assistant to the superintendent. A copy of the pertinent portion of the minutes of the Board's June 10, 1987 meeting is annexed as Exhibit J-3. The five assistant principal/supervisor positions eliminated included the positions of Lawrence Chammings, Edwin Johnston and Eleanor Halak. (The employment of a fourth, non-tenured assistant principal/supervisor was terminated as a result of the reduction in force; the fifth assistant principal/supervisor position was vacant at the time of the reduction.)

18. As a result of the administrative reorganization and reduction in force, petitioners Chammings and Johnston were advised by letters dated June 12, 1987 from assistant superintendent Anthony Vinciguerra that their employment as assistant principals/supervisors would end on August 9, 1987. A copy of the letter to Chammings is annexed hereto as Exhibit J-4. A copy of the letter to Johnston is annexed hereto as Exhibit J-5.

19. The position of assistant principal at the Copeland Middle School was not eliminated in the administrative reorganization. Felicia Jamison was appointed to that position effective July 1, 1987, pursuant to an order of the Director of the Division on Civil Rights, who had determined that the Board violated New Jersey's Law Against Discrimination in denying Jamison a promotion to assistant principal in 1978. A copy of the Director's Administrative Action Findings, Determination and Order with respect to damages, in which the appointment was ordered, is annexed hereto as Exhibit J-6. A copy of a consent order between intervenor Jamison and the Board is annexed hereto as Exhibit J-7.

20. The Board filed an appeal of the aforementioned determination of the Director of the Division on Civil Rights with the Appellate Division of Superior Court. That appeal was dismissed for failure to file the appellate brief. A motion by the Board to vacate the dismissal is currently pending before the Appellate Division

21. At a special meeting held on August 10, 1987, the Board voted to appoint Lawrence Chammings to the position of supervisor reading/language arts. The Board also appointed Eleanor Halak as supervisor of pupil services; Irene Benfatti as supervisor of math/computers; and Edwin Johnston as Copeland Middle School head teacher. A copy of the pertinent portion of the minutes of the Board's August 10, 197 meeting is annexed hereto as Exhibit J-8.

22. By letter from Anthony Vinciguerra dated November 4, 1987, petitioner Johnston was notified that the Board had approved the stipend for his appointment as head teacher. A copy of that letter is annexed hereto as Exhibit J-9.

23. Use of the non-standard title of Middle School head teacher was approved by the Morris County superintendent of schools by letter dated November 4, 1988. A copy of that letter is annexed hereto as Exhibit J-10.

24. At its April 27, 1988 regular meeting, the Board voted to abolish the position of supervisor of reading/language arts effective June 30, 1988. A copy of the pertinent portion of the minutes of the Board's April 27, 1988 meeting is annexed hereto as Exhibit J-11.

25. By letter dated April 28, 1988 from Assistant Superintendent Anthony Vinciguerra, petitioner Chammings was formally notified of the Board's action to abolish his supervisor position. The letter also raised the possibility of summer employment and a stipend position during the school year to mitigate Chammings' salary loss. A copy of that letter is annexed hereto as Exhibit J-12.

26. By letter dated May 13, 1988, petitioner Chammings replied to Vinciguerra's April 28 letter. Chammings requested a vacant fifth grade teacher position at the K. D. Malone school, accepted an offer of summer employment, and declined a stipend position during the 1988-89 school year. A copy of petitioner Chammings' May 13, 1988 letter is annexed hereto as Exhibit J-13.

27. Assistant superintendent Vinciguerra confirmed petitioner Chammings' assignment as a teacher in the district's Malone school by memorandum dated June 3, 1988, a copy of which is annexed hereto as Exhibit J-14.

28. At its June 22, 1988 regular meeting, the Board approved petitioner Chammings' appointment as a supervisor of language arts/reading in its summer program, for the months of July and August, 1988. A copy of the pertinent portions of the minutes of the Board's June 22, 1988 meeting is annexed hereto as Exhibit J-15.

29. A copy of the district's preferred eligibility list for elementary assistant principal and supervisory positions is annexed hereto as Exhibit J-16. Except for Felicia Jamison, there are no assistant principals in the district. There are no non-tenured supervisors in the district.

30. Petitioner Chammings has four years of military service credit for seniority purposes. None of the other parties has any military service credit.

31. Copies of the following job descriptions are annexed hereto as follows:

Exhibit J-17:	Assistant principal
Exhibit J-18:	Supervisor of science, etc (1982)
Exhibit J-19:	Supervisor of social studies, etc. (1982)
Exhibit J-20:	Supervisor reading/language arts (1987)
Exhibit J-21:	Middle school head teacher
Exhibit J-22:	Summer school director
Exhibit J-23:	Director of curriculum
Exhibit J-24:	Supervisor of pupil services

DISCUSSION

In capsule, salient facts show that the Board on June 10, 1987 "reorganized its administrative staff" and abolished petitioners' positions of assistant principal effective August 9, 1987. Each was notified by letter from the administration on June 12, 1987. Petitioner Chammings was then appointed to the position of

supervisor for 1987-88; petitioner Johnston was appointed to the position of middle school head teacher for 1987-88 and serves in it to the present time. The only assistant principalship in the district not abolished in the administrative reorganization was that at Copeland Middle School, to which intervenor Jamison was installed on July 1, 1987 in compliance with a final agency decision of the Division on Civil Rights on April 2, 1987.

The year following the "administrative reorganization," on April 27, 1988, the Board abolished petitioner Chammings' position of supervisor; he was confirmed in the position of 5th grade elementary teacher for 1988-89 by administration letter of June 3, 1988.

Petitioner Chammings' petition was filed in the Department of Education on September 13, 1988; petitioner Johnston's petition was filed November 18, 1988.

Analysis of the material facts may be assisted by recognition of what petitioners' claims are not. Neither petitioner has challenged the reduction in force of 1987 by which all but one assistant principalship was abolished by the Board. Neither petitioner challenged his original transfer for 1987-88 as supervisor (in the case of petitioner Chammings) or middle school head teacher (in the case of petitioner Johnston). Chammings does not challenge abolition of his supervisor position in 1988. Although each petitioner challenges and claims the position of middle school assistant principal held by intervenor Jamison since the 1987-88 school year, petitioners' respective claims do not assert or seek vindication of any rights of seniority or preferred eligibility to the Jamison position. Instead, their claims derive from fundamental rights of tenure and certification as teachers and assistant principals under N.J.S.A. 18A:28-1 et seq., generally, and specifically, perhaps, under rights most recently noted in Bednar v. Westwood Board of Ed., 221 N.J. Super. 239, 241-3 (Law Div. 1987); Mirandi v. Bd. of Ed. of West Orange, 1988 S.L.D. -- (Sept. 15, 1988); aff'd State Bd. of Ed., 1989 S.L.D. -- (Apr. 5, 1989, slip op. at 8-9); and Capodilupo v. West Orange Township Board of Ed., 218 N.J. Super. 510, 514-5 (App. Div. 1987). In Bednar, the court said:

> The tenure statute authorizes creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF. . . . The statute does not create or authorize the commissioner to create competing rights for nontenured teachers. . . . [N.J.S.A.

> 18A:28-1 et seq.] surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. . . .

The court held specifically that a tenured art teacher had the right to avoid a RIF by claiming the secondary school position of a non-tenured art teacher with experience in the specific category of secondary art. 221 N.J. Super. at 241-3.

The question results, therefore, given that petitioners' claims derive from rights of tenure, when those rights, if at all, were presumptively abridged. In my view, such putative or presumptive abridgment occurred at the moment the Board acted in 1987 to install intervenor Jamison in the Copeland Middle School assistant principalship. Contrary to the assertion of petitioner Chammings, the triggering Board action did not occur the following year on or about April 27, 1988 when the Board abolished his voluntarily assumed supervisorship for 1987-88. See, PCh.b at 2. Nor, in my view, as argued by petitioner Johnston, did his claim to Jamison's position arise only when the full meaning of his rights became known with publication of appellate decisions in Bednar or Mirandi. See, PJb at 5-13. All operative events presumptively supporting petitioners' claims were in place at the moment in 1987 when the Board abolished all but one assistant principalship position and installed intervenor Jamison in the one that remained. See, J-3, 8.

There results, next, the question whether the limiting period of N.J.A.C. 6:24-1.2 operates to bar untimely claims of "statutory entitlements" like those presented by petitioners. In Polaha v. Buena Regional School District, 212 N.J. Super. 628 (App. Div. 1986), the court concurred with a State Board conclusion that N.J.A.C. 6:24-1.2 is applicable notwithstanding a claimant asserts a statutory right:

> That a right derived from statute is involved does not excuse non-compliance with the 90-day requirement where the right is functionally related to service as a teacher. North Plainfield Education Association v. Board of Ed., Borough of North Plainfield, 96 N.J. 587 (1984). Thus, contrary to the commissioner's determination, where, as here, abridgment of tenure or seniority rights is asserted, the petition must be filed in accordance with the requirements of N.J.A.C. 6:24-1.2 [id at 632-3].

Finally, if the limiting period of N.J.A.C. 6:24-1.2(b) is applicable, and if the action, order or ruling complained of by petitioners is Board action in 1987 installing intervenor Jamison in the assistant principalship to which they lay claim, and assuming their petitions are measurably out of time, should stricture of the rule be relaxed or dispensed with under authority of N.J.A.C. 6:24-1.17? In my view, the stipulated evidential record here discloses no compelling reasons, if indeed any at all, that would justify relaxation. I reject petitioner Johnston's arguments that genesis of his claim occurred only when he subjectively became aware of legal rights under Bednar that he asserts. Objectively, all material factual elements of his claim lay plainly in place as early as August 1987 yet remained uninvoked until late the following year when his petition was filed with the Commissioner on November 18, 1988. Cf. Burd v. New Jersey Telephone Co., 76 N.J. 284, 291-2 (1978); and Lynch v. Rubacky, 85 N.J. 65, 73 (1981); and see J-3, 8. In Burd, in discussing the analogous statutory limiting period in N.J.S.A. 2A:14-2, the court said:

> The discovery principle modifies the conventional limitations rule only to the extent of postponing the commencement of accrual of the cause of action until plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action. There is no suggestion in any of the leading cases in this area that accrual of the cause of action is postponed until plaintiff learns or should learn the state of the law positing a right of recovery upon the facts already known to or reasonably knowable by the plaintiff . . . [emphasis in text, 76 N.J. at 291-2]

Here the Board action did not follow creation of "competing rights" in other potential candidates for the assistant principalship; position eligibility was closed by mandate of the Division on Civil Rights. Cf., in contrast, Schienholz and Fuller v. Bd. of Ed., Twp. of Ewing, 1989 S.L.D. -- (June 19, 1989; slip op. at 21-22).

CONCLUSION

Based on the foregoing, having considered the evidential record and arguments of the parties thereupon, I **CONCLUDE** as follows:

1. Petitioners' claims to the position of assistant principal held by intervenor Jamison since action of the Board in August 1987 in installing her therein arise under their statutory rights of tenure and certification;

2. Conversely, such rights did not originate at any later time;

3. Rights asserted by petitioners though deriving, if at all, from statutory tenure entitlement are nevertheless subject to the bar of the limiting period of N.J.A.C. 6:24-1.2(b);

4. The petition of neither petitioner was filed within 90 days from actual and/or constructive notice to petitioners of Board action in July 1987;

5. No occasion is presented for relaxation of the limiting bar under authority of N.J.A.C. 6:24-1.17;

6. The petitions of Lawrence Chammings and Edwin Johnston, Jr., therefore, should be, and are hereby, **DISMISSED**; judgment is **ENTERED** in favor of the Board on its affirmative defenses to each petition of the bar of the limiting period of N.J.A.C. 6:24-1.2; and

7. In view of the above, no opinion is expressed herein on any substantive issue concerning the effect on petitioners' claims of the order of the Director of the Division on Civil Rights in the matter of Felicia B. Jamison, complainant v. Rockaway Township Board of Education, respondent, New Jersey Division on Civil Rights, Director's decision, April 2, 1987.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

July 11, 1989
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

July 14, 1989
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 14 1989
Date

OFFICE OF ADMINISTRATIVE LAW

amr

LAWRENCE CHAMMINGS,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
EDWIN JOHNSTON, JR.,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner Johnston's exceptions in which Petitioner Chammings joins were timely filed pursuant to N.J.A.C. 1:1-18.4 as were the Board's and Intervenor Jamison's replies to the exceptions.

Petitioners object to the application of N.J.A.C. 6:24-1.2 as a bar to the filing of their petitions to vindicate their tenure rights. It is averred that the conclusions reached in the initial decision fail to take into account certain changes in the legal interpretation of tenure rights that occurred far after the date of "actual and/or constructive notice" chosen by the court. (Initial decision, ante) In the alternative, petitioners argue that N.J.A.C. 6:24-1.17 should have been applied to relax the 90-day filing requirement, as a rigid application of N.J.A.C. 6:24-1.2(b) in the matters would clearly result in injustice and a denial of statutory tenure rights.

The legal arguments set forth in support of petitioners' position are those submitted in Petitioner Johnston's brief which were reviewed and considered by the ALJ in rendering his initial decision.

Upon review of the record and the arguments of the parties, the Commissioner agrees with and adopts as his own the ALJ's recommendation dismissing the petition submitted by Petitioner Johnston on the basis of untimeliness for the reasons well-expressed in the initial decision. He likewise accepts the recommendation to dismiss the petition filed by Petitioner Chammings on the basis of untimeliness but for reasons other than those reached by the ALJ as explained below.

Unlike Petitioner Johnston, Petitioner Chammings was subject to two reduction in force, one in April 1987 when his assistant principal position was abolished and another in April 1988 when the supervisor of reading and language arts position to which he was transferred was also abolished. Thus, unlike with Petitioner Johnston whose cause of action was restricted to April 1987 when his assistant principal position was abolished, Petitioner Chammings had a new cause of action, i.e., independent of the 1987 action, which triggered his tenure and seniority rights for the second year in a row.

Notwithstanding this fact, Petitioner Chammings' petition is untimely since he did not file it until September 13, 1989, well in excess of the 90-day requirement of N.J.A.C. 6:24-1.2. On April 28, 1988 he was notified that his supervisor position was abolished. (Exhibit J-11) Under the circumstances of this matter, it was at this time that his second cause of action arose.

As with the ALJ, the Commissioner finds no compelling circumstances to warrant relaxation of the filing requirement under the provisions of N.J.A.C. 6:24-1.17. Thus, for the reasons expressed in the initial decision as modified herein, the Petitions of Appeal submitted by Mr. Johnston and Mr. Chammings are dismissed.

COMMISSIONER OF EDUCATION

August 22, 1989

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6665-88
AGENCY DKT. NO. 273-8/88

NICHOLAS MERLINO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,
Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorneys)

John Fiorello, Esq., for respondent
(Feldman, Feldman, Hoffman & Fiorello, attorneys)

Record Closed: June 2, 1989 Decided: July 14, 1989

BEFORE **EDITH KLINGER,** ALJ:

Procedural History

On August 22, 1988, Nicholas Merlino filed a verified petition with the Commissioner of Education alleging that his tenure and/or seniority rights under *N.J.S.A.* 18A:28-5 were violated by the Pequannock Township Board of Education (Board). Respondent filed its answer on September 6, 1988, and on September 12,

1988 the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

After notice to all parties, a prehearing conference was held on December 20, 1988, at which time the hearing was scheduled for May 2, 1989. On that date, the matter was heard but the record was held open until June 2, 1989, to allow the parties to submit briefs.

The issues to be decided are:

1. Does the transfer, appointment and/or assignment of petitioner to the position of "unassigned teacher" violate his tenure and/or seniority rights under *N.J.S.A.* 18A:28-5?
2. Does the new position constitute tenured employment?
3. Is the new position within the scope of petitioner's teaching certificate?
4. Is petitioner estopped by his actions from making his claim?
5. To what relief, if any, is petitioner entitled?

Stipulation of Facts

At the time of hearing, a Stipulation of Facts was submitted by agreement of the parties. The facts set forth in that stipulation are adopted by me and found as facts in this matter:

1. Petitioner is a tenured teaching staff member employed by respondent.
2. Petitioner has been employed by respondent since September 1953.
3. Petitioner was assigned to the High School from September 1969 to June 1988.
4. Three out of four of the teachers assigned to cover the ICE (Isolated Classroom Environment) Program for the 1988-89 school year were members of the High School Social Studies Department.

In addition, certain documents were admitted into evidence without objection.

Undisputed Facts

Based upon the testimony and documents, it appears that the material facts are not in dispute and I **FIND** the **FACTS** set forth in the following summary.

Nicholas Merlino is the holder of a permanent secondary teacher's certificate from the Department of Education of the State of New Jersey. This certifies that he is entitled to teach "in grades 7 through 12 the subjects of History and Government, also English." There is an endorsement to teach "elementary subjects prescribed for grades 3 through 8 inclusive." The certificate was issued on June 9, 1958.

Between 1953 and 1963, he taught fifth and sixth grades at the Pequannock Valley School. Between 1963 and 1969, he taught science to the eighth grade at the same school.

Ralph M. Rizzolo is the principal of Pequannock Township High School. He instituted the ICE program there 12 years ago. This program is designed to deal with students who, for infractions of school rules and regulations, must be isolated from other students While in the program, students are supplied with educational assignments from their classroom teachers and are responsible for completing the assignments on a daily basis. The staff member assigned as teacher to the program is responsible for supervising the students and modifying those negative aspects of their behavior responsible for their placement in the program. Students placed in the program may remain there for from one to three days at a time.

The assignment to teach the ICE program is considered to be a permanent building assignment. No job description of this position was ever sent to the county superintendent for approval and no formal title has ever been attached to the job. The superintendent never determined the certifications necessary to be a teacher in the ICE program.

From 1969 to 1981, Merlino taught social studies at Pequannock Township High School. In 1981, Rizzolo asked Merlino to become the teacher assigned to the ICE program. Prior to this time, another teacher held this position for two years. It was unspecified what that teacher's area of certification was or why he did not continue with the program.

Merlino accepted the position with the ICE program based upon the assurances of Frank Kaplan, assistant superintendent of the Pequannock Township Public Schools, that his functioning in this capacity would be for the good of the school system.

On June 25, 1982, Merlino wrote to Kaplan as follows:

> Would you be so kind as to send me some sort of statement which would stipulate that my return to the high school social studies department be guaranteed should the I.C.E. program ever be discontinued?
>
> I feel this is a fair request on my part inasmuch as I have given a professional lifetime to the Pequannock school system.
>
> Thank you for your courtesy.

Kaplan responded on June 28, 1982, that:

> This letter is a response to your recent inquiry about future assignment to high school social studies program.
>
> Needless to day [sic], I appreciate your concern over this matter which is very important to you. Please understand that each year, particularly with enrollment changes, brings about different staffing needs. It is quite impossible to identify specific departmental staff needs for more than one year; each year requires an examination of the needs and a determination where teachers may best be assigned, taking into consideration their individual backgrounds and strengths.
>
> I hope you will understand why the District cannot guarantee any particular assignment. In a period of falling enrollment, reduction in staff is unavoidable - another factor which prohibits guarantees. This RIF procedure is governed by one's seniority and the type of valid certification, but it does not address itself to assignments or re-assignments.
>
> I hope you find this letter a response to your concern. Thank you for your inquiry and enjoy the summer recess.

Merlino accepted the transfer to the ICE program and his evaluation on March 7, 1984 states that: "For the last three years [he] has done a very fine job." The parties agreed that his performance in this position was good throughout all of the years he held it.

The duties of a teacher in the ICE program include supervising the students' completion of educational assignments from their classroom teachers on a daily basis offering assistance, guidance and academic direction. Although Merlino did not prepare lesson plans for the students in ICE, he did teach them social studies, science, math and commercial subjects, where necessary. He provided limited assistance with language assignments, since he is not certified to teach these subjects. When he was required to help a student in a subject in which he was not certified, he did the best he could seeking guidance from the classroom teacher.

At times no students were assigned to the ICE program, particularly at the beginning and end of a school year. Sometimes only one student would be in the program. At those times when his services were not utilized, Merlino assisted with student control by monitoring the hallway and patrolling the cafeteria and school grounds; he generally tried to use his time in a manner beneficial to the school.

Occasionally he filled in on a voluntary basis for absent teachers, only in emergency situations and for a short time. Although the Board claims now that Merlino performed these non-ICE functions as part of his job, Ralph Rizzolo's March 7, 1984. Total Performance Evaluation Report on Merlino confirms Merlino's assertion that he undertook these duties on a voluntary basis.

Over the years, Merlino developed an expertise in handling students with discipline problems and remedying their problems. In the Total Performance Evaluation Report on Merlino for the 1981-82 school year, he is credited with a drastic reduction in the number of students assigned to in-school suspension because of his effectiveness in handling the program. There is no dispute that when Merlino accepted the assignment to the ICE program from September 1982 through June 1988, he was not assigned to and did not teach any courses in the Social Studies Department. He attended no social studies teaching staff meetings, nor did he

participate in the development of any social studies curriculum program.

According to Rizzolo, the ICE program was modified after the 1987-88 school year for several reasons, including the declining enrollment of the high school, the change in behavior of the students, which he related to the success of the ICE program itself, the additional needs of students in the areas of guidance and rehabilitation and the addition of more supplementary education programs. Accordingly, Merlino's position with the ICE program was appropriately terminated and the duties were divided as building assignments among four other teachers on the high school staff; as stated in the stipulation, three of the four teachers were members of the high school Social Studies Department.

On June 14, 1988, Kaplan notified Merlino that his next year's assignment would be at Pequannock Valley School (the middle school) as an "unassigned teacher." The purpose of the reassignment was to have Merlino upgrade the existing In-School Suspension (ISS) program in the middle school. Before Merlino's transfer, the ISS duties were performed by a teacher's aide, not a certified member of the teaching staff.

Leslie Conlon, principal of the middle school, stated that the paraprofessional formerly assigned to the ISS program had no teaching certificate and had different duties than those assigned to Merlino She made calls to the parents of students, obtained student assignments from classroom teachers and supervised the after school detention. As a practical matter, the aide had students following her around the building during the day while she tried to make phone calls to parents and perform her additional duties. She did not instruct the students or assist them with their assignments. The school administration decided that this situation was not satisfactory. They wanted a certified teacher to replace the aide so that there would be a continuity of instruction from classroom to detention. Merlino was the first teacher assigned under the new arrangement.

Merlino protested this assignment. At a closed session workshop of a Board of Education meeting on August 8, 1988, Merlino appeared represented by David Mendes, a general music teacher for grades 6, 7 and 8 and vice-president of the Education Association, the teachers' association for the Pequannock School System.

Merlino requested that he be returned to the position of social studies teacher at the high school but was told by the school administration that since his position as teacher of the ICE program had not been abolished, he had no rights to replace a present member of the high school Social Studies Department. Even if his position had been abolished, he had not continued to accrue seniority as a teacher of social studies since he had not taught social studies during his years in the ICE program; therefore he was junior to all of the present teaching staff of the department. In a search for alternatives which would allow Merlino to remain at the high school where he wished to be assigned, Mendes suggested that Merlino could be reinstated as a "permanent substitute" or unassigned teacher at the high school. This solution was proposed as a "trial balloon" by Mendes, not Merlino, who objected to it then and continues to object. In any case, the Board did not view this as a viable alternative.

In August 1988, subsequent to Merlino's assignment to the middle school, Frank Kaplan wrote to George A. Snow, the Morris County Superintendent of Schools, requesting that the Pequannock Township School District be allowed to use the title "unassigned teacher" for the new position. No information was provided to the superintendent at the time as to the specific proposed use of Merlino's services in the middle school. Kaplan forwarded to Snow a general job description for the job title "unassigned teacher - Middle School."

On August 30, 1988, Snow responded to Kaplan's request as follows:

> This letter is in response to your request to use the title, Unassigned Teacher. Teacher is a recognized title, therefore the position of Unassigned Teacher, will be recognized. There is no need to apply for approval to use the title, Unassigned Teacher. The individuals employed in that position accrue tenure and seniority pursuant to the instructional endorsement under which they are serving. Should the individual possess more than one instructional endorsement at the time he/she is hired from outside the district, the board of education is required to designate the endorsement under which the individual shall accrue seniority upon the attainment of tenure.

According to Frank Kaplan, the ISS program in the middle school is similar to the ICE program at the high school in several ways. It is the intent of both programs

to keep children in the school building during the course of the day. Students who have violated the school regulations and who manifest discipline or social problems are isolated and required to do productive work while remaining in school. They study and do homework, receiving counseling and academic assistance if necessary. There are certain differences between the programs. In the ICE program, the children are of high school age and are expected to assume a higher level of responsibility. A student is placed into the ICE program for at least one and possibly three whole school days. His entrance into the program is known at least a day in advance, and there is the ability to plan for him. The ISS program in the middle school receives students on a spontaneous basis, possibly for only one or two periods during a day; there is no way to anticipate or plan for the entrance of a student.

Merlino's present assigned schedule as ISS teacher consists of three periods of ISS supervision, two periods of cafeteria supervision, supervision of an eighth grade class between 8:15 and 8:30 in the morning, supervision of the bicycle racks between 2:45 and 3:00 p.m. and two preparation periods. It was explained that these two preparation periods are required by the teachers' contract. All of his present duties are considered building assignments and he is the only teacher in the school system whose program consists entirely of building assignments.

Since beginning his position in the middle school, Merlino has kept a daily diary of his actual assignments. The diary is complete for the school days between September 6, 1988 and March 10, 1989. Since January 23, 1989, the diary reflects that a back injury caused him to be on medical leave. On that date, he fell down the stairs at the middle school and ruptured a disk in his spine.

The diary shows that he was used as a substitute for a social studies teacher, an English teacher, a librarian, an art teacher, a gym teacher, a mathematics teacher, a music teacher, an industrial arts teacher, and, between October 3, 1988 and November 4, 1988, a certified teacher of the handicapped who was on sick leave. Merlino is not certified to teach music, art, gym, industrial arts or special education. He has no qualification to substitute for the librarian and, in fact, when he did so, he sat in the library all day doing nothing.

At any time that he was not substituting for other teachers or supervising the ISS program, he waited by the principal's office for a student to be assigned or did

cafeteria or playground duty. In addition, Conlon gave him an overall assignment to prepare a bibliography for use in the middle school social studies and language arts programs.

The log also reveals that between September 6 and January 23, he actually supervised the ISS program on only three dates, November 21, 28 and 29, and had only one student on each of these days.

The record reflects that at least five members of the Social Studies Department at the high school obtained their positions after Nicholas Merlino. Petitioner was assigned to the high school in September 1969. Robert Arata was initially employed on February 1, 1972. Robert Fulwiler was initially employed on September 1, 1985. John Hellyer and Michael Strangia were initially employed on September 1, 1970. Russell Irving was initially employed on September 1, 1972. None of the teachers named above were made party to this proceeding.

Arguments of Counsel

Petitioner argues that he is tenured with seniority in the category of high school social studies teacher and that he continued to accrue this seniority while in the ICE program. When his tenured position in the ICE program was abolished, he should have been placed back into the high school Social Studies Department. The ISS program at the middle school to which he was transferred is not in the same category as the position of high school in-school suspension teacher.

Respondent argues that petitioner served in the ICE program without complaint and therefore he has waived his rights to complain and should be estopped from raising objections to the ISS transfer. Further, respondent argues that petitioner did not accrue tenure as a high school social studies teacher because he did not teach high school social studies while he was in the ICE program; that the ICE position was abolished; and that the transfer to the ISS position was a lateral transfer.

Discussion of Law and Conclusions

In order to assess the arguments of the parties in this matter it is necessary to

return to the circumstances surrounding Nicholas Merlino's appointment to teach the high school ICE program. The position, for which no recognized job title exists, was created by the district without the approval of the county superintendent of schools. No information on this position was ever submitted to him nor was any attempt made to secure his approval of the unrecognized title.

N.J.A.C. 6:11-3.6(a) requires district boards of education to assign to teaching staff members position titles which are recognized in the rules. I **CONCLUDE** that Merlino was assigned to teach the ICE program, a position title not recognized in the rules, and therefore the district board of education was in violation of the regulations when it made this assignment.

It would have been possible for the Board to create a position title; however, a district board of education must do so in accordance with the regulations. *N.J.A.C.* 6:11-3.6 provides:

> (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.

Merlino was transferred to teach the ICE program without a determination by the county superintendent as to the appropriate certification and title for the position. The approval procedure is mandatory and not within the discretion of the local board.

> Unless and until that determination was made utilizing the procedures mandated by the rules of the State Board of Education, the Board's right to transfer him to that position could not be ascertained.

> Accordingly, it is determined that the Board's unilateral transfer of petitioner on July 13, 1977 from his tenured position of high school principal to the position of Director of Community Services was an *ultra vires* act. *Morra v. Board of Education of Jackson, Ocean County,* 1979 *S.L.D.* 81, 87.

There will be no discussion here as to what certifications would have been appropriate for the ICE position since that determination is within the original jurisdiction of the county superintendent pursuant to *N.J.A.C.* 6:11-3.6. *Cohen v. East Brunswick Board of Education* (N.J. App. Div., March 12, 1984, A-4873-82T3)(unreported), aff'g State Board (Sept. 30, 1982), aff'g Comm'r of Ed. (March 2, 1983).

Respondent argues that petitioner served as a full-time ICE teacher at the Pequannock High School for six years without complaint or the filing of a petition with the Commissioner of Education. This is not the case. Merlino did protest his removal from the Social Studies Department and requested but was denied the assurance that he would be able to return to his position as a member of the social studies faculty in the event the ICE program was discontinued. He did allow himself, as he has apparently done many times over the years, to be persuaded to accept the duties for the good of the school. Respondent now relies upon Merlino's acquiescence in the appointment to argue that he has waived his rights to complain about his present transfer to the ISS program at the middle school and that he should somehow be estopped by his conduct from raising objections to the ISS transfer.

"Waiver" is generally the intentional relinquishment of a known right. *East Orange v. Board of Water Commissioners,* 41 *N.J.* 6 (1963). It is not clear what known right the Board believes Merlino intentionally relinquished. Since he acceded to what he believed was the school administration's legitimate request for him to accept a position in the ICE program for the good of the school, it is clear that he knew of no right which he might intentionally relinquish. Does the Board argue that in order to assert this undefined right Merlino had a duty, possibly yearly under *N.J.A.C.* 6:11-3.6(b), to litigate the Board's illegal act: its failure to apply to the county superintendent to use the unrecognized position title and to fix the

appropriate job description, certification and title for the position? Has he intentionally relinquished his right to complain now because the Board is ordering him to perform duties at the middle school which it illegally ordered him to perform at the high school for six years? I **CONCLUDE** that Nicholas Merlino has waived none of his rights to bring the present action.

The Board next urges that an estoppel should work against Merlino to bar him from prosecuting the present action. The essential principle of estoppel is that one may be precluded by his voluntary conduct from taking a course of action which would work injustice and wrong to one relying on such conduct with good reason and in good faith. *Summer Cottagers' Assoc. of Cape May v. City of Cape May*, 19 *N.J.* 493 (1955). Does the Board argue that by accepting the allegedly legitimate position in the ICE program Merlino induced the Board to rely on his failure to protest its illegal action, thereby barring him from protesting any other action which the Board may choose to take against him? At the very least estoppel is a doctrine of equity. The Board cannot say that its own hands are so clean that it is entitled to close the mouth of an appellant to prevent him from protesting injury done to him. I **CONCLUDE** that Merlino is not precluded by the principle of estoppel from pursuing this appeal.

In contravention of the law, the Board employed and paid petitioner as supervisor of the ICE program, a position with an unrecognized title, from September 1982 through June 1988, a period of six academic years. The record shows that there was no determination of what certificate was required to hold this position nor is there any evidence that at any time Merlino was aware that he did not possess any necessary certification. There is nothing in the record to show that in petitioner's case the local superintendent or the county superintendent of schools performed their affirmative duty of checking annually to make certain that every teaching staff member in the district held the proper certification. *N.J.A.C.* 6:11-3.5(a)(b). Based upon the fact that petitioner served more than two years in this position under these circumstances, I **CONCLUDE** that under *N.J.S.A.* 18A:28-6 Merlino would have acquired tenure in the position of high school ICE teacher if this were indeed a tenurable position. *Cullen v. Board of Education of the Twp. of East Brunswick*, OAL DKT. EDU 5643-81 (August 11, 1982), mod. in other respects, Comm'r of Ed., Sept. 30, 1982, aff'd State Board, March 2, 1983, aff'd *N.J.* App. Div., March 12, 1984, A-3198-82T3 (unreported)

His transfer from the Social Studies Department to the position of teacher of the high school ICE program was a lateral transfer since the latter was not a lesser position. *Vanderhoof v. Board of Education of Scotch Plains-Fanwood Reg. Sch. Dist.,* OAL Dkt. EDU 5200-86, mod. on other grounds by the Comm'r of Ed. (April 15, 1987), aff'd State Board of Ed. (June 3, 1988). Merlino consented to his transfer from high school social studies teacher to the ICE program and therefore his tenure rights are governed by *N.J.S.A.* 18A:28-6.

It is clear that Merlino's position as ICE teacher was tenurable: Merlino, as the Board argues, was merely transferred from a position as a teacher of social studies to the tenurable position of ICE teacher for which he was properly certified, and as the ICE teacher he acquired seniority in that position and in accord with his elementary endorsements. Seniority can be accrued only in a tenured position. *Lang v. Princeton Regional Board of Education*, 1979 *S.L.D.* 245. It has already been decided that whether a position is tenurable depends upon the facts of the situation including the manner in which the position is regarded by the school district and the person occupying the position. *Childs v. Union Twp. Board of Education,* 3 *N.J.A.R.* 163, aff'd State Board (April 1, 1981), aff'd N.J. App. Div., July 19, 1982, A-3603-80T1, (unreported). It was, in fact, specifically decided in *Vanderhoof* that the position of full-time in-school suspension teacher was a teaching position equal to any other teaching position and that a transfer to this position constituted a reassignment within the tenurable position of teacher.

At the conclusion of the school year 1987-88, Merlino's position as ICE teacher in the high school was abolished, that is, his duties were divided among other teachers in the high school as building assignments and his job simply disappeared. There is no challenge to this action and, as found, this abolition of his position was done for appropriate reasons when the ICE program was reorganized because of the high school's declining enrollment and the decreased number of students participating in the program.

Under *N.J.S.A.* 18A:28-9, it is within the power of the local board to abolish a tenured position for good cause, and I **CONCLUDE** that the tenured position of high school in-school suspension teacher held by Nicholas Merlino was appropriately abolished at the end of the 1987-1988 school year for good cause.

As a result of this abolition of position, Merlino's rights to have his seniority determined under *N.J.S.A.* 18:A:28-11 were triggered.

The law is settled that a teacher's "service in the assignment of in-school suspension teacher is to be credited for seniority purposes to all categories in which she had served prior to her reassignment, as well as to the category defined by the position title approved by the county superintendent. *N.J.A.C.* 6:3-1.10(h)." *Vanderhoof,* State Board Decision at 4. That no one in Merlino's case ever defined the category by a position title approved by the county superintendent should not work to the detriment of the teacher. In spite of the Board's assertion to the contrary, I therefore **CONCLUDE** that Nicholas Merlino continued to accrue seniority in all categories in which he served during his tenure as high school in-school suspension teacher, including the category of social studies teacher on the high school level and the *de facto* category of high school in-school suspension teacher. *N.J.A.C.* 6:3-1.10(h). By application of this regulation, I **CONCLUDE** Merlino has seniority of approximately 19 years as a high school social studies teacher as of the end of the 1987-88 school year; the six years he served in the ICE program "tack" onto his prior 13 years of instruction in social studies on the secondary level.

The Board argues that, with the abolition of the ICE position, Merlino was simply transferred to an equivalent position at the middle school. The record does not support this assertion. In the ICE program Merlino was designated by the Board as a full-time teacher of the Isolated Classroom Environment Program on the secondary level, although this title was never approved by the county superintendent nor the duties and required certifications clarified; the position for which the Board received approval in the middle school was that of "Unassigned Teacher."

The regulations provide that a category is defined in accordance with the duties performed and not by title, *N.J.A.C.* 6:3-1.10(g), and the record shows that these two positions do not have the same duties. In the ICE program Merlino served as in-school suspension teacher on the secondary level. In the ISS program, Merlino has served overwhelmingly as a substitute for other middle school teachers and has spent only three days with students in the in-school suspension program. Because of

its own failure to clarify the position of in-school suspension teacher on the high school level, the Board may not now assert that it is the equivalent of any other position in the school district. I therefore **CONCLUDE** that there was no employment in the same category in the district to which Merlino could have been transferred following the abolition of the position of in-school suspension teacher in Pequannock High School. I further **CONCLUDE** that there is no vacancy in this category of his seniority in which Nicholas Merlino can now be placed.

I **CONCLUDE** that petitioner must revert to the category in which he held employment prior to his employment as ICE teacher, and that therefore he should be placed and remain upon the preferred eligible list as a teacher of social studies on the secondary level until a vacancy occurs to which his seniority entitles him. *N.J.A.C.* 6:3-1.10(i).

Summary

Based upon the facts and the applicable case law in this matter, I **CONCLUDE** that petitioner is entitled to relief, not only as a matter of law, but also as a matter of equity so that his willingness to accommodate and be of service to the school district in combination with the irregular procedures followed by the district do not continue to work to his detriment indefinitely. If the Board wishes to prevent him from teaching social studies to high school students in the district, there are other procedures which they must, by law, follow.

I therefore **CONCLUDE** that Nicholas Merlino's position as in-school suspension teacher on the secondary level was abolished at the conclusion of the 1987-1988 school year and that he enjoys seniority as a teacher of social studies at the high school level from September 1969 to date.

Order

Accordingly, it is **ORDERED** that the Board of Education of the Township of Pequannock formulate a seniority list as well as a preferred eligibility list if necessary which reflect the determination of this decision and, further, that the Board provide Nicholas Merlino with such relief as may be required by this determination and the tenure and seniority status it has conferred.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER 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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

July 14, 1989
Date

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

July 14, 1989
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 19 1989
Date

Jacque LaVerdin /K.S
OFFICE OF ADMINISTRATIVE LAW

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NICHOLAS MERLINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4, as was petitioner's reply to the Board's exceptions. However, the Board's "supplement" to its excepitons were untimely filed.

Petitioner is in general agreement with the ALJ's disposition of the issues but urges that the ALJ's conclusions as to petitioner's 19 years seniority as a secondary teacher of social studies not be construed as a limitation on the breadth of his seniority rights overall since he has service as an elementary teacher and science teacher as well. It is noted for the record that any conclusions as to his seniority are limited to the contested issue of his entitlements in the social studies area and the decision is not intended to constitute an all inclusive determination of his seniority rights.

Petitioner also avers that the ALJ erred in determining that he should be placed and remain on a preferred eligibility list for social studies until a vacancy occurs. He contends that he need not wait until one of the present social studies teachers vacates a position since, by virtue of his seniority rights, he had a right to claim the position as of the start of the 1988-89 school year.

The Board argues that the ALJ erred in her determination that petitioner was entitled to relief in this matter. It avers that no tenured teacher is guaranteed continuity of any teaching assignment or acquires a vested right to any particular assignment, class or school building. It relies on Bigart v. Bd. of Ed. of Paramus, 1979 S.L.D. 123 in support of its position that it acted properly in this matter when transferring petitioner to a position of "unassigned teacher." As to this, it maintains that the job descriptions in the two matters are quite similar and that, as in Bigart, no violation of law has occurred either in regard to N.J.S.A. 18A:6-10 in terms of dismissal or reduction in compensation or to N.J.S.A. 18A:25-1 which authorizes a board to transfer a teaching staff member.

The Board also argues that the circumstances in the instant matter are clearly distinguishable from Payne v. Bd. of Ed. of the

Village of Ridgewood, 1976 S.L.D. 605 and Turner v. Bd. of Ed. of the City of Camden, 1984 S.L.D. 823 wherein it was determined that the boards of education had improperly reassigned the teachers in question to permanent substitute duties as a result of poor teaching quality. It avers that, in the instant matter, there is no proof whatsoever that the Pequannock Board perceived that the petitioner had any deficiencies which it was attempting to correct.

The Board cites as support of its rights to have transferred petitioner to the middle school unassigned teacher position Vanderhoof, supra, and Dowding and Hudak v. Bd. of Ed. of Monroe Township, Middlesex County, decided March 7, 1989 wherein the Commissioner found that in school suspension was a teaching assignment since it required a teaching certificate. It further argues that:

> In her Initial Decision, the Administrative Law Judge has concluded that the County Superintendent of Schools somehow improperly approved the job description and duties of unassigned teacher at the Pequannock Valley Middle School. However, as stated in the Vanderhoof decision, the authority to determine what certification is required for service in an unrecognized position title is vested in the County Superintendent. Contrary to Vanderhoof, there is no procedural defect in the instant case to call into question the County Superintendent's determination herein.
>
> The unadorned, uncontradicted facts herein are that the County Superintendent of Schools, after reviewing the detailed and clearly defined duties and job description of the proposed position of unassigned teacher at the middle school, gave his approval thereof and consent thereto. He determined that a teaching certification at the elementary school level was required for such position and, the petitioner, having such a certification was reassigned from the high school ICE program to the position of unassigned teacher. Such a lateral transfer and reassignment is within the authority of the Board of Education. And, as a result thereof, the petitioner herein lost no tenure or seniority rights.
>
> In fact and truth, the only real complaint of the petitioner is that he would rather perform the duties required of him in the high school building rather than in the middle school building. (Board's Exceptions, at pp. 18-19)

Upon review of the record in this matter, the Commissioner agrees with and adopts as his own the ALJ's findings and conclusion that petitioner had as of June 30, 1988 nineteen (19) years seniority in the secondary category under his endorsement to teach

History and Government. N.J.A.C. 6:3-1.10(1)19 He disagrees, however, that any seniority accrued in a de facto category of high school in-school suspension teacher. (Initial Decision, ante) Petitioner accrued seniority in the secondary category under his History/Government endorsement for the six years service as a high school Isolated Classroom Environment (ICE)/in-school suspension (ISS) teacher since that was the endorsement under which he had been serving the previous 13 years and it was sufficient to fulfill the ICE/ISS assignment. See Dowding, supra, which determines that the only certificate appropriate for ISS teaching assignments is an instructional certificate.

The Commissioner also concurs with the ALJ's determination that petitioner's full-time position as an ICE teacher was abolished at the end of the 1987-88 school year. (Id., at p. 13). He likewise agrees that as a result of that abolishment, petitioner's seniority rights were triggered. This case is not merely a matter of a board of education action to transfer a teaching staff member under the provisions of N.J.S.A. 18A:25-1. It is a case stemming from a reduction in force of a full-time ICE teaching position. N.J.S.A. 18A:28-9 et seq. See Fallis v. Bd. of Ed. of the Borough of South Plainfield, Middlesex County, decided March 4, 1985, aff'd State Board September 4, 1985.

At the time that the reduction in force occurred there were in the employ of the Board teachers in the secondary category teaching social studies courses for which petitioner was qualified who possessed less seniority or were not tenured as of June 30, 1988. (Id., at p. 9)

When petitioner's position was abolished, he was entitled to bump less senior or nontenured teachers fulfilling assignments in the social studies area which he was qualified to teach. N.J.A.C. 6:3-1.10(h)

Moreover, the Board is in error when it claims that the "unassigned teacher-Middle School" was an appropriate assignment since it was comparable to the ICE position in the high school. The ALJ is correct in determining that the Unassigned Teacher position was tantamount to a permanent substitute position. Even granting that petitioner spent eight work days out of a four and one-half month period vs. the three days found by the ALJ on in-school suspension assignments at the middle school, the position was almost exclusively one of a substitute teacher. Substitute assignments were made in such areas as physical education, music, art, industrial education, math, library, and special education.

Contrary to the Board's assertion, the circumstances herein are not similar to the circumstances in Bigart, supra. In that case, the petitioner's assignments were limited strictly to the English Department in one school. Here, the assignments were over all of the departmentalized content areas of the middle school. As such, the assignments for substituting in the instant matter were akin to those prohibited in Payne, supra; Turner, supra; and Tenney v. Bd. of Education of Palisades Park, Bergen County, decided

June 5, 1985 and not those allowed in Bigart, supra. As in the cases of Payne, Turner and Tenney, assignment as a substitute teacher herein was not an exception, but a routine virtual daily occurrence. As was also found in those cases, it is determined herein that assignment of a tenured teacher "***as a substitute teacher is clearly not an assignment as a teaching staff member." (Payne, 1976 S.L.D. at 610) That petitioner was not deemed to be a deficient teacher does not alter this determination. Nor is this determination altered by the fact that the Board was not motivated by bad faith.

To the extent that the county superintendent's letter of August 30, 1988 (Exhibit R-6) is perceived as permitting a tenured teacher to serve as a substitute teacher on a routine, on-going basis, that determination of the county superintendent is reversed.

Accordingly, petitioner is ordered to be reinstated forthwith to a teaching position in the secondary category for which he is qualified and to which his seniority rights entitle him.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 22, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 6304-88
AND EDU 5701-88
AGENCY DKT. NOS. 242-7/88
AND 203-7/88
(CONSOLIDATED)

IN THE MATTER OF THE
TENURE HEARING OF
RALPH VILLANI, SCHOOL
DISTRICT OF THE TOWNSHIP
OF BERKELEY, OCEAN COUNTY,
and
RALPH VILLANI,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
BERKELEY, OCEAN COUNTY,
Respondent.

Philip H. Shore, Esq., for the complainant Board of Education-respondent
(Shore and Zahn, attorneys)
Joseph N. Dempsey, Esq., for the respondent-petitioner

Record Closed: June 19, 1989 Decided: July 11, 1989

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

The Board of Education of the Township of Berkeley (Board) certified four charges of conduct unbecoming a teaching staff member to the Commissioner of

Education (Commissioner) against respondent-petitioner (hereinafter, respondent), a tenured teaching staff member in the Board's employ. The Board's action is taken pursuant to N.J.S.A. 18A:6-10 et seq. where, on July 21, 1988, it suspended respondent from his teaching duties without pay, pursuant to N.J.S.A. 18A:6-14, pending a determination of the charges which the Board avers are sufficient, if true in fact, to warrant respondent's dismissal or reduction in salary. Respondent denies the charges as framed and sets forth two separate defenses.

In a separate action, respondent filed a Petition of Appeal before the Commissioner contesting the Board's determination to withhold his salary increment, and salary adjustment for the 1988-89 school year. The Board asserts that its action to withhold respondent's adjustment and/or salary increment was taken pursuant to its statutory authority in accordance with N.J.S.A. 18A:29-14.

The matters were transmitted from the Commissioner to the Office of Administrative Law (OAL) for determination as contested cases, 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 scheduled before Administrative Law Judge Daniel B. McKeown for September 20, 1988, however, it was adjourned at the request of respondent's attorney. The cases were subsequently assigned to the undersigned and a prehearing conference was held on November 7, 1988 at which, among other things; the two matters were consolidated, pursuant to N.J.S.A. 1:1-17.1 et seq., the issues to be resolved by this tribunal were set forth and, the hearing dates were established.

The hearing was held March 7 through March 10, 1989 at the Dover Township Municipal Building, Toms River, New Jersey. The parties requested and were granted leave to submit post hearing briefs and memoranda. Subsequent to the hearing, respondent's attorney was hospitalized for surgery and, therefore, was granted an extension in which to submit his brief. The record was closed on , upon receipt of the last submission.

ISSUES

1. Whether the acts alleged to have been committed by respondent-petitioner and as charged by the Board are sufficient to warrant dismissal from his tenured position, pursuant to N.J.S.A. 18A:6-10?

2. Having used the same grounds which gave rise to the tenure charges for the Board to withhold respondent-petitioner's salary increment, is the Board now estopped from bringing its tenure charges against respondent-petitioner? (See, XIII MOTIONS).

3. Whether the alleged actions by respondent-petitioner justify an increment withholding?

4. Whether the Board provided respondent-petitioner with procedural due process rights by its failure to give him written notice of his right to have representation and attend the Board meeting at which it took its action (s) against him, pursuant to N.J.S.A. 18A:25-7?

5. Whether the Board's action to withhold respondent-petitioner's increment is invalid by virtue of the Board having granted him his full salary, increment and benefits subsequent to the known episode which formed the basis of the increment withholding and the herein tenure charges?

6. Whether the Board's action to withhold respondent-petitioner's increment while the Board was engaged in collective bargaining and had no knowledge of the amount of the increment to be withheld, is valid and consistent with the law?

THE CHARGES

The charges certified to the Commissioner by the Board were brought on by the Board's Superintendent of Schools, Robert Ciliento, alleging conduct unbecoming a teaching staff member. The specific charges state that:

1. On March 31, 1988, Ralph Villani physically assaulted a fellow teacher by repeatedly punching one Gerald Furris, a sixth grade teacher, about the face and head, inflicting cuts that required sutures, knocking Gerald Furris to the floor. The foregoing assault took place in the hall of the Clara B. Worth School in the presence of both students and other teachers.

2. Between April 11, 1988 and the end of the school day on May 10, 1988 did involve the students in his class in the aftermath of the assault upon Gerald Furris in stating to his class that he "would die if he were fired" and broke down and cried in the presence of his class on several occasions and otherwise conducting himself so as to create great concern in his students that he, Ralph Villani, might kill or otherwise injure himself.

3. Ralph Villani did, between the opening of school in September, 1987 and March 31, 1988, engage in an on-going feud between himself and several teachers in the wing where his class was contained, slamming his door, shouting at a teacher, exchanging

insults and slurs and otherwise acting in an unprofessional, immature fashion.

4. Ralph Villani did involve his students in the on-going feud-like exchange between himself and other teachers, in fact making a sign to be placed on the door of the classroom after an incident with a teacher in the classroom.

BACKGROUND FACTS

I

Based upon the pleadings, the credible testimony adduced at the hearing and certain documents in evidence, the following background facts are adopted, by reference, as **FINDINGS OF FACT** in this matter:

Respondent Ralph Villani is presently 42 years of age and has taught under the Board's direction and control for the past 17 years, having acquired a tenure status. Prior to joining the Board's employ, respondent taught one year each with the Lakehurst and Matawan public school districts. Respondent has been married for 22 years and is the father of three children. He has earned a Master of Science in Education degree and an additional 30 graduate credits beyond the degree.

During the 1973-74 and 1975-76 school years, respondent served as a negotiator for the Berkeley Township Teachers Association (Association), an affiliate of the New Jersey Education Association (NJEA), bargaining on behalf of the Association with the Board. During the 1979-80 school year, respondent served as president of the Association. While serving as president of the Association, Mr. Hal Carl Trovato, a teacher and member of the Association, requested that the Association take a "vote of no confidence" with regard to the then Superintendent of Schools. Respondent appointed Trovato to a committee of Association members for a study of the proposition. The committee subsequently recommended that the no confidence vote against the Superintendent be taken. Respondent disagree; contending that more study was required. Thereafter, the Association membership agreed with respondent and did not adopt a vote of no confidence with respect to the then Superintendent.

The following school year, 1980-81, Trovato ran unopposed for the position as Association president. Pursuant to past practice, the immediate past president of the Association served on and advised the Association's Executive Committee President Trovato, however, excluded respondent from such service, relying upon the Association's By-Laws which provided under Section 4, as follows:

> The Immediate Past President; The Immediate Past President shall:
>
> a. advise the Executive Committee and assist the President at the latter's request (P-12).

Respondent did not attend any Association Executive Committee meetings during Trovato's term of office as president for the 1980-81 school year. The subsequent school year, 1981-82, respondent did not join the Association and, as a consequence, could not retain his membership in the NJEA. Respondent was the only teacher on the Board's staff who was not a member of the Association or NJEA. There is no agency contract clause in the agreement between the Association and the Board, therefore, respondent is not obliged to pay dues to the Association. (N.J.S.A. 34:13A-55). Respondent has not been a member of the Association or NJEA since his resignation.

The Board is organized as an elementary school district with three schools under its direction and control; i.e., Bayville, H.M. Potter and Clara B. Worth elementary schools. For the most part, respondent was assigned and taught at the Bayville Elementary School. Respondent was granted a sabbatical leave from the district for the 1986-87 school year. Upon his return from sabbatical leave, respondent was assigned to the Clara B. Worth Elementary School in September 1987 for the 1987-88 school year. Mr. Hal Trovato was a physical education teacher also assigned to the Clara B. Worth school during the 1987-88 school year and prior thereto.

II

The evidence clearly demonstrates that Hal Trovato initiated and perpetuated an ongoing hostile climate between himself and respondent. Trovato's hostility toward respondent was manifest in a variety of ways as the record shows:

1. Subsequent to his election as the Association president, Trovato excluded respondent, the immediate past president, from any participation with the Association's Executive Committee. Notwithstanding the Association By-Laws (P-12), the past practice of newly elected presidents was to include the immediate past president in the discussions and deliberations of the Executive Committee. Trovato's exclusion of respondent from the Executive Committee meetings was not merely failing to give respondent notice of the meeting but, rather by way of a direct threat to respondent. Trovato told respondent, in private, that he, Trovato, would throw respondent out of any Executive Meeting respondent attempted to attend.

2. Mr. Fagan, a teaching staff member, friend and colleague of respondent's announced his retirement (presumably prior to January 1988) from the school district and the profession. A retirement dinner was planned to honor Mr. Fagan. Respondent deposited his money with a Mrs. Greco, an employee of the Board, to cover respondent's costs as a guest. Trovato commenced a campaign to have respondent excluded from attending Mr. Fagan's retirement dinner on the basis that respondent was not a member of the Association. The Association was not the sponsor of the event but, rather, a conduit for the collection of money. There was no written Association policy with respect to who could or could not attend Association social functions nor did the Association vote to bar respondent from Mr. Fagan's retirement dinner. To the contrary, the teachers assigned to the Bayville Elementary School believed that respondent should attend the affair, and non Association members did attend. Nonetheless, prior to the dinner, respondent requested and received his deposit and did not attend the function honoring his friend and colleague.

3. In September 1987 and thereafter, subsequent to respondent's assignment to the Worth School, Trovato engaged in a pattern of sniffing on occasions when respondent passed Trovato or on occasions when respondent was in Trovato's

presence. Trovato disingenuously testified that he suffered from a deviated septum, which caused him to sniff, whereas other teaching staff members asserted that Trovato's sniffing was an expression of his distain or scorn for respondent.

Edward Mulligan, a teaching staff member at the Worth School, testified, credibly, that he observed and heard Trovato sniff and state, "I smell shit." Mulligan respondent that he did not smell anything. Subsequently, respondent walked past Trovato and Mulligan whereupon Trovato stated to respondent, "It must be you." Respondent continued to walk past the two men without making any comment. Trovato testified that he knew the sniffing bothered respondent, however, Trovato refused to discontinue the practice.

In or about October 1987, respondent requested a meeting with the principal of the Clara B. Worth School, himself and Trovato. Respondent complained to the principal, William Scott Steiner, Jr., about Trovato's behavior of sniffing when in respondent's presence. Trovato admitted that he had been sniffing when respondent was in his presence. Principal Steiner directed that the two men avoid all contact with one another. The principal was of the belief and opinion that Association members were either picking at or on respondent.

In October 1987, respondent also reported to the Superintendent that he was having a problem with Trovato and Gerald Furris, a teaching staff member assigned to the Worth School. The Superintendent later told Trovato and Furris to stay away from respondent.

4. Trovato threatened respondent with physical harm at the Bayville School parking lot at a time not specified on the record. John T. Moyse, a physical education teacher in the Board's employ, testified he heard Trovato make the threat to respondent where Trovato stated to respondent that he would like to "pop" respondent. The threat was such that Moyse directed respondent to leave the premises by another route in order to avoid contact with Trovato.

5. Trovato, in concert with other teachers who were members of the Association at the Clara B. Worth School, engaged in tactics to harass respondent. These included, among others, Gerald "Gerry" Furris, Paul Fusiak and a Mr. Collozzo. On the morning of March 31, 1988, Lucy Ann Russ, a teaching staff member with the

Board for 25 years, heard Fusiak and Furris shouting "scab" to respondent while in the Teachers' Room at the Worth School. She also heard one of the two men ask respondent, "Is that a scab on your elbow?"

On the morning of March 31, 1988, respondent heard teachers talking in the Teachers' Room of the school assert that they were going to report respondent to the United States Internal Revenue Service (IRS) for allegedly taking an income tax deduction for Association dues which respondent did not pay. Trovato asserted to respondent that Trovato's conduct would not change until respondent joined the Association.

On the morning of March 31, 1988, respondent reported to the Superintendent that there was a continuing problem with Association members and that certain members intended to report respondent to the IRS. Respondent expressed his concern to the Superintendent because, in part, of respondent's wife's real estate business and the impact of an IRS audit would have on her business. It is unclear what, if anything, the Superintendent did as a consequence of respondent's report and complaint. Respondent requested that he be transferred from the Worth School.

6. Other incidents involving Trovato include an inadvertent classroom door slammed shut at respondent's classroom whereupon Trovato took it upon himself to enter and interrupt respondent's classroom lesson and shouted, "Who slammed the door?" Respondent answered, that no one had slammed the door and ordered Trovato out of his classroom.

Trovato testified that the classroom doors were known to slam shut, causing a loud noise. Trovato also testified that thereafter, the principal installed door stops to lessen the noise when the doors closed. Respondent subsequently sent a memorandum of apology to Trovato for respondent's rude behavior (P-10).

Trovato also complained about respondent, in the presence of respondent's pupils, about respondent walking on the school's grassed area.

Trovato knew that respondent wished to have visitors to his classroom knock on the classroom door before entering. On one or more occasions, Trovato ignored

respondent's wishes and would enter respondent's classroom without knocking first. Respondent caused signs to be posted on his classroom door which read, "Please knock when entering. Please knock with love." This caused Furris to place signs on his classroom door which read, "Please enter, we're flexible."

III

On March 31, 1988, at approximately 12:05 p.m., a fistfight between Furris and respondent occurred in a corridor at the annex of the Clara B. Worth Elementary School. Respondent was not injured in the fray. However, Furris was injured severely and subsequently transported by ambulance to the Community Hospital, Toms River, New Jersey, where he was administered emergency treatment. The emergency treatment administered by a physician and attendant consisted of, among other things, fifteen sutures above Furris' left eyebrow, three sutures in his eyelid and three sutures in his left cheek (P-6, P-7).

The conflicting testimony as to how and what started the fight will be addressed post. under TESTIMONIAL EVIDENCE.

IV

On May 10, 1988, at its regularly scheduled monthly meeting, the Board by separate motions and upon roll call votes did suspend respondent and Furris from their respective teaching duties with pay, effective May 11, 1988. The motions also included that charges should be certified to the Commissioner against the teachers relative to the incident (fistfight) which occurred on March 31, 1988 (R-3).

On May 10, 1988, the Board accepted Furris' resignation effective July 31, 1988 (R-3). Furris applied for and was granted retirement by the Teacher's Pension and Annuity Fund (TPAF).

On June 14, 1988, the Board approved a recommendation of the Superintendent to withhold any salary adjustment, career inservice and increment to which respondent was entitled for the 1988-89 school year.

On July 19, 1988, the Board, by roll call vote, adopted its resolution to certify tenure charges of unbecoming conduct against respondent to the Commissioner and to suspend him without pay.

TESTIMONIAL EVIDENCE

The Fistfight

Both Furris and respondent admit that the fistfight occurred on March 31, 1988. They, however, disagree on several relevant and significant points with respect to the altercation.

Gerald Furris' Version

Mr. Furris testified that on March 31, 1988, he had taken his sixth grade classroom to the school's all-purpose room and was returning to his classroom alone. He passed the Teachers' lunchroom and proceeded to a T-intersection in the corridor where he turned left to walk to his classroom. While walking toward his classroom Furris heard footsteps behind him and then he heard respondent's voice shout "scumbucket" as respondent turned toward the Teacher's Room from the righthand corridor of the T-intersection. Furris muttered "bum" and continued to walk toward his classroom. Furris heard the footsteps stop and return in his direction. Respondent, according to Furris, yelled at Furris, "What did you call me?" Furris turned toward respondent and observed respondent walking toward Furris; not running, but at a quick gate. Respondent again asked, "What did you call me?" Furris testified that he responded, "I called you a bum." Respondent asserted, "No one calls me a bum." Furris retorted, "You called me a scumbucket." Furris testified that respondent walked toward him with his fists clenched and said something about respondent's constitutional rights. Respondent is alleged to have said to Furris, "Come on, come on." Whereupon Furris asked, "What do you want, a fight?" Respondent continued to walk with clenched fists toward Furris whereupon Furris said, "Ralph, go to hell!"

At this juncture, Furris testified, respondent placed his hands in a clenched fist position in front of respondent's body. Furris reacted and brought his open hands up to position them on either side of Furris' face. Respondent hit Furris' right hand

away from Furris' face and struck Furris with three rapid blows to the right side of Furris' face. Furris went down to the floor, wobbly and groggy from respondent's punches. Furris attempted to get up whereupon respondent struck Furris three more blows on the left side of Furris' face around his eye and cheek. Furris went down to the floor a second time and when he attempted to get up Furris grabbed respondent's necktie. As Furris held on to respondent's necktie, Furris felt he was being pulled by someone. Furris released respondent's necktie whereupon respondent struck Furris again.

Respondent's Version

Respondent testified that on March 31, 1988, he had escorted his pupils to the school's All-Purpose Room and returned to his classroom to turn off the lights and close the door. He then walked toward the T-intersection of the corridor to turn left on his way to the Teacher's Room. Respondent encountered Furris who said, according to respondent, "I've got you now," and "You punk." Respondent asserted to Furris, "We've got to talk." Whereupon Furris asked respondent, "You want to fight?," and struck respondent.

Respondent then struck Furris whereupon Furris grabbed respondent's necktie and continued to swing his free fist at respondent. Respondent backed away from Furris continuing to strike fist blows to Furris in the attempt to dislodge Furris' hold on respondent's necktie. Respondent was moving backward while Furris was moving toward respondent during the fray.

Ms. Russ' Version

Lucy Ann Russ, a teaching staff member, testified that on March 31, 1988, she had a guest teacher for drugs and alcohol for her class. At approximately 12:05 p.m., Ms. Russ had placed her pupils in two lines at the classroom door in preparation for their walking to the school's all-purpose room for lunch. Ms. Russ opened her classroom door and observed respondent and Furris standing approximately five feet from her classroom door shouting at one another. Furris was facing the T-intersection of the corridor while respondent was facing Furris and toward Furris' classroom.

Ms. Russ, held her pupils in her classroom and then started to walk toward the two men shouting, "Fellow cut it out!" As respondent was moving backward, Russ observed Furris moving toward respondent as both moved toward the corridor T-intersection. Ms. Russ' pupils, almost the entire classroom of 22 children, entered the corridor as she attempted to get them back into the classroom. Ms. Russ observed Mr. Fusiak exit his classroom and rush toward the two men. She also observed Mr. Fusiak's pupils come out of the classroom into the hall to witness the altercation

Following the fight between respondent and Furris, Ms. Russ, on March 31, 1988, wrote the following statement:

> At 12:03 my class was lined up inside the room, ready to leave for lunch. I opened the door & saw Jerry [Furris] & Ralph [respondent] standing approximately three feet from each other about five feet from me, speaking angrily to each other. One of them (I don't know who) said something like, "Do you want to fight?" (That's what it sounded like to me) Fists starting flying from both of them at the same time, as far as I could tell.
>
> I yelled "Fellows, stop it!" as they fought & edged their way down the hall (toward intersection). At the same time I was yelling at my class to get back in the room, as they had witnessed the fight & had spilled out into the hall.
>
> From my door I continued to yell at them [respondent and Furris] while trying to control my class. At this point Paul [Fusiak] opened his door & came out, his kids spilling into the hall. When I last looked at them [respondent and Furris] just before closing my door, both men [respondent and Furris] were on the floor at the corner of the hallway.
>
> I calmed my class, opened the door, saw the hall was clear & took the kids toward the cafeteria (R-4).

Mr. Fusiak's Version

On March 31, 1988, Fusiak was administering a test to his fourth grade pupils before 12:00 noon when he heard a female voice shouting from the corridor outside his classroom, "Cut that out, cut that out!" Fusiak believed the problem was with some of his pupils whom he had excused to go to the lavatory upon completing the test. Fusiak opened the classroom door and observed two men fighting in the corridor. He observed that Furris had one hand on respondent's necktie and that

Furris had fallen to the floor. He observed that respondent was backing up with Furris moving forward. Pupils began to come out of classrooms into the hallway whereupon Fusiak went to the two men and attempted to separate them. Fusiak remembers respondent throwing a punch which passed Fusiak's head and Furris went down to the floor while still holding onto respondent's necktie and kicking at respondent. Fusiak testified that he observed both men throwing punches.

Approximately 15 minutes after the fistfight, Fusiak wrote a statement which stated, in part, as follows:

> Around 12:00, I heard a female voice, whom I thought was Miss Russ, saying "Hey, cut that out you two, cut that out." I thought a couple of boys had gotten into a shoving match. I walked; then ran out into the hall. I saw Mr. Villani (facing in my direction) and Mr. Furris (with his back towards me). I thought they [were] seperating (sic) a couple of students. I assumed they were in control of the situation and turned to go back into my room. Then I realized there were no students between them. I started down the hall as they began swinging at one another. I verbally told them to stop. Then I cautiously tried to seperate (sic) them by slowing stepping in between them and asking them to stop. Both ceased their action near the teacher's lavatory (men's) and teacher's room (R-5).

THE BOARD'S CHARGE

No. 1

In its first charge, the Board alleges that respondent physically assaulted Gerald Furris, a fellow teaching staff member. It charges that respondent repeatedly punched Furris about the face and head inflicting cuts that required sutures and that respondent knocked Furris to the floor; all of which took place in the hallway of the Clara B. Worth School in the presence of both pupils and teachers.

There is little doubt that a fistfight between respondent and Gerald Furris occurred on March 31, 1988, at the Clara B. Worth School at approximately 12:00 p.m. The evidence clearly demonstrates that Furris suffered lacerations and contusions upon his face, head and in the area of the eye. This, together with other admitted evidence, supports the Board's charge that Furris was repeatedly punched by respondent and that the injuries inflicted upon Furris required medical attention and sutures.

The evidence is less clear as to the Board's charge and allegation that respondent committed an assault upon Furris. The facts demonstrate that on the morning of March 31, 1988, certain teaching staff members in the Worth School who were members of the Association continued a pattern and practice of harassment against respondent initiated by Trovato. The torment by the teachers was of such an extent that respondent reported the incident to the Superintendent.

The facts demonstrate that at approximately 12:00 noon on March 31, 1988, respondent and Furris were the only two individuals in the hallway of their section of the school building. Harsh and abrasive words were exchanged by the two men as they approached one another. The evidence demonstrates that it was Furris who asked the question as to whether respondent wanted to engage in a fight. Furris testified that he reacted to respondent's approach by asking "What do you want, a fight?", while respondent and Ms. Russ heard the words, "Do you want to fight?"

The facts reveal that during the confrontation, respondent was retreating while Furris continued to advance toward respondent. Respondent struck at Furris, hitting Furris about the head and face while retreating from Furris. Furris grasped and held onto respondent's necktie, advancing toward respondent, striking at respondent with his free hand as well as kicking at respondent with his feet.

I **CONCLUDE** that Furris was the aggressor in this instance and that it was he who committed the assault against respondent. It is illogical to conclude otherwise. Had Furris not been the aggressor, it would have been prudent of him to retreat after the first blow was struck to his head. The facts demonstrate that Furris advanced on toward respondent, grasping respondent's necktie and swinging his free fist while kicking at respondent. Furris continued to advance toward respondent during the melee until it was broken up by Mr. Fusiak. Respondent, on the other hand, retreated and defended himself against Furris' aggressive advancement. The laws of our State, under the Code of Criminal Justice, clearly provide for respondent's action to use force as a justifiable means of self-protection. Pursuant to N.J.S.A. 2C:3-4:

> ... the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of

> protecting himself against the use of unlawful force by such other person on the present occasion.

I **CONCLUDE**, that under the circumstances, subsequent to Furris' assault, respondent used justifiable force in his own defense and for his self-protection against Furris' assaultive behavior. N.J.S.A. 2C:3-4; *State v. Goldberg* 12 N.J. 293 (1951).

For the reasons stated above, I **CONCLUDE** that that portion of the Board's Charge No. 1 which alleges that respondent physically assaulted Furris is without merit and, therefore, must be **DISMISSED**.

The Board argues, among other things, that the Commissioner's decision *In the Matter of the Tenure Hearing of James Samiljan, School District of High Point Regional Sussex County*, OAL DKT. NO. EDU 5020-87 (March 9, 1988), aff'd Commissioner (April 18, 1988) is dispositive of the instant matter. In *Samiljan*, the Board certified tenure charges with the Commissioner alleging insubordination and conduct unbecoming a teaching staff member as a consequence of an incident involving Samiljan and an Assistant Superintendent of Schools. The Honorable James A. Ospenson, Administrative Law Judge (ALJ) found, among other things, that Samiljan intentionally and without provocation struck the Assistant Superintendent with a closed fist causing a fracture of the nose. The incident occurred at a meeting attended by Samiljan, his principal and the Assistant Superintendent. The ALJ stated that: "It is clear from the evidence that the alleged assaultive behavior was culmination of a defiance of administrative authority by respondent of long-standing." OAL DKT. NO. EDU 5020-87, at p. 10. The Board here observes that the Commissioner adopted the ALJ's findings and conclusions and ordered that Samiljan forfeit his tenured position.

The facts and circumstances surrounding the two matters are distinctly different. In *Samiljan*, the respondent assaulted a superior staff member in defiance of the supervisor's authority and respondent's failure to fulfill certain objectives and obligations. In the instant matter, respondent was the target of the assaultive behavior by a fellow teaching staff member who perpetuated a course of conduct to harass respondent because of respondent's choice not to belong to the local

teachers' association. In *Samiljan*, respondent was the assaulter; where respondent in this case was the victim of the assault.

CHARGE NO. 2

The Board's Charge No. 2 is grounded on hearsay without a residuum of competent evidence to support the charge. N.J.A.C. 1:1-15.5; See: *Weston v. State* 60 N.J. 36, 51 (1972). The Board was able to establish that four female pupils in respondent's classroom were concerned about respondent's future subsequent to the events of March 31, 198. Lynne Turkowsky, a school social worker in the Board's employ, testified that after Furris and respondent were both suspended from duty by the Board on May 10, 1988, representatives of the Child Study Team and a guidance counsellor addressed the pupils of the two classes on May 11, 1988. The staff members discussed concerns of the pupils and advised them that special counselling services were available. Turkowsky testified that four girls from respondent's classroom sought her counsel. She asserted that they were concerned that respondent might commit suicide because of a statement he uttered to the effect that, "I will just die if I'm fired." Turkowsky also testified that one pupil advised her that respondent had cried in the classroom when another teacher came into the classroom to take over for respondent until he calmed down.

None of the pupils testified at these proceedings. However, the mother of one of the pupils counselled by Turkowsky testified that her daughter was concerned about respondent losing his job. The mother also asserted that she asked her daughter whether it was a concern that respondent might commit suicide, whereupon the pupil responded that she had overheard respondent's remark ("I will just die if I'm fired") and realized that it was just a figure of speech.

Edward Mulligan was the only individual to testify about respondent's alleged crying in the classroom in the presence of respondent's pupils subsequent to the March 31, 1988 incident. Mulligan testified that respondent was upset and emotional when Mulligan expressed his sympathy asking respondent how he was feeling concerning the events. Mulligan asserted that respondent turned away from the pupils but Mulligan did not observe respondent cry or sob. Mulligan took charge of respondent's classroom for approximately five minutes while the pupils continued a spelling lesson respondent had begun.

I **CONCLUDE**, therefore, that there is no basis in fact to support Charge No. 2.

Accordingly, Charge No. 2 is hereby **DISMISSED**.

CHARGE NO. 3

Charge No. 3 alleges that respondent engaged in an on-going feud with other teachers in the wing of the building in which his classroom was located. The Board alleges that respondent slammed his classroom door, shouted at a teacher, exchanged insults and slurs and otherwise acted in an unprofessional and immature fashion.

The evidence in this matter clearly demonstrates that it was Trovato who initiated and perpetuated an ongoing course of hostility and harassment against respondent. Trovato opined to Edward Mulligan that he, Trovato, was doing nothing wrong and, further, that he was not going to stop his abrasive course of conduct toward respondent. The record shows that it was respondent, not Trovato, who reported Trovato's aberrant behavior toward respondent to principal William Steiner. The evidence also demonstrates that Trovato threatened to do physical harm to respondent. The threats were observed and witnessed by other teaching staff members. There was no evidence presented at these proceedings to demonstrate that respondent engaged in tactics to harass, intimidate or otherwise interfere with the proper conduct of the school.

The feud, for which the Board charges respondent, was the product of Hal C. Trovato. Respondent took no action against Trovato nor did he reciprocate in any manner to prolong the hostility between himself and Trovato. Rather, respondent attempted to isolate himself and avoid contact with Trovato and his followers.

Mr. Trovato could learn much from those off-repeated words of Mr. Justice Brandeis in his dissenting opinion in *Olmstead v. U.S.*, 277 U.S. 438 (1928) where he said:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his

> feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. ... Id. 478.

While Justice Brandeis observed that the above protection was guaranteed by the Fourth and Fifth Amendments as against governmental intrusion, "the right to be let alone" is no less a protected guarantee in ones personal life and the professional setting. In his myopic view of his relationship with the Association, Trovato lost sight of respondent's right to choose to join or not to join the organization. In choosing not to join the Association, respondent then had "the right to be let alone." Trovato ignored those rights and commenced a vendetta against respondent.

As the Commissioner said in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County*, 1972 S.L.D. 302 ad 321:

> Of equal concern to the Commissioner is the situation where the teacher, who should set the good example, assumes that some higher right justifies activities, which are inimical to the public interest and which are designed to impede the orderly progress of public education.

The facts of this matter clearly demonstrate that Trovato's behavior and actions did not set a good example for either the pupils nor the staff of the Clara B. Worth School or the teaching profession. His behavior and conduct was certainly inimical to the teaching profession and public interest which ultimately impeded the orderly progress of public education at the Clara B. Worth School.

I **CONCLUDE**, therefore, that that portion of Charge No. 3 which alleges that respondent "engaged in an on-going feud with other teachers in the wring of the building in which his classroom was located," is without merit and, accordingly, is hereby **DISMISSED**.

With regard to the other allegations contained in Charge No. 3, the facts demonstrate that opened classroom doors often would slam closed on their own.

The fact that respondent's classroom door slammed closed while Trovato was in the vicinity does not, in itself, prove that respondent caused the door to slam closed. By Trovato's own testimony, principal Steiner caused door stops to be installed to prevent the slamming of the doors subsequent to the incident between Trovato and respondent. As to the remainder of Charge No. 3, the evidence does not support the Board's allegations and, therefore, Charge No. 3 in its entirety is hereby **DISMISSED**.

CHARGE NO. 4

There was no evidence presented to support the Board's charge that respondent involved his students in the on-going feud-like exchange between himself and other teachers. The facts, however, do support the second portion of the charge which alleges that respondent caused a sign to be placed on the door of his classroom after an incident with a teacher (Trovato) in the classroom. This incident, which also caused Furris to place a sign on his classroom door, is set forth at Section II of the Background Facts, supra, and need not be repeated here.

I **CONCLUDE**, therefore, that the Board failed to carry its burden with regard to that portion of the charge which alleges that respondent involved his students in the on-going feud-like exchange between himself and other teachers. Notwithstanding that the Board was able to prove the latter portion of Charge No. 4, which alleged that respondent caused a sign to be placed on his classroom door, I **CONCLUDE** that the latter action by respondent to be de minimis and not worthy of consideration here.

Accordingly, I **CONCLUDE** that Charge No. 4 be and is hereby **DISMISSED** in its entirety.

Having determined that the weight of the credible evidence does not support the charges as certified by the Board to the Commissioner, I **CONCLUDE** that petitioner's dismissal from his tenured teaching position is not warranted. The record demonstrates that respondent has been evaluated as a satisfactory teaching staff member in the performance of his teaching duties during his career with the Board (satisfactory is the highest rating ascribed by the Board). There is no record of past disciplinary action against him by the school's administration or his superiors.

ORDER

Accordingly, it is **ORDERED** that the Board of Education of the Township of Berkeley reinstate respondent to his teaching position effective September 1, 1989; that it compensate respondent for all back salary lost as a consequence of his suspension by the Board, less mitigation of monies earned by him during the period of the suspension, reinstate the increment withheld from him for the 1988-89 school year; and, award respondent all benefits and emoluments for which he was eligible and lost during the period of his suspension.

By this **ORDER**, respondent has prevailed with regard to his Petition of Appeal contesting the withholding of his salary and/or adjustment increment for the 1988-89 school year.

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.

11 July 1989
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

July 14/1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 14 1989
DATE

Jacquelyn A. Suarez
OFFICE OF ADMINISTRATIVE LAW

dho

IN THE MATTER OF THE TENURE HEARING OF RALPH VILLANI, SCHOOL DISTRICT OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY.	:	
- - - - - - - - - - - - - - - - - -	:	COMMISSIONER OF EDUCATION
RALPH VILLANI, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY, RESPONDENT.	:	DECISION

The Commissioner has reviewed the record of this matter including the findings, conclusions and recommendations set forth in the initial decision rendered by the Office of Administrative Law. Timely exceptions and replies thereto were filed with the Commissioner pursuant to N.J.A.C. 1:1-18.4 and have been reviewed accordingly.

In its exceptions, the Board addresses both substantive and procedural matters. The Board first disputes (Exception I) the ALJ's reliance on testimony, purportedly excluded by him at the hearing (T7-144,* 153; T8-113), relating to matters pre-dating the 1987-88 "feud" cited in Charge 3. The Board also disputes (Exception III) the ALJ's reliance on an eyewitness' written statement (Exhibit 4) received and marked for identification but ostensibly neither offered nor received in evidence (T7-133). The Board further contends (Exception II) that Villani had waived or abandoned his right to urge the matters set forth as issues in the Prehearing Order, based on his attorney's failure to argue them as instructed by the ALJ (T10-86/87). This exception did not apply to Issue 2, which had been withdrawn as anticipated by Villani's attorney on the final day of hearings.

* T7 refers to the hearing transcript of March 7, 1989; T8 to the transcript of March 8; T9 to the transcript of March 9; and T10 to the transcript of March 10 (mislabeled March 7).

Turning to the substance of the case, the Board challenges the ALJ's findings and conclusions regarding the actual altercation (Charge 1), offering instead citations from the hearing transcript (T7-20/29, 32/34, 79, 92, 99/103, 112/15, 139/40, 155/56; T8-17, 33, 38, 40, 50, 82, 184/87; T9-55/57, 183/84, 206) intended to support the Board's position that Villani was the aggressor and that the other teacher involved (Gerald Furris) had not provoked him directly or indirectly (Exception IV). The Board also contests (Exception VIII) the ALJ's viewing the altercation in a context of harassment and conspiracy, citing misconstrual of evidence in one instance (excluding Villani from a retirement dinner) and lack of it on the other (Furris acting in concert with union president Hal Trovato*). Having thus sought to undercut the ALJ's characterization of Villani as victim, the Board cites a series of cases (discussed below) in support of the notion that one incident of the instant type was sufficient to warrant dismissal and/or withholding of increment (Exceptions IV, V and IX).

Finally, the Board disputes (Exceptions VI and VII) the ALJ's dismissal, for lack of evidence, of Charges 2 and 3 (involving students in the aftermath of the primary incident and active participation in an ongoing feud with coworkers). The Board points instead to statements in the hearing transcript (T7-90; T8-88, 94; T9-86/87, 189, 190, 201) and in evidence (P-10) purportedly supporting these charges.

In his reply to the Board's exceptions, Villani urges acceptance of the ALJ's decision in its entirety. He observes that the ALJ did not unilaterally exclude all evidence prior to 1987, but rather drew a distinction between evidence allowed for purposes of establishing the context of the primary altercation (entire history of respondent's employment in district and involvement in union activities) and evidence allowed for purposes of demonstrating the specific 1987-88 feud cited by the Board in Charge 3 (no evidence beyond the reach of current evaluation). While recognizing that evidence frequently overlapped, Villani maintains that the ALJ properly separated its connotations when dealing with Charge 1 (primary altercation) as opposed to Charge 3 (feud). With regard to the disputed eyewitness statement, Villani notes that it was clearly his intent, which he claims to have so stated on several occasions, to have all items marked for identification also marked for evidence. Although lack of access to a hearing transcript (reportedly due to cost and lack of time) precludes him from pointing to such statements in the record, Villani maintains that his clear intent and the weight of other corroborating evidence should override any possible administrative oversight.

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* Mr. Trovato's name is variously spelled throughout the proceedings (Trovato, Travato, Travoto); the ALJ's spelling is adopted herein.

Villani further asserts that, contrary to the Board's exceptions, he did, in fact, abundantly argue Issues 1 and 3 (Issue 2 having been withdrawn) in a trial memorandum submitted on May 12, 1989 (copy appended to reply). He also explains that he saw no real need to argue procedural issues (Issues 4, 5 and 6) once his innocence appeared to have been proven, since such arguments would only come into play if he had been found responsible for the incidents charged.

Villani characterizes the Board's exceptions to the ALJ's account of the actual altercation as "an argument which might have been made to a jury or, at the conclusion of the trial, to the Judge, asking that inferences be drawn from proofs presented by the Board of Education, and isolated statements in the record which the attorney for [the Board] might have believed would persuade the finder of the facts to construe the evidence in [its] favor." (Reply Exceptions, at p. 8) Villani proposes instead that, absent any indication of failure to properly weigh evidence, the ALJ's interpretation should stand, based as it was on observation of witnesses under both direct and cross-examination. Villani further dismisses the Board's interpretation of certain statements cited in support of its position (Furris as "scapegoat" and testimony to the effect that Furris was not observed throwing punches) and the Board's rejection of self-defense as a legitimate factor in exonerating Villani.

Villani also disputes the Board's claims of sufficient evidence, contrary to the findings of the ALJ, to uphold charges of involving students in the altercation's aftermath and engaging in an ongoing feud with fellow teachers. Villani instead endorses the ALJ's conclusions and offers counter-interpretations of the evidence cited by the Board in its exceptions.

Villani addresses the legal cases cited by the Board by reference to the trial memorandum he submitted to the ALJ at the close of hearings. In essence, this memo sought to distinguish Villani's case from those where physical violence resulted in dismissal and liken it to those where, even when the tenured staff member was found to be the aggressor, one incident of this type was not judged sufficient to warrant loss of position.

Having carefully reviewed the record, the Commissioner holds that the Board's procedural arguments (Exceptions I, II and III) are without merit and that, with the crucial exception noted below, the ALJ's decision is correct in its substantive conclusions.

It is clear upon examination of the transcript--even if the Commissioner had confined his review to the pages cited by the Board, which he did not--that the ALJ did in fact mean to limit testimony for recency only on the question of the 1987-88 feud specified in Charge 3. His use of evidence dating from or referring to incidents before that time when attempting to establish the circumstances of the primary charge is, thus, both appropriate and

correct. Further, on the matter of the disputed eyewitness statement, the transcript does in fact show at least two statements by Villani (T7-134; T10-6) clearly indicating that all identified documents were to be admitted into evidence, and the copy provided to the Commissioner was in fact so marked. Finally, the discussion cited by the Board as evidence that Villani had waived his right to argue Issues 1, 3, 4, 5 and 6 appears to be nothing more than a specific exchange about the handling of Issue 2, and the trial memorandum submitted by Villani does in fact argue at length on Issues 1 and 3. Because the initial decision is silent as to its omission of Issues 4, 5 and 6, it could be concluded that the Board's basic construal of this discussion is correct; but it could just as readily be concluded that the ALJ, like Villani, judged procedural conclusions unnecessary given his substantive findings. In any case, the Commissioner concurs that procedural issues will have no significant effect on the outcome of the present dispute and he will not discuss them further in this context.

As to the substantive charges against Ralph Villani, the Commissioner concurs with the ALJ that Charges 2, 3 and 4 are unsupported by the weight of credible evidence and should be dismissed in their entirety. The Commissioner adopts the ALJ's discussion of these charges as his own, adding only the following observations in response to the Board's exceptions: One episode of momentarily losing composure when asked "how are you doing" after a difficult experience and one remark, obviously not intended literally, to the effect that "I'll die if I'm fired" hardly constitute involving students in the aftermath of the altercation, particularly when the record clearly shows that they had virtually no effect on any student other than one female described by her guidance counselor (T8-93) as having a "crush" on Villani (and that student's mother felt that the episode had no serious or lasting impact). Likewise, while relations between certain teachers in the district clearly leave something to be desired and the Commissioner can readily believe that Villani may have occasionally displayed frustration or anger, nothing in the record is sufficient to sustain a charge against Villani for actively engaging in inappropriate conduct; indeed, in his evaluation for the period of the alleged feud, there is no mention of any such behavior and he was in fact rated "acceptable" (the highest rating) in every area dealing with staff relations and school environment (Exhibit R-7, evaluation dated March 24, 1988).

With respect to Charge 1, however, the Commissioner must differ with the conclusion of the ALJ. Judge Law dismissed this charge on the grounds that Villani had ample provocation, was not the aggressor and had a right to act in self-defense. This conclusion is in large part premised on a literal reading of the Board's charge that Villani "assaulted" Furris, implying a deliberate and considered attack. The Commissioner does not dispute the ALJ's findings with respect to the course of events and rejects arguments of the Board which would have him substitute his own judgment for that of the ALJ in weighing evidence and judging the credibility of witnesses, absent any clear indication of error or

impropriety. Indeed, the Commissioner notes for the record that while a careful reading of the four-volume hearing transcript does reveal bits of conflicting evidence, the overwhelming tenor of testimony given supports both the background account and the treatment of discrepancy offered by the ALJ. The Commissioner holds, however, that in using the word "assault" the Board meant simply that Villani struck Furris with some force, which he undeniably did, and in precisely the manner described by the Board in its charge. The Board clearly did not mean to limit the validity of its charge to a finding that Villani actually started the fight; in fact, the word "assault" is also used in the Board's charges against Furris (Exhibit R-3), who by the Board's account of record (Exception IV) was an innocent victim of Villani's attack. The Commissioner agrees that use of the work "assault" was unfortunate in its legal connotations, but also believes that judgment should not be frustrated by imprecise use of a common word when its intended meaning is so clearly spelled out in the language of the remainder of the charge. The Commissioner holds instead that Ralph Villani's involvement in the altercation of March 31, 1988 was sufficient to sustain Charge 1 in the broader sense intended by the Board.

The question before the Commissioner thus becomes whether this one charge is sufficient to warrant Ralph Villani's dismissal from his tenured employment, and the Commissioner determines that it is not. Judging from testimony and evaluations dating as far back as 1970 (Exhibit R-7), Villani is a creative, dedicated teacher who cares about his students and works hard to keep them interested and motivated. He also appears to have been a regular participant in inservice and other activities aimed at improving the quality of education in the district. There is no blemish of any kind on his record, and certainly nothing that would indicate that the present eruption of physical violence was anything but an unfortunate aberration; indeed, an evaluation dated days before the incident specifically notes the principal's pleasure at having him as a staff member at Clara B. Worth School (Exhibit R-7, evaluation of March 24 1988). Villani's attitudes, beliefs and mannerisms may have irritated some of his colleagues and, thus, indirectly contributed to the undeniable atmosphere of tension and harassment prevailing since the development of union factions in 1979-80; however, there is virtually no evidence that he did anything to actively encourage this situation, and much evidence that he tried (unsuccessfully, to judge from the record) to address it through proper administrative channels.

In cases such as this, the Commissioner has frequently held that a single incident in an otherwise unblemished career is insufficient to warrant dismissal. The precedent adduced by the Board in support of its position does not alter this pattern. The Board relies on In the Matter of the Tenure Hearing of James Samiljan, School District of High Point Regional, Sussex County, decided by the Commissioner on April 18, 1988, aff'd with modification State Board November 1, 1988, to demonstrate that a single instance of flagrant physical assault has been found

sufficient to warrant dismissal. The Commissioner notes, however, that in that case the respondent was without question an unprovoked aggressor and that his conduct in the period immediately before and after the incident was deplorable; whereas in this case, evidence that Villani was the aggressor is neutral at best, and the preponderance of testimony supports the ALJ's conclusion that he was instead the victim of a chance encounter in an empty corridor, a participant in a spontaneous eruption rooted in years of simmering hostility.

The Board also cites In re Gilbert, 1982 S.L.D. 274, aff'd St. Bd. 328, quoting with favor an obiter dictum of the ALJ to the effect that any one of the multiple charges (two dealing with physical assault) sustained against respondent Gilbert would be sufficient to warrant dismissal. The Commissioner notes, however, that even if the Board is granted its reliance on a passing observation, the assault charges in Gilbert were, as in Samiljan, supra, based on deliberate and unprovoked aggression and compounded by otherwise deplorable behavior.

Quite inexplicably, the Board also points to Dennis v. Board of Education of the City of Long Branch, 1976 S.L.D. 14 citing the Commissioner's order to the board to certify tenure charges based upon the assault of one teacher (Milton Belford) on another (Dennis) after it had refused to do so, and noting the Commissioner's reasoning that the incident in question appeared sufficient to warrant possible dismissal or reduction in salary. When the case came before the Commissioner, however, Belford was restored to his position without penalty based on the Commissioner's finding that the incident (a spontaneous tussle where no one was injured), circumstances and surrounding behavior patterns did not in fact warrant dismissal or salary reduction (In the Matter of the Tenure Hearing of Milton Belford, School District of the City of Long Branch, 1978 S.L.D. 660). In this context, Dennis merely establishes that such incidents can be serious enough to warrant the Commissioner's consideration, while Belford undercuts rather than supports the Board's position.

Finally, Redcay v. Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944), is cited as having established that single incidents can be sufficiently flagrant to warrant dismissal. This case, however, simply gives the Commissioner the authority to make such a judgment, which he has chosen not to do in the present matter (in contrast to Samiljan, supra).

Thus, with respect to Ralph Villani, the Commissioner will not terminate a long and successful teaching career on account of one unfortunate incident, particularly in view of the surrounding circumstances. Judging from the record, the situation in this district was bound to come to a head; Villani and Furris' chance meeting in the hallway simply provided the necessary elements for spontaneous combustion.

However, although the Commissioner holds that dismissal is not warranted, the seriousness of the incident must be acknowledged through an appropriate penalty. The Commissioner recognizes and acknowledges with regret, that of all parties in the lamentable situation described in this case, only Ralph Villani was subjected to charges and hence to penalty. The Board and administration took no meaningful action, and no lesser disciplinary measures, to deal with a clearly disruptive and demoralizing interpersonal situation among its staff despite long-standing awareness of the problem. Gerald Furris was able to avoid tenure charges and suspension without pay by conveniently retiring, an option not realistically available to the younger Villani. Here, the Commissioner notes for the record that Furris' letter to the Board (Exhibit P-13) praying for consideration and asking to be kept on with the district, together with the timing of subsequent events, strains beyond all belief Furris' claims (T7-161/163) that his retirement effective July 31, 1988 was purely coincidental. The evident prime instigator of the entire situation, Mr. Hal Trovato, was able to avoid disciplinary action altogether simply by the good fortune of not having actually been involved in the culminating fistfight. Yet, the fact remains that Villani assaulted Furris within the meaning of the board's charge, and the Commissioner cannot condone physical violence of this magnitude under any circumstances.

Accordingly, the Commissioner sustains the action of the Board of Education of the Township of Berkeley withholding Ralph Villani's 1988-89 increment, but directs that Villani be returned to his teaching position effective September 1, 1989. He further determines that, in recognition of the seriousness of the charge against him, he shall forfeit 60 of the 120 days' salary withheld from him by virtue of his suspension without pay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 25, 1989

KEARNY BOARD OF EDUCATION	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Dunne & Thompson (Frederick R. Dunne, Jr., Esq. of Counsel)

For the Respondent, Hannoch Weisman (Michael J. Herbert, Esq. of Counsel)

This matter has been opened before the Commissioner of Education by way of a Petition of Appeal filed by the Kearny Board of Education in which it seeks an order of the Commissioner releasing it from the Watchung Conference and allowing it to transfer to the Northern New Jersey Interscholastic League (NNJIL). The Kearny Board also seeks a declaration from the Commissioner that Article III, Section 8 of New Jersey State Interscholastic Athletic Association (Association's) Bylaws is void because it unconstitutionally denies equal protection and prohibits the free exercise of the Board's legal rights of appeal as guaranteed by the federal and state constitutions. Article XIII, Section 8 requires that any member school which institutes an unsuccessful challenge of the rules of the Association shall assume all litigation costs.

The following statements of fact and procedural history provided by the Board appear to be undisputed by the parties.

[1.] On November 22, 1988, Kearny High School gave written notification to the Watchung Conference that Kearny was requesting permission to withdraw from the Watchung Conference. On the same date Kearny High School received notification from the Northern New Jersey Interscholastic League (hereinafter referred to as NNJIL), that if Kearny received its release from the Watchung Conference, the NNJIL would accept Kearny in the NNJIL.

[2.] On December 6, 1988 at the regular meeting of the Watchung Conference at Kearny's request a motion was presented to release

Kearny from the Watchung Conference. At that meeting 14 schools voted with 6 schools voting yes to Kearny's withdrawal and 8 schools voting no to Kearny's withdrawal.

[3.] After the vote, Kearny observed that it was illegal for both East Side and Shabazz to vote since neither had met the Conference's membership period requirements, which [were] a prerequisite to a member participating in a vote.

[4.] As a result, a second vote was held, with the result of six members voting yes to Kearny's withdrawal and six members voting no to Kearny's withdrawal.

[5.] The by-laws of the Watchung Conference require a two-thirds approval for any of its members to be released from the conference. Therefore, the Conference denied Kearny's request to be released.

[6.] Kearny appealed this decision to the New Jersey State Interscholastic Athletic Association which conducted a hearing on February 8, 1989. After the hearing, the New Jersey State Interscholastic Athletic Association voted 28 in favor, 3 in opposition to the action taken by the Watchung Conference.

[7.] On May 10, 1989, the Kearny Board of Education filed this present appeal to the Commissioner of Education of the State of New Jersey. (Board's Brief, at pp. 1-2)

BOARD'S POSITION

The Board argues that the Executive Committee of NJSIAA acted in an arbitrary, capricious and unreasonable manner in rejecting Kearny's application to withdraw from the Watchung Conference. It points to the fact that the Association is governed by N.J.S.A. 18A:11-3 and that the Association's guidelines are not rules promulgated under the Administrative Procedure Act. Rather, they are informal and subject to oversight review and action by the Commissioner, whose standard of review is not to substitute his judgment for that of the organization, absent a showing of arbitrary or capricious behavior.

The Board argues that contrary to the Executive Committee's assertion, the Executive Committee did not make its decision after considering all of the materials and all of the presentation made at the hearing before the committee. Thus, its decision is arbitrary, capricious and unreasonable.

The Board states that it sought release from the Watchung Conference in 1984 but withdrew the request, given that it had not been accepted by any other conference. This is not the case now, however, since the NNJIL has indicated it would accept Kearny into its league if released from the Watchung Conference. (Appendix A)

The Board argues that foremost among its reasons for requesting a transfer from the Watchung Conference to NNJIL is the academic problems caused by travel to compete in the Watchung Conference, i.e., both students and coaches must be dismissed early to get to other schools in the conference creating academic problems not only for them, but other students whose teachers are coaches.

The Board avers that if it were allowed to join NNJIL there would be a benefit to both the conference and league. Also, there would be no adverse impact on the minority racial balance on either league, as both league and conference would maintain a 50/50 ratio as to racial balance. Moreover, the number of games played and the scheduling for both the league and conference would not be adversely affected.

The Board contends that the only reason for the denial to withdraw from the conference is that Kearny is a perennial loser in football games; thus, other schools are able to earn football power points for State rankings in defeating Kearny since it is a Group IV school. Of this, the Board states:

> ***The Kearny Board of Education believes it is unequivocal that there is absolutely no other reason why any member school of the Watchung Conference is trying to force Kearny to remain a member of the Watchung Conference.
>
> It is against every principle and standard of the New Jersey Educational System to force a member school to remain in a conference for this transparent reason when it creates an academic hardship on the students, teachers, coaches, and taxpayers of a community. It is asserted by the NJSIAA that Kearny sat on its rights and took no action after the third realignment. Until the Commissioner's recent decision moving various schools to various leagues, there was no logical place for Kearny to go if and when it was successfully released from the Watchung Conference. In view of the recent school movements, the NNJIL is in a position, as evidenced by the attached correspondence, where they will be happy to bring Kearny into their league provided Watchung releases Kearny. Placement did not exist prior to the Commissioner's latest actions and, therefore, Kearny believes now is the proper and opportune time to seek Kearny's release and transfer. The Watchung Conference and the NJSIAA both failed to state valid and reasonable arguments of why Kearny should not be allowed to be released from

the Watchung Conference. It does not apply definite standards to its decision or provide rational reasons for its actions. Therefore, the denial should be reversed. Smith vs. New Jersey Interscholastic Athletic Association 3 NJAR (1981). (Board's Brief, at pp. 7-8)

ASSOCIATION'S POSITION

The Association provides the following information as background to the instant matter:

1. On January 13, 1988, the Special Committee on Leagues and Conferences for the Association issued its report (Report) concerning the Third Realignment of Leagues and Conferences and which also contained the general notices sent to all member schools, including petitioner, to participate in that process on March 9, 1987 and October 17, 1987.

2. Appeal hearings were heard by the Association's Executive Committee on February 10, 1988 whereafter Report was submitted to and approved by the Commissioner.

3. Three separate appeals were taken to the Commissioner by the Newark school system, St. Patrick's of Elizabeth and Immaculata High School.

4. The Commissioner issued a comprehensive decision on June 8, 1988, In re NJSIAA, Third Realignment, directing inclusion of the Newark schools into surrounding conferences. The other two matters were remanded to the Executive Committee, one of which was settled (St. Patrick's) and the other (Immaculata) which denied the school's appeal.

5. Thirty-four schools and 10 conferences participated in the 1987 realignment process (Report, at p. 15). Two of the most heavily involved conferences were NNJIL and Watchung; the first of which had four predominantly white schools seeking to leave for other conferences (Belleville, Bloomfield, Nutley and Paramus) and the second to which Newark East Side and Shabazz had made application.

6. As a result of the Report and the Commissioner's June 8, 1988 decision In re

NJSIAA, the Watchung Conference was expanded to include East Side and Shabazz High Schools while NNJIL was expanded to include Barringer High School.

7. Petitioner Kearny chose not to make any application to leave the Watchung Conference during the third realignment in 1987; instead it chose to wait until January 1989 to seek a transfer.

8. In preparation for the scheduled hearing of Kearny's request to transfer, the Association's director issued to the Executive Committee a report, "Director's Report."

The "Director's Report" which was submitted to the Executive Committee in preparation for the February 8, 1989 hearing reads as follows:

BACKGROUND SUPPORT DATA FOR KEARNY HIGH SCHOOL APPEAL

In March, 1987 all member schools were sent detailed application procedures to be utilized for applications for league or conference membership. Member schools were again solicited in October 1987 to participate in that process. As a result of those announcements, thirty-four schools made formal and informal applications and those schools and ten affected conferences participated in day long hearings on December 4th and December 11, 1987 before the Special Committee on Leagues and Conferences.

On the basis of the application materials and the hearings, the Special Committee prepared a comprehensive report which was subsequently approved by the Executive Committee in February, 1988. The Report made a number of general policy recommendations and specific determinations relating to individual applications. That Report was then sent to the Commissioner of Education who approved the policy recommendations but reversed the NJSIAA as it related to the application of the Newark schools. A decision was then made by the Executive Committee not to appeal and we are advised that the Newark schools are now completing the incorporation process within six northern New Jersey conferences, including the Watchung Conference and the NNJIL.

In 1984, Kearny High School participated in the second realignment of leagues and conferences,

seeking to transfer from the Watchung Conference to the Northern New Jersey Interscholastic League (NNJIL). Both the Special Committee and the Executive Committee denied that transfer and a subsequent appeal was withdrawn by that school. Kearny apparently chose not to participate in the third realignment process even though both the Watchung and the NNJIL Conference fully participated at the realignment hearings before the Special Committee in December, 1987 and the appeal hearings.

In the Special Committee's Report, the following policy recommendation was presented to, and adopted by, the Executive Committee in February, 1987:

> Therefore, the Special Committee recommends that the Executive Committee amend Section B of the realignment procedures, which were distributed to all member schools on March 9, 1987, (4A) so as to terminate further statewide realignment processes. As in the past, the only exception to the prohibition on inter-conference shifts would include transfers which meet the approval of both conferences and which do not violate Criterion 7, protecting the terms of the Commissioner's mandate. If localized extraordinary problems occur (such as a school merger or a truly dramatic change in enrollment) then any school or conference would be free to make an application directly to the NJSIAA.
>
> Such a policy would also enable this Special Committee to invest the time and resources to assist Newark in significantly improving both the quality and magnitude of its athletic program. [Report, pgs. 28, 29; emphasis in original].

The central purpose of considering applications for transfers within the context of a statewide realignment process was to assess the impact on other schools and conferences on a regional basis. That process involves the application of seven criteria, including the impact on other schools. This is the principal reason why the NJSIAA has resisted any transfers of one school to another, outside of the realignment process, absent the consent of the involved conferences has reviewed the appeal of Kearny and does not

> believe that the requisite extraordinary problems have been presented to reverse the Watchung Conference decision. The staff is also against approving Kearny's appeal since it failed to participate in the third realignment process when its application could have been considered in the context of assessing the impact on the various leagues and conferences. If Kearny's approval was granted, then it would undermine the efforts of the NJSIAA to properly place and retain member schools in appropriate conferences. (emphasis in text) (Association's Brief, at pp. 3-5)

The Association argues that the petition should be dismissed since Kearny chose not to participate in the third realignment process. It points to the fact that three separate statewide realignments of leagues and conferences have been completed by NJSIAA. Each of these realignments has been approved by the Commissioner and resulted from the Association's application of specific criteria including assessment of the effect a change would make on other leagues and the existing relationships of the school and any negative effect that the transfer might have upon the present balance of minority and non-minority schools in a league or conference at variance with the mandate of the Commissioner of Education. (Id., at pp. 6-7)

Moreover, the Association avers that:

> ***All requests to transfer from one conference to another must receive the approval of the NJSIAA according to a number of specific criteria (size, geography, administrative and programmatic considerations, etc.) and the impact such a transfer might have on the involved conferences, including the balance of minority schools into such conferences. This impact criteria was intended to preserve the achievements, already reached in fulfilling the Commissioner's mandate in 1979. (Id., at p. 7)

The Association also argues that the Commissioner should not substitute his judgment for NJSIAA in disapproving petitioner's application for a transfer. In re NJSIAA Third Realignment, (Immaculata High School v. NJSIAA), decision on remand March 29, 1989; R.S.R. et al. v. NJSIAA, decided November 13, 1986; Pascack Valley Regional High School District v. NJSIAA, decided August 19, 1987 It does not dispute petitioner's motives in seeking a transfer, i.e., geography and transportation considerations, and it acknowledges that, unlike the conference to which Immaculata sought entrance, the NNJIL Conference has a substantial minority enrollment. However, the Watchung Conference has the second greatest minority enrollment of the 30 conferences statewide which is well in excess of 50%. (Id., at p. 9)

Moreover, the Executive Committee believes that if petitioner's transfer were granted, there would be severe adverse impact upon the Watchung Conference. As to this, the Association maintains that:

> It is significant that at the February 8, 1989 hearing, some of the Watchung representatives who supported the transfer of Kearny, viewed that transfer as "the beginning of a demise of the conference." These smaller Watchung schools all had enrollment compositions similar to Kearny and candidly admitted that Kearny's departure would make it easier for them to join in the exodus (2/9/89 Tr 65, 66). In fact, after the Watchung was expanded in the first realignment, Cranford, Linden, Rahway, Scotch Plains and Kearny all sought to leave that conference in the second realignment. In addition, at that hearing, it was pointed out that a number of Watchung schools (Elizabeth, Rahway, Linden, Irvington, Shabazz and East Side) were actually closer to Kearny than many NNJIL schools, thereby contradicting the stated reason for Kearny seeking the transfer to the latter league (2/8/89 TR 52 to 58).
>
> (Id., at pp. 9-10)

Lastly, as regards the transfer, the Association argues that there are even stronger reasons to deny petitioner's transfer request than existed with Immaculata High School urging that:

> ***First, unlike Immaculata, Kearny chose not to participate in the realignment process. Second, the Watchung Conference is in a far more delicate situation at this point in time, as borne out by the testimony of Watchung representatives at the February, 1989 hearing. Third, it appears that even those Watchung member schools that voted to release Kearny did so with the motive that they could also leave that endangered Conference.
>
> (Id., at p. 11)

The Board's reply brief reiterates that it does not want to leave the conference simply to leave it. Rather, it wants to leave to enter the NNJIL. It also reiterates that it withdrew its request for a transfer at the time of the Second Realignment immediately upon learning from the Association that it could be sent to any conference. The Board emphasizes that its decision for requesting a transfer is based on educational, economic, and community involvement reasons.

The Board describes the Association's assertion that adverse racial impact will result as "clearly untrue" and avers that "[b]oth the Watchung Conference and the N.N.J.I.L. are made up of similar minority enrollments and the moving of Kearny from one to the other would have little or no impact on either conference." (Reply Brief, at p. 2)

As to the other schools in the Watchung Conference wanting to leave, the Board contends that unlike its own educational and economic reasons for wanting to leave, the other schools' reasons are based on the level of sports competition, mostly football. More specifically, the Board avers that:

> ***Considerable discussion into power points and the ability to compete took place by these representatives. On the other hand, Kearny has been extremely successful in its level of competition within the Watchung Conference and has no problem in that area whatsoever. Kearny, in fact, stated that if it were not for the excessive travel time and costs, they would waive the community involvement consideration and stay in the Watchung Conference, but that the first two reasons for wanting to transfer were too important. In short, it appears that Kearny's request for transfer is based upon sound, educational and economic reasons while the Watchung Conference's and the NJSIAA's reasons for denial are football power points and desire to throw this matter back to the Commissioner because the NJSIAA is unhappy with the Commissioner's decision with regard to the Newark schools. (Id., at pp. 2-3)

COMMISSIONER'S DETERMINATION

Upon careful and independent review of the record in this matter, including the transcript of the February 8, 1989 hearing before the Association's Executive Committee, the Commissioner affirms the decision reached by the Executive Committee having found that it is neither arbitrary, capricious nor unreasonable.

For the reasons set forth by the Kearny Board, it declined to seek a transfer from the Watchung Conference during the third realignment statewide in 1987. Thus, according to the Association's procedures for inter-conference shifts, The Board could now transfer out of the Watchung Conferences only if (1) it obtained the approval of both the Watchung and NNJIL Conferences and such movement did not violate Criterion 7 for realignment concerning racial balance or (2) if an extraordinary circumstance arose it could apply to NJSIAA directly. Under the factual circumstances of this matter neither condition prevails.

The Watchung Conference denied petitioner's request and contrary to petitioner's allegations the reasons for that denial are not, upon review of the record, arbitrary or motivated by a desire to keep Kearny captive so as to secure power points. As forthrightly stated by Mr. Gene Schiller of the Scotch Plains-Fanwood School District, who voted for Kearny's release, the Watchung Conference "***is fighting to survive as a conference and I think some schools see the exit of Kearny as the beginning of the demise of the conference because there certainly will be other

schools that will request leaving the conference very, very shortly thereafter or regardless even if Kearny does not -- is not allowed to leave.***" (Tr. 65) Mr. Schiller further testified that while power points were a consideration by some in not wanting Kearny to leave, it was not the sole reason. (Tr. 67)

Mr. Schiller's statements of a troubled Watchung Conference are certainly borne out by the testimony of Mr. Tom Lewis of the Rahway district who also voted to release Kearny and who stated Rahway too wants to leave the league (Tr. 77-80) and Mr. Lou Rettino who voted against Kearny's transfer (Tr. 81-86).

Mr. Rettino's testimony as to the deliterious effects of Kearny's transfer are captured well by the following:

> ***[T]he first thing I heard was about the power point arguments. I think they kind of lost their own argument. If they think we want to keep them there because of power points, certainly it doesn't help us a whole lot to beat Kearny. I think in the eight or nine years they've been there, they fit into the bottom half of the conference in terms of the number of power points gotten from beating them because they don't win any games. That's one of the factors. To say we want to keep Kearny in the league because it's more power points for us is ludicrous. They don't give us the power points many of them give us.
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> To say we want to keep them in because it makes it a little easier to schedule, it does give you a little bit more equity. It does allow Rahway to drop Union and not play Union in certain sports and can play Kearny instead. It gives you one more flexible means of scheduling.
>
> Certainly we are in bad shape. There's no question what Gene said is absolutely true. The conference is in very, very bad shape. We saw a shot to allow Kearny to leave as really the first major step in the conference collapsing. So, do we want to keep Kearny in and want it forever? No. We don't. I feel for Kearny, but we have to have some other alternative. In the meantime, it's the lesser of two evils. The lesser of two evils is to keep everybody we have and hope to go someplace else in the future. That just makes a bad situation worse by taking Kearny and taking them out of our League. It is a bad situation that should be addressed. I hope it's going to be addressed in the near future by this organization, but certainly by taking them out you just compound what is already a negative situation.

Number two, terms of racial balance. I don't know. He tells me according to those statistics they're more of a minority school than we are. If you played either of the teams, I think you have trouble trying to figure that one out. We're 15 percent minority and they're over that, yet all of their teams are white. They're white teams in every sport and we 've played them all in every sport. If you don't think that changes the racial balance, you're incorrect. One school doesn't change it drastically. It changes when you take -- we're a minority conference. We are a minority conference. Over 50 percent of our schools are minority. If you take a school that all of their competitions are 90 to 95 to even higher percent white, you are changing the racial balance of our league. You're making again a negative situation even worse. That's point number two.

Number three, in terms of distance -- and I apologize for breaking in, Mr. Herbert, but the league changed this year. The Pacific Division is not what it used to be. The Pacific Division of the NNJIL, the league that they are -- have applied and been accepted, includes Don Bosco of Ramsey, it includes Paramus Catholic, it includes Paramus, includes Hackensack plus the close schools of Essex County. It's an eight team league, would be nine if Kearny comes in, and at least three or four of these schools are further in distance than at.least five or six of ours. We're a lot closer than Ramsey. So is Irvington, so is Shabazz, so is East Side, so is Elizabeth.

There are quite a few schools -- that's in the crossover situation. They would be playing at Don Bosco every year. That's in the same division. It's no longer a Bergen-Passaic Division and an Essex-Bergen or a Bergen Division and a Passaic-Essex Division. It's since been changed. The distance to those schools I just mentioned is [farther] than at least five or six or seven of the Watchung schools. Overall, I don't know what the percentage would be, but I know what you heard is not actually the way it is.

In terms of fatigue problem, all kids have that. In terms of traveling, we go to Kearny. We get back. We don't get back at eight or nine. Maybe we take a better route. We're about the same distance than a lot of the other schools.

I think the bottom line in all of this is, however, as much as I would like to see Kearny move, I think it's to their benefit to be in the

> NNJIL, I am strongly convinced it is not to the benefit of the other 12 members. The reason they got five votes to leave is because those teams foresaw they might leave after them and they knew, as Tommy just mentioned, he knows it's a negative effect on his school right now if Kearny leaves. The positive effect is that maybe he can leave afterwards, and that's the sole reason that he voted to allow them to leave.
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> Now, if there's someplace for our league to go, fine, but in the situation that we're in now, you're taking us with our hands behind our backs and just making it tighter if you allow them to leave. It's that simple. We're in that bad a shape and we are close to demise. We really are. (Tr. 82-86)

As to the Association's reasons for denying the Board's request for transfer, the Commissioner finds no support for the allegations that the decision was arbitrary, capricious and unreasonable. Kearny failed to get approval for a transfer from both conferences; it presents no extraordinary circumstances for the Association to grant a transfer such as merger with another school or a dramatic rise in enrollment; and, in the Association's judgment, the transfer would contravene criteria 7 and 4 since the move would create an adverse impact on racial balance and on the Watchung Conference as a whole, which is described as ready to collapse. Added to these rational bases for rejecting Kearny's transfer is the fact that Kearny chose not to participate in the 1987 statewide realignment.

Accordingly, having found the decision of the NJSIAA Executive Committee to be (1) a reasonable, rational exercise of its authority and (2) consistent with its duly approved rules and procedures, the Petition of Appeal is hereby dismissed. As to the allegation of Article VIII, Section 8 being unconstitutional, the Commissioner relies on his previous decision in In the Matter of the Unsportsmanlike Conduct Allegations Arising Out of the Cranford-Ridgefield Hockey Game of October 9, 1987, decided July 28, 1988, which rejected similar constitutional claims as set forth by Kearny in its petition but not pursued in its brief. In that decision the Commissioner accepted the arguments proffered by NJSIAA that when a school adopts the annual resolution for memberships in NJSIAA, pursuant to N.J.S.A. 18A:11-3, Article VIII, Section 8 is accepted as part of its own board of education policies. If a district believes the provision is wrong, then it should address its dissatisfaction with the bylaw through the available internal processes of the Association.

August 28, 1989

COMMISSIONER OF EDUCATION