State of New Jersey
Department of Education
Trenton

NEW JERSEY
SCHOOL LAW DECISIONS

January 1, 1968, to December 31, 1968

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THEODORE C. SEAMANS, INDIVIDUALLY, AND AS CO-CHAIRMAN OF THE MIDDLESEX COUNTY CLERGY AND LAYMEN CONCERNED ABOUT VIETNAM; MIDDLESEX COUNTY CLERGY AND LAYMEN CONCERNED ABOUT VIETNAM; ARLYNE MARKS AND FRED MARKS; PAULA MORGAN; BLENDA J. WILSON; BRYNNE JOHNSON SOLOWINSKI, AND JOHN G. WIGHTMAN,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mandel, Wysoker, Sherman & Glassner (Jack Wysoker, Esq., of Counsel)

For the Respondent, Francis C. Foley, Esq.

This case is an appeal from a decision of the Woodbridge Township Board of Education denying the use of certain public school facilities for a debate sponsored by the Middlesex County Clergy and Laymen Concerned About Vietnam (hereinafter "Organization"). The Organization and the other petitioners, who are officers or members thereof, or who are residents of Woodbridge, allege that the Board has acted arbitrarily, capriciously, and discriminatorily in denying to them the use of Colonia Senior High School, in Woodbridge Township, on January 10, 1968, for a debate open to the public. Respondent Board asserts that it has acted in proper exercise of its discretion.

The petition herein was filed on December 8, 1967. Respondent's answer was filed on December 20. Because of the imminent date of the scheduled debate and the particular nature of the problem raised in this matter, a hearing was specially scheduled and conducted on December 26, 1967, by a hearing examiner appointed by the Commissioner for that purpose, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

On November 4, 1967, the Rev. Theodore C. Seamans, a petitioner herein and Co-Chairman of the Organization, addressed a letter to the members of the Woodbridge Township Board of Education (R-5) which called attention to a "United States Day" program which had been held in the Woodbridge Senior High School stadium on the previous October 22, and which, the testimony discloses, had been sponsored as a patriotic program by the Woodbridge Business and Professional Women's Club and the Mayor's Commission on Youth. The letter recited the writer's understanding that the stadium had been made available to the sponsors without payment of custodians' fees, and

that some 60,000 letters announcing the program had been distributed through the schools of the Township. The letter concluded as follows:

> "* * * I hereby request your assurance of similar assistance and facilities of the agencies under your direction to demonstrate that by and large dissenters against U. S. policy and practice in Vietnam are intelligent, conscientious, and patriotic. Further, that their criticism has a double motivation: their concern for mankind and their special concern for their own country."

The letter was read at the next regular Board meeting on November 21, and ordered filed.

On November 18 Mr. Seamans telephoned the President of the Board, and told him of the Organization's plan to present a debate on Vietnam policy by the Princeton University Debate Panel. He asked whether the Board would permit the use of the Woodbridge High School auditorium for such purpose, without payment of fees. The President advised Mr. Seamans to make the regular application for use of school facilities, and to write a letter to accompany the application, requesting exemption from payment of fees. The application for use on January 10, 1968, and letter (R-1, P-1) were accordingly filed in the office of the Secretary of the Board on November 20. Shortly after the filing, Mr. Seamans was notified that the Woodbridge Senior High School facilities had already been scheduled for another purpose on January 10. Of several other schools not so scheduled, Mr. Seamans selected Colonia Senior High School auditorium, and his application was accordingly modified.

The application form (P-1) contains, *inter alia*, the following item:

> "7. The person in charge for the organization whose signature appears below, agrees for the organization to comply with the policies and regulations of the Woodbridge Township Board of Education for the use of school facilities. (See stipulations on attached sheets.)"

The attached policies and regulations of the Board (stipulated by counsel to be those made a part of the petition herein) provide that no rental fee would be charged for use of facilities by "groups organized for community benefit" unless an admission is charged. The policy further provides: (page 1)

> "* * * Any group using the facilities without the payment of rental fees shall be responsible for the payment of janitorial fees in accordance with the rates established by the Board. No rentals shall be approved that will in any way conflict with the program and best interests of the school."

The schedule of rates provides for a rental fee of $50 for a senior high school auditorium and at least two hours of janitorial service at $4.00 per hour per janitor assigned. The Secretary testified that customarily any waiver or exemption from the regular fees was granted only by Board action.

The letter (R-1) which accompanied the application reads as follows:

> "Thank you for your consideration of our application for free use of the Woodbridge Senior High School Auditorium on January 10, 1968. The program is designed to be an open constructive educational venture to benefit our community. The Princeton Debate Panel will present vigor-

ously *all* viewpoints on our Vietnam involvement using accepted rules of debate. George Bustin, outstanding Woodbridge High graduate will be one of the panel.

"You have received a communication previously (Nov. 4, 1967) citing your assistance to the planners of the United States Day Program held October 22nd, at the Woodbridge High School stadium with janitorial fees paid and some 60,000 announcements distributed throughout the system.

"We would respectfully request, therefore, that the janitorial fees also be assumed by the board budget for our program on January 10th. Further, that we be afforded the facilities by which a simple announcement of this event (without editorializing) will be distributed throughout the school system within two days of the program."

At the regular Board meeting immediately following the filing of the application, Mr. Seamans asked for its early consideration. He was informed that while such applications were normally considered at the next "agenda meeting" (which would occur on December 14) preceding the next regular Board meeting (December 18), an effort would be made to consider his application sooner—within eight to ten days.

The Board met in executive, or conference, session on December 2, at which seven members were present. It is clearly established that the meeting was not convened as a regularly called meeting of the Board, was not a public meeting, and no minutes were kept. The Board considered the application at some length, and by a vote of six of the seven members present, with the seventh member abstaining, decided to disapprove the application. The President testified that the members directed the wording of a letter (stipulated by counsel to be the letter made a part of the petition herein) dated December 2, which reads as follows:

"It is the decision of the Board of Education, Township of Woodbridge, that in the best interest of the Community the request for use of Colonia Senior High School, on January 10, 1968, will not be granted and, therefore, we are returning your application."

The President testified that it is his belief that the "basic factor" in the Board's decision was the request for waiver of janitorial fees, but that the subject of the proposed debate was a "contributing factor." However, the President testified, the wording of the letter was to give as the Board's reason for denying the application "a broad, general statement."

The petition herein was served on the Board on December 7, and was filed with the Commissioner on December 8. The Secretary testified that copies of the petition were supplied to all members of the Board. At its "agenda meeting" on December 14, the Board formalized a resolution (R-2) which it adopted at its regular meeting on December 18. The preamble recites the factual details preceding and including the filing of the application as set forth *supra*, and continues:

"WHEREAS, on November 30, 1967 and December 2, 1967 several Board members met in conference and a majority of the Board declined to grant

the request for free use of the facilities of the Board and the request as outlined in the letter and application of November 20, 1967 as being in the best interest of the community and requested the Secretary to advise said organization of the decision notwithstanding that the matter had not been acted upon at a public meeting;

"NOW THEREFORE, BE IT RESOLVED, that for the reasons set forth above and in view of the lack of information concerning the applicant organization and the effect on the school system and the availability of the requested school facilities for the type and character of the sponsoring group and eligibility of the applicant, the request of the applicant is denied."

Mr. Seamans testified that at no time prior to the hearing of this matter had he been requested to supply any of the information whose "lack" is recited in the resolution, *supra*. The Secretary also testified that he had not been directed to solicit or secure such information. Mr. Seamans also testified that at no time had he insisted on "free use" of the facilities as an inseparable condition of his application, and points to his signed acceptance of and agreement to comply with Board policy and regulations, *supra*. He further testified that at no time was he advised by any representative of the Board of Education that if he withdrew the request embodied in his letter of November 20, his application would receive reconsideration or other consideration. He points to Paragraph 17 of his petition of appeal, which contains a statement of willingness to pay janitorial fees, which was known to the Board at the time it adopted its resolution, *supra*, on December 18. The President of the Board, however, testified that the Board took no account of this offer at the time it acted on the resolution, since it had been advised by counsel that matters contained in the petition, once it had been filed, were within the jurisdiction of the Commissioner and not of the Board.

In closing argument, accompanied by a memorandum of law, counsel for petitioner referred to decisions of the courts in support of his argument that the denial of petitioners' application was an abridgment of constitutional guarantees of free speech, freedom of assembly, and due process of law, as well as the right to non-discriminatory treatment. See *East Meadow Community Concerts Association* v. *Board of Education*, 18 *N. Y. 2d* 129, 272 *N. Y. S. 2d* 341 (1966); *Brown* v. *Louisiana*, 383 *U. S.* 131, 15 *L. Ed. 2d* 637, 86 *S. Ct.* 719 (1966); *ACLU* v. *Board of Education*, 55 *Cal. 2d* 167, 10 *Cal. Rptr.* 647, 359 *P. 2d* 45, 94 *ALR 2d* 1259, cert. denied 368 *U. S.* 819, 7 *L. Ed. 2d* 25, 82 *S. Ct.* 34 (1961); *Buckley* v. *Meng*, 35 *Misc. 2d* 467, 230 *N. Y. S. 2d* 924 (1960); *State* v. *Corbisiero*, 67 *N. J. Super.* 170 (*Hudson Co. Ct.* 1961). Respondent, on the other hand, insists that the issue here is the very narrow one of whether the Board, in the proper exercise of its discretion, decided that granting the Organization free use of its facilities was not in the best interest of the community.

The hearing examiner concludes from the facts found and reported herein that:

1. Petitioner Seamans filed an application on behalf of his Organization in the form required by respondent, accompanying said application with a *request* that the Organization be accorded the same free use and treatment accorded other groups which had been granted use of facilities.

2. Respondent made no determination as to the Organization's eligibility to use the facilities according to the Board's own criteria of eligibility, nor did it make any effort to acquire the information needed for such a determination. Rather, it cited the "lack of information" in its resolution formalizing the denial of the application.

3. Notwithstanding an undercurrent of other considerations evident in the demeanor of witnesses from the Board, and in allusions to the subject of the debate, and "some of the foregoing activities of Rev. Seamans," such undercurrent never came to the surface in the expressed reasoning of the Board in explanation of its disapproval of the application. The only defined factor in respondent's determination was its unwillingness to waive payment of janitorial fees.

4. Respondent took action at a conference meeting on December 2, which became the basis of an official letter to the Organization on that same day, and which precipitated the petition herein.

5. Respondent, at a public meeting subsequent to the filing of the petition, of whose contents it was aware, formalized its December 2 determination in a resolution which recites as its reasons for denying the Organization's application only that it "declined to grant the request for free use of the facilities" and that its action is "in the best interest of the community."

* * * * * * *

The Commissioner has carefully considered the findings and conclusions of the hearing examiner and concurs therein.

New Jersey statutes (*R. S.* 18:5–22) authorize boards of education, "subject to reasonable regulations to be adopted by such boards," to permit the use of school facilities, when not in use for school purposes, for, *inter alia*:

> "* * * holding such social, civic, and recreational meetings and entertainments and for such other purposes as may be approved by the board of education."

Thus, a local board of education is endowed with broad discretionary power in granting the use of its facilities. But as in all matters wherein the use of discretion is authorized, such use must be found to be reasonable. *Cf. Pelletreau* v. *Board of Education of New Milford*, decided by the Commissioner March 8, 1967, reversed by State Board of Education September 6, 1967.

The Commissioner therefore conceives it his responsibility to examine not only the reasonableness of a board's regulations adopted pursuant to *R. S.* 18:5–22, but also the proper use of the board's discretion in the application of such regulations.

In consideration of the findings of fact reported herein, the Commissioner finds it unnecessary to consider the broader constitutional questions raised by the petitioners. The regulations established by respondent, as set forth in the schedule attached to the petition and stipulated to be the Board's policy and regulations, are found to be reasonable. But respondent's exercise of its discretion and its procedures in applying its regulations to the application of

the Organization are found to be so deficient as to require that respondent's determination be set aside.

In the first place, respondent has emphasized out of all proportion the question of "free use of the facilities." Nowhere is there any basis for concluding that respondent's determination was required to be dictated by the applicant's letter *request* that janitorial fees be waived. Mr. Seaman's language was clearly a *request*, and nothing more. His assent to compliance with Board policy, including payment of janitorial fees, is expressly set forth in the official application form which he signed. Respondent could have denied the *request* but approved the *application*. Instead, it elected to deny both the request and the application upon the basis that it was "in the best interest of the Community" to do so. Such a statement is not a *reason* at all; rather it is a *conclusion* which must be founded upon reasons. In this case, the reasons are unstated, and may not be speculated. The questions of the validity of reasons which were examined in the cases mentioned by petitioners cannot be examined here, for there are no reasons to be examined. While it might be argued that the matter should therefore be remanded to the Board for a clear statement of its reasons, if such there be, the Commissioner finds that under the circumstances no purpose would be served thereby. Respondent made an original determination on December 2 after considering the matter "at length," and it stated its position to the Organization. It formalized that determination after the petition herein, of which it had been apprised, had been filed. No new position was established in that resolution, although the Board had a second chance to state its reasons for its position.

Moreover, it is in that "second chance" that the Commissioner observes another deficiency. The determination made on December 2, however officially it was embodied in the letter announcing it to the Organization, has no legal standing, for it is well established that a board of education cannot take official action except when it is convened at a public meeting in accordance with law. *R. S.* 18:5–47 Boards may, and frequently do, meet in conference or caucus sessions, "during which there is free and full discussion, *wholly tentative in nature.*" (Emphasis added.) *Cullum* v. *Board of Education of North Bergen*, 15 *N. J.* 285, 294 (1953) But no final action can be taken at such a meeting, and respondent acknowledged this fact in its subsequent resolution, *supra*. Thus, as the Board itself recognized that its action on December 2 was "wholly tentative," it is self-serving for it now to say that it could not in any event take cognizance of the assertion of petitioners, under oath, that they would in fact pay the janitorial fee, if such were a reasonable and equitable application of respondent's rules. Parties in litigation, especially of the sort here involved, may and often do change their stance, once the pleadings have been filed. Thus the resolution of December 18 must be regarded as purely arbitrary, and the Commissioner so holds.

For the reasons set forth, the Commissioner finds that the refusal of respondent to grant use of the Colonia Senior High School on January 10, 1968, by Clergy and Laymen Concerned About Vietnam, for the purpose of presenting a public debate, was wholly without valid reason, must be deemed to be arbitrary, and must therefore be set aside. The Commissioner therefore directs respondent to grant such use on January 10, 1968, subject to its regulations governing the use of school facilities as stipulated herein, and

subject to payment by the Organization of such reasonable janitorial fees as respondent's regulations provide. The Commissioner finds no requirement in law that respondent provide the Organization with facilities for publicizing this program, notwithstanding the fact that such facilities were in the past made available for a program sponsored in part by the Mayor's Commission on Youth. The Commissioner therefore places no such requirement upon respondent with respect to the January 10 debate.

COMMISSIONER OF EDUCATION

January 4, 1968

GEORGE A. RUCH,

Petitioner,

v.

BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

ON MOTION TO DISMISS

For the Petitioner, Joel A. Mott, Jr., Esq.

For the Respondent, Champion and Champion (Edward W. Champion, Esq., of Counsel)

Petitioner is a teacher who, after three years of employment in respondent's school system, was not reappointed. He alleges that the Board's failure to continue his employment was arbitrary, capricious and discriminatory, being based, he asserts, on inaccurate and prejudicial reports and information upon which he has been denied the right to be heard. Respondent denies that its failure to reemploy petitioner was in any way improper and moves to dismiss the petition on the grounds that (1) petitioner is guilty of laches, and (2) the petitioner sets forth no cognizable cause of action. The Motion to Dismiss is presented in briefs of counsel.

The undisputed facts disclose that petitioner was employed as a teacher by respondent for the academic year beginning September 1, 1963, and ending June 30, 1964. He was subsequently reemployed for the 1964-65 and 1965-66 school years, each time at an increased salary. In the pleadings petitioner alleges and respondent admits that (1) on December 13, 1965, the department chairman submitted a report recommending petitioner's dismissal on the grounds that he failed to meet standards of the district; (2) in February 1966 a second report was submitted by the department chairman outlining in detail alleged weaknesses in petitioner's teaching methods and techniques; (3) in June 1966 respondent arranged a meeting with petitioner at which petitioner

was permitted to speak; (4) respondent has taken no further action with respect to petitioner, its minutes contain no reference to this matter, and no notification of any decision has been communicated by its Secretary to petitioner; and (5) respondent has not yet employed a replacement for petitioner.

Respondent maintains that petitioner has lost the right to appeal because of his laches. It points to the fact that petitioner's employment terminated on June 30, 1966, and that the petition herein was not served on respondent until July 14, 1967, a lapse of more than a year. Such an interval of time before initiating an action to contest the failure to renew petitioner's contract constitutes unreasonable delay, respondent contends, and calls for dismissal of the petition.

Respondent argues further that in any event the petition sets forth no ground on which an appeal can be based. It maintains that since petitioner's third contract with respondent expired by its terms on June 30, 1966, and petitioner was at that time a probationary employee who had not acquired tenure, he had no entitlement to a hearing on the question of nonrenewal of his contract. Respondent contends, in short, that it made no decision with respect to petitioner from which an appeal can be taken. It entered into separate contracts with petitioner for three consecutive academic years and both parties fulfilled their obligations thereunder. The third contract expired on June 30, 1966. Thereafter, respondent contends, both parties were relieved of any further obligation to each other. Respondent thus avers that since it took no action with respect to petitioner either to terminate or continue his employment, and was under no requirement to take such action with respect to petitioner, and none having been taken, there is no basis on which an appeal can be grounded.

Petitioner, on the other hand, contends that in his case alleged reasons for dissatisfaction with his teaching were set forth in a written report, a copy of which he received and incorporated in his brief. All of the reasons given, he maintains, were arbitrary, capricious and discriminatory and were based on his teaching of a subject for which he was not certificated. Under such circumstance, petitioner avers, he is entitled to the opportunity to cause such reasons to be exposed to the light of day and to either administrative or judicial review. Petitioner also denies that he is in laches, maintaining that whatever delay occurred failed to prejudice respondent to the degree necessary to involve such an equitable defense. Finally, petitioner argues, the pleadings herein raise disputed questions of material fact which require resolution by the Commissioner of Education.

It is well established that the right of tenure does not come into being until the precise conditions laid down in the statute have been met. *Ahrensfield* v. *State Board of Education*, 126 *N. J. L.* 543 (*E. & A.* 1941) It is clear that petitioner's employment with respondent failed to fulfill any of the probationary periods required by the statute, *N. J. S.* 18A:28-5. Petitioner, therefore, has no statutory claim to tenure status in respondent's school district.

It is equally clear that petitioner was not dismissed nor was his contract with respondent breached or terminated. The agreement between the parties expired June 30, 1966, by its own terms. Respondent took no action with

respect to petitioner's third contract nor was any called for. It simply fulfilled its obligations under the contract and took no action to continue the relationship. The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the nonrenewal of a probationary contract which has expired. The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the discretionary authority of the board. *N. J. S.* 18A:11–1c, 18A:16–1, 18A:27–4 See also *Zimmerman* v. *Board of Education of Newark*, 38 *N. J.* 65 (1962). Respondent was under no obligation to renew its agreement with petitioner, and in failing to take any action with respect to his reemployment it did no more than exercise the discretionary powers accorded it by statute.

A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper. *Cullum* v. *North Bergen Board of Education*, 15 *N. J.* 285 (1954) In this case, petitioner avers that respondent acted arbitrarily for the reason that its decision not to reemploy him was based on reports which were inaccurate and unjust. Petitioner, therefore, claims entitlement to a hearing on the reasons given for his nonreemployment.

A board of education is under no legal obligation to respond to a demand for reasons for its nonrenewal of employment short of tenure. In *Zimmerman* v. *Board of Education of Newark, supra,* at page 70, the Court said that the "historically prevalent view" is expressed by *People ex rel* v. *Chicago,* 278 *Ill.* 160, *L. R. A.* 1917*E*, 1069 (*Sup. Ct.* 1917) as follows:

> "'A new contract must be made each year with such teachers as [the board] desires to retain in its employ. *No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all.* The board is responsible for its action only to the people of the city, from whom, through the mayor, the members have received their appointments. * * * Questions of policy are solely for the determination of the board, and when they have once been determined by it, the courts will not inquire into their propriety.'" (Emphasis added.)

See also *Taylor and Ozmon* v. *Paterson State College,* decided by the Commissioner March 29, 1966. In the case of *Parker* v. *Board of Education of Prince George's County,* 237 *F. Supp.* 222, 228 (*D. C. Md.* 1965) the Court said:

> "* * * unless there is a statute to the contrary, probationary teachers' contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing." (at page 227)
>
> "It is true, of course, that any dismissal or termination of employment by an employer for personal reasons limits to some extent the opportunity of the employee to obtain other employment, because some prospective employers may prefer employees whose services have never been terminated by their previous employers. But that does not give a probationary teacher the constitutional right to a hearing * * * on termination of his contract

> * * *. Any other rule would impose unreasonable burdens upon the members of the School Boards and would weaken the whole concept of tenure * * *."

Petitioner avers, however, that in accordance with a policy of respondent which required that written statements be given to all probationary teachers who are not performing up to the standards of the school, he was given "reasons" in the form of a report of his department chairman. Petitioner claims that he is therefore entitled to a full hearing on the statements made about his performance upon which it is presumed the Board failed to renew his contract, in order that he might have a fair opportunity to disprove their validity.

The Commissioner cannot agree. The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the "reasons" for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.

The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny. But such is not the case in the instant matter. While petitioner has charged respondent with arbitrary, frivolous and discriminatory conduct with respect to his further employment, such a bare allegation is insufficient to establish grounds for action. *U. S. Pipe and Foundry Company* v. *American Arbitration Association*, 67 *N. J. Super.* 384 (*App. Div.* 1961) Petitioner does not allege that race or religion or any other kind of unlawful bias influenced respondent's failure to reappoint him. Nor does he claim that respondent was motivated by frivolous considerations. Petitioner's charge of unreasonable and arbitrary action rests on the unfavorable report of his superior. But examination of the report, which petitioner attached to his pleadings, reveals that it is nothing more than his supervisor's written evaluation of petitioner's classroom performance and teaching competence. Supervisory evaluations of classroom teachers are a matter of professional judgment and are necessarily highly subjective. There is no allegation that the supervisor's report was made in bad faith, the result of personal animosity or bias, or in other ways improper. What is plain is that the supervisor, in the normal course of her duties, rendered a report of her evaluation of petitioner's competence as a teacher to the administration, that a copy was furnished to petitioner for his knowledge, that the administra-

tion and the Board of Education considered the report and, although it did not conduct an adversary type hearing such as petitioner demands, it did afford petitioner an opportunity to meet with the Board and express his point of view, and that as a result and with this information before it the Board simply chose not to reemploy petitioner. Under such circumstances the Commissioner finds no vestige of any unlawful, arbitrary or capricious motivation. The Commissioner cannot agree that because respondent made information underlying its decision not to place petitioner in a tenure status available to him, it bound itself to accord him a plenary hearing as a matter of right.

The Commissioner therefore finds no genuine issue of material fact in this case. Granted, there are many allegations made in petitioner's lengthy petition of appeal which are denied by respondent. The facts relative and material to the issue herein are not in dispute, however, and on the basis of these undisputed facts the Commissioner finds that petitioner has established no cause for action on which relief can be granted. *Ocean Cape Hotel Corporation* v. *Macefield Corporation*, 63 *N. J. Super.* 369 (*App. Div.* 1960) Respondent's Motion to Dismiss the appeal will therefore be granted.

Finally, although petitioner asserts that he was assigned to teach the subject of economics without proper certification for that subject, the Commissioner does not find this allegation, even if true, material to the central issue here. Petitioner makes no assertion that he accepted the assignment to teach economics against his will or better judgment. While the Commissioner does not condone the assignment of a teacher outside the limits of his certificate, he does not regard this fact as material to the issue of petitioner's claim to reemployment, in the light of the findings herein expressed.

In view of the foregoing, the Commissioner finds no necessity to pass upon the issue of laches raised by respondent. For the reasons stated respondent's Motion to Dismiss is granted and the petition herein is dismissed.

COMMISSIONER OF EDUCATION

January 29, 1968

Dismissed by State Board of Education, May 1, 1968.

Pending before Superior Court, Appellate Division.

LAWRENCE M. DAVIDSON,

Petitioner,

v.

NEWARK STATE COLLEGE AND EUGENE G. WILKINS,

Respondents.

For the Petitioner, Meth and Wood (Theodore Sager Meth, Esq., of Counsel)

For the Respondent, Arthur J. Sills, Attorney General (Stephen G. Weiss, Deputy Attorney General)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a musician who taught in respondents' College, alleges that he has acquired tenure in the position of Professor of Music and is entitled to continue in his employment. Respondents deny that petitioner has obtained tenure status and therefore assert that he has no claim to continuing employment. The matter is presented on stipulations of fact and briefs of counsel. Although the state colleges have been transferred to the Department of Higher Education by the enactment of *Chapter* 302 of the *Laws* of 1966, the Commissioner of Education has retained jurisdiction over this matter by virtue of the provision of section 39 of that Act which provides for the continuation of pending matters by the agency before which action was initiated.

Prior to September 1962, petitioner was employed as a part-time teacher of music in the extension division of Newark State College. In June 1962 he was appointed to the academic rank of Professor of Music (Artist-in-Residence). He fulfilled all the requirements made known to him at that time for appointment to the academic rank of professor, including qualification for enrollment in the Teacher's Pension and Annuity Fund, and began his professorship at the beginning of the 1962-63 academic year. Petitioner performed his duties satisfactorily and was reappointed for the academic years 1963-64 and 1964-65. It is undisputed that during these three academic years he served with complete satisfaction and in full accordance with the provisions with respect to faculty set forth in the "Administrative Code for Public Higher Education in New Jersey."

As petitioner approached appointment to a fourth academic year, the Executive Council of the Faculty Association made known its opposition to petitioner's being accorded the tenure status which would thereby accrue. The Faculty Association's opposition was based on its contention that petitioner did not have a doctoral degree and therefore lacked the academic qualifications for full professor pursuant to the provisions of the "Guide in Personnel Policies for the Faculties of the New Jersey State Colleges." The Guide states *inter alia* that a professor should have an "earned doctorate in the field of his major assignment and eight years of successful professional experience."

The Personnel Policies Guide provides also for evaluation of faculty requirements and attainments by the president of the college. Accordingly, on March 31, 1965, and by direction of the Commissioner of Education, President Wilkins, respondent herein and hereinafter "President," wrote petitioner suggesting that such an evaluation be made by "an outside jury" to be appointed by the Commissioner, if the faculty executive committee approved. No such jury was appointed but petitioner's personal attorney wrote the Commissioner of Education on April 10, 1965, setting forth in detail petitioner's qualifications for reappointment as professor of music. The letter also cited a "Statement on the Standards for Notice of Nonreappointment" approved by the Council of the American Association of University Professors which requires at least twelve months' notice before the expiration of an appointment after two or more years' service, as a condition precedent to nonreappointment. When no "outside jury" was empaneled, petitioner furnished the President with statements from an orchestra conductor and from professors of music at Columbia University, Juilliard School, and Princeton University. The writers were in accord that petitioner's training and experience as a professional musician were equivalent to a doctor's degree and that he was well qualified to be a professor of music.

On June 11, 1965, the President presented petitioner a choice of two options: (1) to be appointed professor of music or (2) to be appointed "artist-in-residence." As professor, petitioner was informed, he would be required to assume a full schedule of teaching and to discharge concomitant responsibilities, such as office hours on campus, extra-curricular assignments, student counseling, etc. It was also specifically pointed out that such an appointment would not permit extended leaves for the purpose of professional appearances and engagements. It was suggested, however, that the position of artist-in-residence would allow for such absences and would permit petitioner to continue the various activities and services which he had been performing, at the same salary as a professor of music. It was specifically noted that the appointment would be on a year-to-year basis with no tenure status. Assurance was also given by the President that although the tenure of the position would be from year to year, "a minimum duration will be for three academic years." (Appendix G) Moreover, if petitioner were to elect the second option, he was required to submit a written resignation as professor in order to be appointed artist-in-residence.

By letter dated June 29, 1965, (Appendix J) petitioner chose to be appointed artist-in-residence and, in accordance with the President's suggestion, submitted his resignation as professor. Thereafter he received a letter from the chairman of the College music department enclosing a copy of the schedule of classes to which petitioner was assigned, but advising him that someone else would be employed for such purpose for the first semester as it appeared that petitioner's appointment as artist-in-residence would not be accomplished before November 1. Subsequently, petitioner received a letter from the President inviting him to meet on September 2 "to discuss provisions for Visiting Specialists to be employed at the state colleges." (Appendix L) Whether that meeting occurred is not clear, but in any event, an oral proposal was made by the President to petitioner that his service for the 1965-66 school year take the form of a series of demonstration song recitals at the several State Colleges. This proposal was confirmed by letter from the President

and resulted in the execution of a contract dated November 24, 1965. (Appendix O) The contract, prepared and entered into by the Division of Purchase and Property in the Department of Treasury, for and on behalf of the Department of Education, called for the performance of seven concerts by petitioner for which he was to be paid $1,878.14 per concert or an aggregate of $13,147. Petitioner stipulates that his ordinary fee for such a recital is $500 to $600, from which, after necessary expenses are deducted, he usually realizes a net of $250 to $300. He avers that the excessive fees paid him under the 1965-66 contract were for the purpose of matching the salary he would have received as professor or artist-in-residence on the Newark College campus. Petitioner performed the recital series according to the schedule set forth in the contract.

On April 20, 1966, the President informed petitioner by letter that although he had attempted to explore the status of the position of "visiting specialist" in the State College he had been unsuccessful in having anything done, and that consequently "there is no official position at the present time for next year." (Appendix P) Petitioner received no further word from the College or the State, and on July 1, 1966, made demand on the President for faculty appointment to a full professorship. Receipt of petitioner's letter was acknowledged, but without further action on the part of respondents. Finally, it is stipulated that petitioner has made reasonable efforts to find comparable employment elsewhere but without success.

Petitioner asserts that continuation of his employment by the College is important to him both financially and professionally. He claims that (1) he has acquired tenure status by virtue of the length of time he was employed by the College; (2) even if it be held that he has not acquired tenure he is at least entitled to two years' additional salary under agreements with the College; and (3) as the unwitting victim of a dispute between the Faculty Association and the College, equity and fair play demand that he be accorded appropriate relief.

I.

Petitioner was employed by respondent as professor of music for three consecutive academic years beginning September 1962 and ending June 1965. Such a period of employment falls short of fulfilling the requirements of the statute, *N. J. S.* 18A:60–1, for the accrual of tenure status. But, petitioner argues, he served from 1958 to 1962 as a part-time teacher in the College's Extension Division. That employment, he contends, when tacked to the three consecutive years of full-time service from 1962 to 1965 more than fulfills the statutory requirement for the acquisition of tenure. Petitioner claims, therefore, that he was employed by respondent not for three consecutive academic years but for an aggregate of seven years and hence has acquired tenure. Petitioner recognizes no distinction between full and part-time employment and fails to find any such differentiation in the statute.

The Commissioner concurs that there is nothing in the tenure statute which distinguishes between full and part-time employment. He recognizes also that it is well established that part-time teachers in the public schools acquire tenure under a similar statute. *N. J. S.* 18A:28–5 *Cf. Fox* v. *New Providence Board of Education*, 1939-49 *S. L. D.* 134. If petitioner had been employed by re-

spondent as a part-time member of the faculty of the College in addition to his three-year term as a full-time professor, the Commissioner would find as a matter of fact that petitioner had acquired tenure. Petitioner's prior service, however, was not as a member of the regular College faculty but as a teacher in the College's Extension Division, a distinction of significant difference.

In addition to the regular curriculums offered to students enrolled for matriculation, each of the six New Jersey State Colleges maintains a service variously called "extension service," "field service," "evening division," etc. Under such a program, the College makes available a wide range of courses, depending on demands, to persons interested in pursuing further education for cultural, vocational, professional, or avocational purposes. These courses are offered usually after normal school hours in the late afternoon or evening and on Saturdays and in many instances are given off campus at locations convenient for the participants. Members of the regular College faculty who are interested in such extra work may be assigned to teach such classes. A great many of the instructors, however, are interested persons who have no connection with the College but whose knowledge and experience in a particular field provide the necessary competency to teach. Thus it is not unusual to find that a large segment of the faculty of the extension division, often more than half, is comprised of persons who are employed full time elsewhere but who teach one or two courses for the College in their off-duty hours.

It is significant to this issue that instructors assigned to teach extension or field service courses are not subject to the policies or entitled to the privileges established by the "Guide in Personnel Policies for the Faculties of the New Jersey State Colleges." It is to be noted in this respect that (1) extension course teachers are not required to meet the criteria for preparation and experience for appointment to the regular staff; (2) all extension course teachers regardless of training or experience are paid the same rate per semester hour taught, and the salary schedule established for regular faculty members does not apply to the extension service; and (3) selection, nomination, and appointment of extension course instructors, while ultimately requiring the approval of the Commissioner of Education, is executed much less formally than in the case of a regular staff appointment. The procedures for employment of extension course teachers are carried on largely by administration subordinates with little or none of the active involvement of the College president, the Assistant Commissioner of Education or the Commissioner which is necessary to a regular faculty appointment. Extension courses result from a known demand, need, expression of interest or request. Once the course and the location in which it is to be offered are decided, a suitable instructor is sought. Thereafter appointment to teach the particular class is usually *pro forma*. In fact the chairman of the department involved usually suggests instructors for extension courses to a member of the staff of the Division of Higher Education. That staff member then contacts the person suggested and makes the necessary arrangements. Seldom is any correspondence resorted to. Nor are any contracts issued. While some written notice of the assignment may ultimately be transmitted, all arrangements preceding are in most cases made orally and informally. Such a procedure is materially different from the employment of a regular faculty member, whose application must be accompanied by a complete transcript of his training and experience, and who must be nominated by the president of the College, recommended by the Assistant

Commissioner of Education, and appointed by the Commissioner of Education subject to the approval of the State Board of Education.

Nor is there any entitlement on the part of extension course teachers to reappointment for subsequent semesters of courses. While it is true that there is continuing need for certain courses which are offered routinely, many others are given only from time to time and at indefinite intervals depending on interest or demand. Even where the same course is offered again, a different teacher is often assigned, and there has never been any question of the right of the College to change instructors. To any one familiar with the operation of the Colleges it is clearly obvious that instructors in the extension division and the full-time faculty of the College are separate and distinct entities and that statutes and rules applying to one are not applicable to the other.

The Commissioner cannot conceive of any intent by the Legislature to include other than regularly employed College faculty members under the protection of tenure by its enactment of *R. S.* 18:16–37 (now *N. J. S.* 18A:60–1). To hold that the statute is applicable also to persons who have taught a single course in a College evening session for more than three consecutive years would be an illogical and unreasonable conclusion. Under such an assumption literally thousands of persons employed full time in public schools (where many already hold tenure), in other colleges and in various other occupations, would now, as a result of petitioner's argument, be entitled to claim tenure as a member of one or more College staffs. Under such an interpretation it would be well-nigh impossible to administer an extension or evening division with the flexibility essential to the proper operation of the program.

A statute will not be construed to reach an absurd or anomalous result. *Robson* v. *Rodriquez*, 26 *N. J.* 517 (1958); *Slocum* v. *Krupy*, 11 *N. J. Super.* 81 (*App. Div.* 1951) See also *Schumacher* v. *Board of Education of Manchester Township*, 1961-62 *S. L. D.* 175, affirmed as *Board of Education of Manchester Township* v. *Raubinger*, 78 *N. J. Super.* 90 (*App. Div.* 1963). In the Commissioner's judgment, petitioner's argument enlarges the statute far beyond any intent of the Legislature and would produce untenable and unreasonable results.

The argument herein holds more similarity to one advanced by petitioner in the case of *Taylor* v. *Paterson College*, decided by the Commissioner March 29, 1966. In that case, a College faculty member sought to tack his summer session employment to the regular academic year in order to achieve tenure. In holding that such summer session employment could not be used to satisfy the conditions laid down in the statute for the achievement of tenure, the Commissioner said:

> "* * * Summer sessions are not part of the academic year. They differ in many respects from the regular school term. The courses may enroll other than full-time students, may be taught by other than regular faculty members, and may be administered and supervised by persons other than those assigned to such duties during the academic year. Under petitioner's argument, teachers who are employed in an evening session or any other special or extra session could count that service toward the probationary employment requirement and acquire tenure before three years had elapsed. The

Commissioner finds no such intention in the statute and holds that the legislative purpose was to require persons employed on an academic year basis to be employed for a fourth such year or its equivalent before tenure accrues."

Furthermore, by long established administrative usage and practice, tenure in the New Jersey State Colleges has been limited solely to persons who have been appointed and reappointed to the regular faculty of a College and who have served as members of that faculty for the statutorily mandated time. In no instance has a person employed to teach in a summer, evening, extension, or field service session been considered to have achieved tenure or to have satisfied thereby any part of the employment period required by the statute. Such long administrative practice is entitled to great weight and in the Commissioner's judgment is dispositive of this question. *Gualano* v. *Board of Estimate of Elizabeth School District*, 72 *N. J. Super.* 7, 32 (*Law Div.* 1962), affirmed 39 *N. J.* 300 (1963)

The Commissioner finds, therefore, that petitioner's employment which could be credited toward satisfying the period essential to the accrual of tenure was for a period of three academic years only and therefore petitioner failed to achieve tenure status.

II.

Petitioner's second argument is that even if he did not acquire tenure he is entitled to two years' additional salary by virtue of the agreements reached between the College and himself. He contends that the College made an offer to appoint him as artist-in-residence on a year-to-year basis but with a minimum duration of three years. Petitioner asserts that he accepted the offer and submitted his resignation in reliance thereupon. As a result of such offer and acceptance petitioner argues that a contract binding upon both parties thereby came into being. Petitioner further maintains that he changed his position in his reliance upon respondents' offer by resigning as professor of music and surrendering his tenure rights. He therefore claims the right to be paid full salary for the two additional years which he would have earned as artist-in-residence or visiting specialist had respondents fulfilled their part of the alleged agreement.

The Commissioner cannot agree that a viable and enforceable contract arose as a result of the discussions and communications between petitioner and respondents nor can he agree that petitioner's resignation submitted in reliance upon respondents' alleged offer resulted in a change of position. Petitioner's resignation was an unnecessary and immaterial act which had no effect whatever on his position with the College. He had been employed as professor of music for three consecutive academic years under three separate contracts for one year each. The last of those contracts expired in June 1965. The terms of the agreement having been fulfilled by both parties and petitioner having failed to acquire tenure, no rights to further employment existed. *Taylor* v. *Paterson State College, supra; Currie* v. *Board of Education of Keansburg*, decided by the Commissioner November 3, 1966; *Zimmerman* v. *Board of Education of Newark*, 38 *N. J.* 65, 75 (1962) Petitioner had no position or employment with respondents after June 1965 from which he could resign. Despite the President's assumption that a resignation should be submitted,

there was no necessity or reason therefor, and petitioner's act was a nullity which did not alter his position or create or negate rights not then existent.

Nor can the Commissioner find that the President made a legally enforceable offer to petitioner in their discussions with respect to the position of artist-in-residence or visiting specialist. No such position had then or ever existed in any of the State Colleges. The establishment of such a position would require an act of the Commissioner of Education and the approval of the State Board of Education and is beyond the scope of authority of a College president. Apparently the President conceived the idea of an artist-in-residence as a means to retain the valued services of petitioner in a way which would be palatable to the Faculty Association. Apparently also he assumed that creation of such an employment category would be acted upon favorably upon his recommendation. In any event, his discussions with petitioner anent such a position were wholly exploratory and tentative in nature. Those discussions proceeded on the assumption that if a way could be devised to continue petitioner's employment which would be acceptable to all concerned, procedures would be put in motion to establish such a position, after which a firm offer could be made to petitioner. Lacking such an established employment category and with knowledge of all the conditions pertaining thereto, the President could not make an offer of the kind argued by petitioner. The Commissioner finds, therefore, that no offer of a legally binding nature and upon which petitioner could rely was made by respondents.

The Commissioner further finds nothing in the contract for the recital series or the circumstances pertaining to it which support any of petitioner's claims to continued employment or further compensation. The contract was a valid instrument, executed for a term of one year only, and both parties fulfilled their obligations under it. Despite whatever impressions or assumptions petitioner may have read into the matter, *i.e.*, that the contract would be renewed annually or that it was used as a substitute for the first year as artist-in-residence until such position could be established, petitioner has no solid legal basis upon which relief can be claimed or afforded. The Commissioner finds, therefore, that no legally competent offer was made to petitioner by respondents, that no legally binding agreement arose between the parties, and that no further obligation exists on either side.

III.

Finally, petitioner contends that equity and fair play require that his petition be considered favorably and that he be accorded appropriate relief. He asserts that he has been made the unwitting victim of a dispute between the Faculty Association and the College administration; that in an attempt to placate the faculty, the administration devised an ingenious scheme, *i.e.*, the position of artist-in-residence without tenure; that petitioner went along with the idea, resigned, and abandoned his tenure rights in reliance thereon; and that after he had done so, respondents reneged on their part of the agreement. Therefore, petitioner argues, having relied on respondents' proposal and changed his position, it is only fair and just that he be awarded relief.

Even if it is conceded that petitioner was the focus of an unfortunate controversy in which the Faculty Association opposed his appointment and that the administration did not successfully conclude its attempts to devise a way

in which his services might be continued without offending the Faculty Association, petitioner's contention that in reliance upon the proposal he changed his position and is therefore entitled to equitable relief ignores the facts. The clear facts are that (1) petitioner taught several late afternoon or evening classes prior to the 1962-63 school year; (2) such employment was of an informal nature as a member of the staff of the Field Services Division and not as a member of the regular faculty of the College and as such was not applicable to a tenure appointment; (3) petitioner was employed as a regular faculty member for three consecutive academic years ending in June 1965; (4) petitioner was not reappointed for the 1965-66 school year and therefore failed to fulfill the precise conditions laid down in the statute for the achievement of tenure status; (5) after June 1965 petitioner had no employment status with the College and therefore his "resignation" was a nullity which could not alter or change his position; (6) respondent unsuccessfully attempted to create an alternative kind of employment by which petitioner's services could continue which would not accord him the status of tenure, but such position was not created then or since; and (7) petitioner's agreement to accept an alternative kind of employment, which was conditioned on the completion of appropriate and requisite procedures for the establishment of such a position, produced no enforceable rights to such alternative employment or compensation therefor when the position failed to be created. Furthermore, petitioner was afforded an opportunity to be reappointed to the position of professor of music which would have given him tenure. He chose instead to relinquish that opportunity, presumably because it would require him to give up his other musical interests and commitments, in favor of a possible artist-in-residence position without tenure which would permit him to continue his outside professional engagements. Certainly petitioner knew that the latter position had not yet been created, that it was beyond the authority of the President to establish such a position, and that the President's proposal could not be a binding commitment until the position was established and approved. Petitioner elected to take his chances, which undoubtedly both he and the President thought were excellent, on a yet-to-be-created position which would permit his continuing to be a performing artist off campus against an appointment to an established position on campus which would allow no such outside activities. That the newly-conceived employment did not eventuate was certainly no fault of petitioner, but neither is there any showing that the President failed to lend his best efforts to its ultimate creation. While the Commissioner deplores the inept manner in which this matter was handled and sympathizes with petitioner over its unfortunate outcome, he cannot find, in his adjudication of this issue, that petitioner has established any enforceable rights.

The Commissioner finds and determines that petitioner did not acquire tenure status as a member of the faculty of the New Jersey State Colleges and that he has no legally enforceable rights to further employment or compensation. The petition is therefore dismissed.

COMMISSIONER OF EDUCATION

February 5, 1968

Appeal dismissed by State Board of Education, March 5, 1969, for failure to prosecute.

FREDERICK OLLEY,

Petitioner,

v.

BOARD OF EDUCATION OF SOUTHERN REGIONAL HIGH SCHOOL, OCEAN COUNTY,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

For the Petitioner, Weitzman, Brody & Weitzman (Samuel Weitzman, Esq., of Counsel)

For the Respondent, Berry, Whitson & Berry (Jane Rinck, Esq., of Counsel)

Petitioner seeks reinstatement in a position as janitor in respondent's schools, alleging that he was unlawfully dismissed from that employment. Respondent maintains that its termination of petitioner's employment was proper and lawful and has moved to dismiss the petition of appeal. Argument on respondent's motion was heard by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the State Department of Education, Trenton, on September 7, 1967.

There is no material disagreement with respect to the facts underlying the dispute. Petitioner was first employed by respondent as a janitor for the period from September 6, 1962, to June 30, 1963. His employment was renewed for the 1963-64, 1964-65, 1965-66, and 1966-67 school years by annual action of the Board of Education recorded in its minutes. In each of the five school years petitioner signed a written contract setting forth the terms of the employment. The 1966-67 contract employed petitioner as custodian from July 1, 1966, to June 30, 1967, at a salary of $4,600 payable in twenty-four semi-monthly installments. The contract provided that:

> "It is agreed by the parties hereto that this contract may be terminated by either party, at any time, by giving to the other party a thirty-day written notice of intention to terminate the same."

On January 3, 1967, the Superintendent of Schools sent petitioner a letter (obviously misdated 1966) suspending him from his duties as janitor. Petitioner was further advised that the suspension would continue in effect until the next meeting of the Board of Education at which time the Superintendent intended to recommend that petitioner's employment be terminated. At that meeting, which was held on January 16, 1967, petitioner appeared and was afforded an opportunity to speak to the Board in executive session.

Thereafter petitioner received the following letter from the Secretary of the Board dated January 17, 1967:

> "In accordance with the terms of your contract you are hereby notified of the termination of your contract on thirty days notice.
>
> "At a regular meeting of this Board of Education held on January 16, 1967, it was regularly moved, seconded and approved with all members present voting in favor of the resolution:
>
> > "BE IT RESOLVED that the contract of Frederick Olley is terminated in accordance with the terms of the contract and he is to be given thirty days notice.
>
> "You are not to report to work, but you will receive compensation at the usual rate until and including February 15, 1967."

Petitioner thereafter filed this appeal alleging he had obtained tenure. Respondent moves to dismiss the appeal on the grounds that petitioner has no cause for action. The motion is predicated on the assertion that petitioner did not have tenure and his employment, therefore, was terminated in complete accordance with the terms of his mutually agreed upon contract. Respondent points out that since petitioner was hired for a specific period each year, his annual acceptance of such a definite term of employment constituted, under the law, a waiver of tenure protection for an undefined span of time.

Petitioner disputes respondent's interpretation of the laws governing the employment of janitors, maintaining that there exists no difference, *vis a vis* tenure status, between janitors hired for a specific period and those employed for an indefinite term. He contends that *R. S.* 18:5–67 protects all janitors from discharge, except for cause established at a hearing, regardless of the terms and conditions under which they were hired. Petitioner urges that there is no distinction in the statutes between "tenured" and "nontenured" janitors except for provisions respecting reduction in the number of employees. If, therefore, all janitors are protected by the statute from dismissal, it follows then, petitioner argues, that such a statutory right cannot be waived by the signing of a thirty-day termination clause. Finally, petitioner claims that he was considered to be and was treated as a permanent employee and that the thirty-day cancellation clause was never authorized by the Board of Education and it is therefore not binding or enforceable by either party.

The statute pertinent to this issue at the time of this appeal was *R. S.* 18:5–67, which provides:

> "Except as provided by section 18:5–66.1 of this Title, no public school janitor in any school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except for neglect, misbehavior, or other offense and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. Charges may be filed by any person, whether a member of the school board or not."

Petitioner's claim to tenure status is at odds with a series of decisions rendered by the Commissioner of Education, the State Board of Education and the New Jersey Courts. Without exception, the decisions hold that tenure for janitors, unlike professional employees, is a matter of personal privilege which may be waived by the acceptance of employment for a definite term. Janitors may be employed without term, in which case they may not be dismissed without a showing of good cause. If, however, as here, a janitor is appointed for a specific term, and he accepts the employment on that basis, no rights survive the expiration of the period agreed upon. See *Horan* v. *Orange Board of Education*, 58 *N. J. L.* 533 (*Sup. Ct.* 1895); *Hardy* v. *City of Orange*, 61 *N. J. L.* 620 (*E. & A.* 1898); *Lynch* v. *Irvington Board of Education*, 1938 *S. L. D.* 703, affirmed State Board of Education 705: *Calverley* v. *Landis Township Board of Education*, 1938 *S. L. D.* 706, affirmed State Board of Education 709; *Ratajczak* v. *Perth Amboy Board of Education*, 1938 *S. L. D.* 709, affirmed State Board of Education 711, affirmed 114 *N. J. L.* 577 (*Sup. Ct.* 1935), affirmed 116 *N. J. L.* 162 (*E. & A.* 1936); *Williams* v. *West Orange Board of Education*, 1938 *S. L. D.* 714, affirmed State Board of Education 718; *McGarry* v. *Paterson Board of Education*, 1938 *S. L. D.* 732, affirmed State Board of Education 735; *Shepherd* v. *Seaside Heights Board of Education*, 1938 *S. L. D.* 737, affirmed State Board of Education 739, affirmed 119 *N. J. L.* 413 (*Sup. Ct.* 1937), affirmed 15 *Misc.* 394; *Kriser, Clark et al.* v. *Trenton Board of Education*, 1939-49 *S. L. D.* 61, affirmed State Board of Education 64, modified on other grounds, 122 *N. J. L.* 323 (*Sup. Ct.* 1939); *Whitehead* v. *Morristown Board of Education*, 1949-50 *S. L. D.* 65; *Mignone* v. *West Orange Board of Education*, 1965 *S. L. D.* 104.

In view of the fact that petitioner was appointed annually as janitor by separate actions of the Board of Education for a period of one year each time, the Commissioner finds that by accepting such employment for a specific period of time petitioner waived any rights to the protection of indefinite tenure.

Finally, petitioner claims that nowhere in respondent's minutes is there any indication that the Board authorized the inclusion of a thirty-day termination clause in his contract. This contention is without merit. Employment of staff is commonly performed by action of the board of education naming the person to be hired and the salary to be paid. Implementation of such authorization, such as preparing contract forms, is customarily carried out by administrative personnel in terms of policies and practices of the district established by the Board unless specific exceptions have been directed. Thus, some districts use a 30-day termination clause, others use 60 or 90 days, and some omit the provision entirely. In this case it is apparent that a thirty-day termination clause was standard practice and had the Board's knowledge and approval.

On the basis of the undisputed facts the Commissioner finds and determines that petitioner had not acquired tenure status in respondent's school district and that respondent's action in terminating his employment on 30 days' notice was in accordance with a valid agreement mutually entered into by both parties. Since respondent acted lawfully and pursuant to its discretionary authority, the motion to dismiss the petition of appeal herein is granted.

COMMISSIONER OF EDUCATION

February 7, 1968

In the Matter of the Tenure Hearing of William Nagy, School District of Caldwell—West Caldwell, Essex County

Commissioner of Education

Decision

For the Complainant, Stickle, Kain, and Stickle (Harold M. Kain, Esq., of Counsel)

Written charges against respondent, a groundskeeper, of insubordination, failure or refusal to follow the instructions and orders of his superiors, absence from his assigned work without permission, absence from work without notice, and tardiness in reporting for work, were certified to the Commissioner by the Board of Education of Caldwell-West Caldwell by resolution dated August 14, 1967. A copy of the charges and resolution were served upon the respondent by certified mail received on August 16.

On August 17 and September 25, 1967, respondent was directed by letter to file and serve his Answer to the charges, or, in the alternative, to indicate that he did not intend to enter a defense. No written response to these letters was received. On November 20, 1967, a conference was held with respondent in the office of the Assistant Commissioner in charge of the Division of Controversies and Disputes, and resulted in his being afforded an additional ten days to file a written reply with respect to the charges. No further response was received within 10 days or thereafter. Accordingly, on December 13 the Board was directed to submit affidavits setting forth, under oath, the facts alleged in support of the charges. Opportunity was given to respondent to file a reply affidavit or to otherwise enter his objections to this procedure. Again, no response was received.

The affidavits of the Secretary of complainant Board, the supervisor of maintenance of the school district, and the supervisor's assistant show that:

1. Respondent failed or refused to perform duties assigned to him as the work of a groundskeeper, such as spreading fertilizer, excavating land, replacing broken window glass, and proper care and use of the equipment and tools used by a groundskeeper.
2. Respondent parked an unlicensed automobile on school grounds without permission and refused to remove same when directed by his superiors to do so.
3. Respondent failed or refused to submit his vacation preferences in the Spring, as requested, but took his vacation in July on short notice to his superiors.
4. Respondent was on several occasions absent without timely notice to his employer, or without notice altogether.
5. Respondent was late for work at least three times in the period between April 17 and May 3, 1967, and on another occasion left his work early without permission.

6. Respondent was generally "argumentative and combative" and required constant supervision.

In the light of the verified statements of those responsible for the direction and supervision of respondent's work, and the complete absence of any refutation by respondent, even though given every reasonable opportunity to do so, the Commissioner finds and determines that the charges are true in fact and sufficient to warrant dismissal. He therefore directs that respondent William Nagy be dismissed from his employment by the Board of Education of Caldwell-West Caldwell, effective as of the date of his suspension by said Board.

COMMISSIONER OF EDUCATION

February 19, 1968

MICAH BERTIN, BY HIS PARENT AND GUARDIAN AD LITEM, GERALD A. BERTIN; ANNE BERTIN, BY HER PARENT AND GUARDIAN AD LITEM, GERALD A. BERTIN; SHARON, SANDRA, GREGORY AND CRAIG MCCLAIN, BY THEIR PARENT AND GUARDIAN AD LITEM, WILLIAM MCCLAIN,

Petitioners,

v.

CHARLES A. BOYLE, JOSEPH M. RUGGIERI, THOMAS J. MCEVOY, STEWART A. SCHODER, JR., JOHN J. ANDERSON, JOHN L. CHIZMADIA, ARTHUR W. PRICE, AND HERBERT M. MATHIASEN,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION FOR SUMMARY JUDGMENT

For the Petitioners, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondents, R. Joseph Ferenczi, Esq.

Petitioner Micah Bertin was a senior at Edison High School when, on May 24, 1967, he was suspended from school for failure to comply with respondents' dress code. He appealed from that suspension and asked that it be set aside. The other petitioners were subsequently added as parties in interest by amendment of the original petition of appeal. Respondents, the principal of Edison High School, the Superintendent of Schools, and the members of the Board of Education of Edison Township, Middlesex County, oppose the petition on the ground that the suspension of Micah Bertin was a proper exercise of their rule-making authority and discretionary power.

The conditions of the suspension of Micah Bertin were that although he would be permitted to complete all the academic requirements for graduation from high school, until and unless he complied with the school's dress code, particularly with respect to the length of his sideburns, he would be barred from further holding class office and participation in school functions or

extracurricular activities. The particular effect of this prohibition was to bar him from his expected participation in the class day and commencement exercises of his class, of which he was president, in June 1967.

Petitioner moved before the Commissioner for a stay of the resolution of suspension in order that he might be able to participate in these exercises. After a hearing on this motion on May 31, 1967, the Commissioner, in an order dated June 5, 1967, denied the stay. Appeal from the Commissioner's order was immediately taken to the State Board of Education, which, on June 7, 1967, granted the stay. The Superior Court, Appellate Division, on June 13, 1967, denied respondent's motion for leave to appeal from the State Board's decision. Petitioner thereafter participated fully in the graduation exercises.

On October 6, 1967, petitioners filed a motion for summary judgment asking for a rescission of respondents' resolution of May 24, 1967, or in the alternative, asking that the resolution be declared null and void. Argument on the motion was heard by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the State Department of Education, Trenton, on November 13, 1967.

Petitioners base their argument on the grounds that there is no issue of material fact involved and that the decision of the State Board of Education on September 6, 1967, in *Pelletreau* v. *Board of Education of New Milford*, in the existing state of the facts, is controlling.

In *Pelletreau*, *supra*, the State Board reversed an earlier decision of the Commissioner which sustained a rule of the New Milford Board of Education barring extreme hair styles. *Pelletreau* had been excluded from school for violation of that rule. In reversing the Commissioner's decision and ordering *Pelletreau's* reinstatement, the State Board found that the Board's rule could not be sustained as necessary to preserve the good order of the school.

In the instant matter, respondent's resolution of suspension (P-R-2) recites that its dress code

> "* * * was adopted for the purpose of preventing extremes in appearance and dress for the purpose of preventing disruption to the educational process in the school * * *."

The resolution further recites that Micah Bertin's hair is "barely in compliance" with the dress code, but that his sideburns are not trimmed to normal length and are excessively long and in violation of the dress code. Photographs entered in evidence at the hearing on the application for stay (P-R-2, 3, 4, 5, 6, 7) show that his sideburns extended down to a line approximately opposite the mid point of the ear lobes. Petitioners contend that this matter is plainly governed by the State Board decision in the *Pelletreau* case and that respondents' resolution being based on a rule which cannot be sustained in law, should therefore be set aside.

The Commissioner agrees that under the principles laid down by the State Board in *Pelletreau*, the Board's rule proscribing sideburns longer than "normal length" cannot be shown to be necessary for the maintenance of good order in the schools. The Commissioner, even further, is constrained to note that "normal length" of sideburns is even less definable than the "extreme

hair styles" which were described in relatively precise terms in *Pelletreau*. The Commissioner finds, therefore, that respondents' rule cannot be upheld in the light of the State Board's decision in *Pelletreau*.

With respect to petitioner Micah Bertin, the essential question of his suspension has become moot since the stay granted by the State Board on June 7, 1967, made it possible for him to be reinstated as class president and to participate in the graduation activities of his class. Having graduated, he is no longer subject to any rules governing the operation of Edison High School. However, the other petitioners are still pupils in the Edison Township schools and may still be subject to rules covering hair style and length of sideburns. The Commissioner therefore holds that as to them these rules are plainly invalid.

Petitioner Micah Bertin also asks that any records reflecting his suspension be expunged. The Commissioner finds no need for such an order. School records are a report of what has happened. Any record of the instant matter must, therefore, necessarily reflect the events, including the determinations of the Commissioner and the State Board, subsequent to the suspension of May 24, 1967. The Commissioner directs that respondents complete their records accordingly, and provide a full account whenever, if at all, they reflect this incident in any report with respect to Micah Bertin.

Petitioners' motion is therefore granted, and summary judgment is entered in favor of petitioners to the degree and within the limits set forth herein.

COMMISSIONER OF EDUCATION

February 19, 1968

NORMAN A. ROSS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, *Pro Se*

For the Respondent, Magner, Abraham, Orlando & Kahn (Leo Kahn, Esq., of Counsel)

Petitioner in this case alleges in two separate petitions that respondent has improperly denied him certain salary increments and adjustments which he claims are due him under its salary guide. Respondent asserts that petitioner has received all increments and adjustments to which he is entitled.

A hearing in this matter was conducted on July 19, 1967, at the office of the County Superintendent of Schools in Elizabeth by a hearing examiner

appointed by the Commissioner. The report of the hearing examiner is as follows:

During the school year 1965-66, petitioner was in his thirteenth year of experience as a teacher, and had a bachelor's degree plus 30 semester hours of graduate credit. His salary during that year was $8,150. On March 16, 1966, respondent adopted a "Salary Guide" (Exhibit R-1) to be effective for the 1966-67 school year, which provided, *inter alia*, that a teacher who had completed thirteen years of experience and held a bachelor's degree plus 30 semester hours of graduate credit would be eligible to receive a salary of $8,850. Petitioner therefore contends in his first petition, that for 1966-67 he should have received a salary of $8,850, when in fact his salary for the first four months from September 1, 1966, to December 31, 1966, was at the annual rate of $8,750. Beginning on January 1, 1967, after petitioner had received his master's degree, he was paid at the annual rate of $9,050. The salary guide provides for a salary of $9,600 for a teacher having 13 years of experience and a master's degree. Thus, in his second petition, petitioner claims that he should have been paid at the higher annual rate of $9,600 beginning on January 1, 1967.

The testimony of the Superintendent and of a present Board member who had previously been a general supervisor in respondent's school district establishes that for at least ten years it has been the consistent policy of the Board to limit the annual increase and adjustment for a classroom teacher to a maximum of $600, regardless of the salary guide provision. The maximum increase and adjustment for employees at the supervisory and administrative levels has been greater than $600; and for the school year 1966-67 the limit was $700 for subject supervisors and principals.

However, examination of respondent's "Salary Guide," (Exhibit R-1) gives no indication of the adoption by the Board of such a policy of limitation, nor was there any evidence of its adoption otherwise. On the other hand, it was testified that the $600 limitation was well known to the members of the teaching staff, even if not expressly contained in the salary guide, and had been discussed by the teachers' association. Indeed, petitioner does not deny knowledge of such a limitation.

The testimony further demonstrates that more than 20 teachers, of whom petitioner is one, were compensated below their positions on the salary guide by virtue of respondent's policy of limiting increase and adjustment to an annual maximum of $600 and that the cost of adjusting these teachers to their proper place on the guide for 1966-67 would be $12,145. It was testified that petitioner, as well as all others, would be adjusted to their positions on the guide in 1967-68. Finally, as is demonstrated in the salary guide, a teacher who is enrolled in a degree program is eligible for an annual increase of $200, as an "incentive" to pursue such a program.

It is petitioner's contention, as previously set forth, that pursuant to respondent's salary guide, he should be compensated for the first four months of the 1966-67 academic year at the annual rate of $8,850, and thereafter to the end of the year at the annual rate of $9,600. He argues that by virtue of *Chapter* 236, *Laws of* 1965, § 1 (*N. J. S.* 18A:29–4.1), the salary guide, *supra*, adopted on March 16, 1966, becomes contractual in nature. He therefore contends that to deny him the full amounts provided in the guide violates

his contractual rights. He further contends that the operation of respondent's policy which permits a higher maximum increment and adjustment for supervisors and administrators than for classroom teachers violates the definition of "teacher" set forth in section 2 of *Chapter* 236, *Laws of* 1965 (*N. J. S.* 18A:1–1), and is, therefore, discriminatory. Finally, he contends that providing an increase of $200 annually for teachers pursuing a degree, and only $300 when the degree is attained, is incongruous, if not manifestly absurd.

Respondent denies that the salary guide constitutes a contract, and asserts that it retains discretion to put a "ceiling" on the amount of annual salary increases, so that teachers could be brought to their positions on the guide in more than one step. Respondent also urges that the definition of "teacher" in *N. J. S.* 18A:1–1, *supra*, does not require like treatment for all certificated personnel. It points out that all teachers in the same category were treated alike, and that the evidence shows no indication of arbitrary, fraudulent, capricious, or corrupt action with respect to petitioner.

* * * * * * *

The Commissioner has reviewed the findings contained in the foregoing report of the hearing examiner and concurs therein. He has further considered the respective contentions of petitioner and respondent, and comes to the following conclusions:

The adoption by respondent in March 1966 of a "Salary Guide" (Exhibit R-1) established for the period prescribed by the statute, *N. J. S.* 18A:29–4.1, the precise terms and conditions under which teachers would be eligible to receive the salary amounts named therein for the various levels of training and experience. Nothing appears in the guide, or the policy statement included therein, which would limit the amount of increment or adjustment to which a teacher would be entitled in any one year. If respondent had wished to include such a limitation it could have done so. The principle of limiting the amount of adjustment-to-guide is well established in the State Minimum Salary Law (*N. J. S.* 18A:29–6 *et seq.*), which provides for the payment of an annual "adjustment increment" to teachers below their proper place on the minimum salary schedule, so as to bring them to their proper place, over a period of years if necessary. In the enactment of *Chapter* 236, *Laws of* 1965, the Legislature made it possible for school districts to establish salary policies, including salary schedules, which would give to their professional employees a precise statement of their salary expectations over the succeeding two years, and at the same time would make it possible for boards of education to budget meaningfully to implement such schedules. Both of these purposes would be defeated if the board could impose other conditions not precisely set forth in the salary policy.

In the instant matter respondent relies upon a traditional past policy, known to petitioner, of limiting the adjustment-to-guide for any teacher to $600 per year. In the Commissioner's judgment, the fact that such a traditional practice was well known to petitioner does not diminish the effect of respondent's failure to include it in its statement of policy. Only by expressly so stating its practice could all know of it and be equally bound by it, including the voters, the municipal governing body, or the Commissioner, each of whom conceivably could be involved at some point in fixing the amounts to be raised by local taxation to support the school budget, including the salary

policy. The Commissioner therefore holds that petitioner became eligible at the beginning of the 1966-67 school year for an annual salary of $8,850, instead of the $8,750 which he was paid.

The increase of $300 granted petitioner effective January 1, 1967, by virtue of his attainment of a master's degree, is similarly affected. Here again, respondent elected to advance its teachers, including petitioner, on the salary scale when they achieved a master's degree during the school year, but maintained a "policy," not specifically set forth, of limiting the increase to $300 in any one year. If petitioner is entitled to any part of the increase, he is entitled to all of it, absent an express limitation established in respondent's salary guide. The Commissioner therefore holds that beginning January 1, 1967, petitioner was entitled to be paid at the annual rate of $9,600.

The Commissioner finds respondent's assertion that its "Salary Guide" is not contractual to be inconsistent with the clear intent of *Chapter* 236, *Laws of* 1965. It is true, as respondent points out, that many decisions of the Commissioner, the State Board of Education, and the Courts prior to *Chapter* 236 had held that salary schedules are not contractual. See, for example, *Greenway* v. *Board of Education of Camden*, 129 *N. J. L.* 461 (*E. & A.* 1943); *Belli* v. *Board of Education of Clifton*, 1963 *S. L. D.* 95; *Massaro* v. *Board of Education of Bergenfield*, 1965 *S. L. D.* 84, affirmed State Board of Education, 1966 *S. L. D.* 243, affirmed Superior Court, Appellate Division, September 23, 1966. But the enactment of *Chapter* 236 clearly established the contractual nature of salary policies, including salary schedules, adopted by boards under the authority of that *Chapter*. In addition to authorizing the adoption of such policies, the act further provides:

> "* * * Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy * * *."

Thus, the holding of the Court of Errors and Appeals in *Greenway*, *supra*, that a local salary schedule did not bind succeeding boards is now specifically altered by legislative enactment. A statement by the adopting board, as here, that its salary guide "is not to be considered as a contract between the teacher, administrator, or supervisor and the Board of Education" (Exhibit R-1) should not, in the Commissioner's judgment, change the clear prescription of the statute. A local board of education rule may not be inconsistent with the statutes. *N. J. S.* 18A:11–1c

In the light of the Commissioner's findings as set forth herein, it is unnecessary for him to consider allegations of discriminatory and unequal treatment made by petitioner.

The Commissioner finds and determines therefore that respondent's traditional practice of limiting the amount of salary increase for any teacher in any one year was not a part of its adopted salary policy effective for the school year 1966-67. He holds, therefore, that petitioner is entitled to payment of additional salary based on an annual rate of $8,850 from September 1, 1966, to December 31, 1966, and on an annual rate of $9,600 from January 1, 1967, to the end of the 1966-67 school year.

COMMISSIONER OF EDUCATION

February 19, 1968

Affirmed by State Board of Education without written opinion, October 9, 1968.

In the Matter of the Annual School Election Held in the School District of Eastampton Township, Burlington County

Commissioner of Education

Decision

The announced results of the balloting for two candidates for full-term seats in the Eastampton Board of Education at the annual school election held February 13, 1968, were as follows:

Robert W. Bechtel	95
David R. Bannar	50
Frank R. Campagna	51
Frank Campagna	2

Pursuant to a letter request made by Candidate Bannar a recount of the ballots cast was ordered by the Commissioner of Education and conducted by the Assistant Commissioner in charge of Controversies and Disputes on February 20, 1968, at the office of the Burlington County Superintendent of Schools, Mount Holly.

At the conclusion of the recount, with 18 ballots set aside for referral to the Commissioner, the tally of the uncontested votes was as follows:

Bechtel	81
Banner	50
Campagna	39

It should be noted that all votes for Candidate Campagna on the uncontested ballots were tallied for him whether they appeared as Frank R. Campagna or Frank Campagna.

Examination of the 18 referred ballots reveals that on 10 of them (Exhibit A) the voter has pasted on the ballot a slip on which the name Frank R. Campagna is printed. On six of these ballots the paster is placed in one of the blank spaces provided for personal choice votes. On the other four ballots the sticker has been placed over the name of one of the candidates printed on the ballot. In all ten cases the voter has also placed a printed X to the left of the paster in the approximate location of the square provided for the voter's mark, which square is obliterated.

These 10 ballots may be counted for Mr. Bechtel before whose name a proper mark is made in the voting square. They cannot be counted for Mr. Campagna for the reason that the voter has not made a substantial cross, plus, or check mark in the square to the left of and before the name of the candidate. While ballots may be counted where the voter has fixed the paster over the printed name of another candidate (*In re Annual School Election in Tabernacle Township*, 1938 *S. L. D.* 188, 190) the marking of a cross, plus, or check mark is a mandatory requirement in order for a vote to be recorded.

The conclusion that a voter must not only write or paste in his personal choice but also put a proper mark in the appropriate square was reached by the New Jersey Supreme Court in the case of *In re Lavallette*, 9 *N. J. Misc.* 25 in 1930. In 1935 the Commissioner of Education, following the opinion of the

Court, made a similar ruling in the *Matter of* the *Annual School Election in Jackson Township*, 1938 *S. L. D.* 187. The question was more recently raised in the case of *In re Keogh-Dwyer*, 45 *N. J.* 117 (1965), in which the Supreme Court reaffirmed its earlier decision and said:

> "a personal choice vote should not be counted unless the voter not only writes or pastes in the candidate's name but also makes a proper mark."

Finally, the Legislature has seen fit to clarify this issue in its enactment of Title 18A in which the following language appears as part of *N. J. S.* 18A:14–55:

> "* * * Any voter who desires to vote for any person or persons whose names are not printed upon the ballot for any office to be filled at such election, may write or paste under the proper title of the office the name or names of the persons so to be voted for *and mark a cross* (×) *or plus* (+) *or check* (√) *mark in the square at the left of such name in black ink or black pencil* * * *." (Emphasis added.)

It having been determined that these 10 ballots in Exhibit A may not be counted for Mr. Campagna, there is no necessity to consider the remaining 8 ballots referred for the reason that even if they were all counted for Mr. Campagna and added to his tally of 39 uncontested votes the result will not be altered.

The Commissioner finds and determines that Robert W. Bechtel and David R. Bannar were elected at the annual school election on February 13, 1968, to seats in the Board of Education of the Township of Eastampton for full terms of three years each.

COMMISSIONER OF EDUCATION

February 21, 1968

DECISION OF STATE BOARD OF EDUCATION

For Appellant, Robert F. Rogers, Esq.

For Respondent, Dimon, Haines & Bunting (Martin L. Haines, Esq., of Counsel)

The pertinent results of the February 13, 1968, school election for membership on the Board of Education of the Township of Eastampton showed that David R. Bannar, whose name was printed upon the ballots, was defeated by Frank R. Campagna, a "write-in" candidate, 51 votes to 50. Pursuant to Bannar's letter dated February 14, 1968, challenging the validity of the write-in votes, the Commissioner of Education ordered a recount on February 20, 1968. The balloting on recount (exclusive of 18 questioned write-in ballots) showed,

Bannar	50
Campagna	39.

The ballots were in the form prescribed by *N. J. S. A.* 18A:14–36, and bore the printed names of Bannar and Bechtel with two blank spaces below their names for personal choice (write-in) votes. Nine of the 18 questioned write-in ballots had stickers, bearing Campagna's name, pasted over the printed names

of either Bannar or Bechtel. Because these 9 ballots cannot be counted for Campagna, the remaining ones, even if counted for him, would give him but 48 votes as against 50 for Bannar.

N. J. S. A. 18A:14–35 requires that instructions be printed at the top of each ballot including the following:

> "To vote for any person whose name is not printed upon this ballot write or paste the name in the *blank space* . . ." (Emphasis supplied.)

It further provides:

> "Below these instructions shall be printed a heavy diagram rule below which shall be printed such directions to the voter as may be necessary 'Vote for one,' or 'Vote for two,' or a greater number, as the case may be, immediately after which shall be printed the names of the candidates duly nominated by petition as they appear signed to the certificate of acceptance in the order prescribed by law . . . Immediately after the space allotted to the names of candidates there shall be *as many ruled blank spaces* as there are members to be voted for. * * *" (Emphasis supplied.)

N. J. S. A. 18A:14–55 states:

> "Any voter who desires to vote for any person or persons whose names are not printed upon the ballot for any office to be filled at such election, may write or paste under the proper title of the office the name or names of persons so to be voted for . . ."

The above quoted school election statutes are substantially identical with *N. J. S. A.* 19:14–4(4), 19:14–6, 19:15–28 and 19:16–3(d) (which deal with write-in votes in general elections), and judicial interpretations and constructions of the latter must be considered as directly applicable here. *In re Keogh-Dwyer*, 85 *N. J. Super.* 188 (*A. D.*, 1964), reversed on other grounds, 45 *N. J.* 117 (*Sup. Ct.*, 1965), in construing the general election statutes cited, held that the provisions covering the casting of votes for personal choice candidates are mandatory and not directory; and that a vote cast by pasting a sticker bearing the name of a personal choice candidate *over* the name of a candidate imprinted upon the ballot, rather than in the space provided, may not be counted. The holding is a fair and sound construction, and consistent with a legislative intention to avoid the possibility of fraudulent votes.

Appellant also questions the jurisdiction of the Commissioner to conduct a recount, contending that *N. J. S. A.* 19:28–1 et seq. and 19:29–1 et seq. operate to require the county superintendent of elections or county board of elections to conduct recounts in school elections. The point has been neither briefed nor researched by appellant. It is enough to say that the same recount procedure here followed was viewed approvingly in *Welsh et al.* v. *Board of Education*, 7 *N. J. Super.* 141 (*A. D.*, 1950). See also *N. J. S. A.* 18A:6–9.

The remaining points raised alleging violations of *N. J. S. A.* 18A:14–48, –49, –50, –51 and –62 do not specify the acts constituting the claim violations and, in any event, are unsupported by any evidence.

For these reasons, the Commissioner's determination that Bannar prevailed over Campagna is affirmed.

THE STATE BOARD OF EDUCATION

September 4, 1968

CITY OF BAYONNE, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY, THE BOARD OF EDUCATION OF THE CITY OF BAYONNE, AND THE BOARD OF SCHOOL ESTIMATE OF THE CITY OF BAYONNE,

Petitioners,

v.

CARL L. MARBURGER, COMMISSIONER, DEPARTMENT OF EDUCATION OF THE STATE OF NEW JERSEY,

Respondent.

February 2, 1968.

Gentlemen:

The attorney for the City of Bayonne requested the Commissioner to review the communication from this Department under the date of January 18, 1968, addressed to you and signed by Dr. Edward W. Kilpatrick, III, Assistant Commissioner of Education.

The communication of January 18, 1968, stated that it was not possible for the City of Bayonne to issue school bonds to raise the local fair share of building aid in lieu of a local tax levy.

I have reviewed this request, and find that the conclusion reached in Dr. Kilpatrick's letter of January 18, 1968, was correct for the following reasons.

The Building Aid Act requires that school districts must annually establish a capital foundation program, based upon an annual budget concept. Municipal and school budgets are financed through revenue receipts thus excluding the use of a non-revenue receipt item such as bonds and notes.

If the device here proposed were permissable, the net result would be that the State would pay State building aid twice on the same amount of local fair share: first, on a local fair share raised by a bond issue, and second, on the annual payments of interest and principal on the same bonds. The Commissioner can find no justification in the statutes for such double payment. The statutes cannot be construed to produce an anomalous result.

Sincerely,

COMMISSIONER OF EDUCATION

Bayonne Board of Education
669 Avenue A
Bayonne, New Jersey 07022

Affirmed by State Board of Education without written opinion, February 7, 1968.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued March 11, 1968—Decided March 18, 1968.

Before Judges Goldmann, Kilkenny and Carton.

On appeal from the State Board of Education.

Mr. James P. Dugan argued the cause for appellant City of Bayonne.

Mr. John J. Pagano argued the cause for appellants Board of Education and Board of School Estimate.

Mr. Stephen G. Weiss, Deputy Attorney General, argued the cause for respondent (*Mr. Arthur J. Sills*, Attorney General, attorney).

The opinion of the court was delivered by
GOLDMANN, S.J.A.D.

This is an appeal from a determination of the State Board of Education (State Board) unanimously affirming the decision of the Commissioner of Education (Commissioner) denying the request of the Bayonne School District (Bayonne) that it be permitted to raise its "local share" under the School Building Aid Law, *N. J. S.* 18A:58–20 *et seq.*, formerly *N. J. S. A.* 18:10–29.49 *et seq.*, by the issuance of bonds. The sole issue presented is whether Bayonne may raise its local share in the manner it proposes rather than by a tax levy. We hold it may not.

Acting upon the statutorily prescribed formula, *N. J. S.* 18A:58–23 (formerly *N. J. S. A.* 18:10–29.52, as amended), the New Jersey Department of Education computed the capital foundation program for Bayonne for the 1968-69 school year to be $398,655. Of this amount Bayonne was required, under *N. J. S.* 18A:58–24(a) (formerly *N. J. S. A.* 18:10–29.53(a), as amended) to raise the sum of $258.957 as its local share. The State, in turn, would then contribute the balance of $139,698 as the maximum state building aid available. In January 1968 Bayonne informed Assistant Commissioner of Education Kilpatrick that it intended to raise its local share by issuing bonds in lieu of taxation.

Bayonne had a year earlier requested permission to utilize this alternative procedure for the 1967-68 school year. At that time Assistant Commissioner Kilpatrick twice informed the attorney for the Bayonne Board of Education that Bayonne's local share had to be raised by taxation; a proposed bond issue would not qualify Bayonne for state building aid under the capital foundation program. The City of Bayonne thereafter raised its local share for the 1967-68 school year by taxation.

When Bayonne renewed its bond issue proposal in January 1968, Assistant Commissioner Kilpatrick again advised that the school district would not qualify for receipt of the $139,698 in state aid unless it raised its local share of $258,957 by taxation. His letter gave a more detailed explanation of the Department's view of the unsoundness of Bayonne's request:

> "Since 1956, when the State School Building Aid Act was enacted, the Division of Business and Finance has uniformly required school districts to raise their annual local fair share only by means of an annual tax levy. The Division has never considered the Act as permitting any alternative method. Indeed, to my knowledge, no school district has ever sought eligibility for building aid on any other basis, nor objected to the Division's interpretation.
>
> In my opinion, the plain meaning and intent of the State School Building Aid Act required the annual local fair share to be raised by a tax levy. As you know, school districts, under the Act, must annually establish a capital

foundation program. This procedure, based as it is upon an annual budget concept, does not reasonably permit inclusion of non-revenue receipt items such as bonds or notes. These non-revenue items, of course, would not be compatible with the annual budget concept of the capital foundation program. If such items could be included then, at the time of the payment of the debt, itself, there would be created a further eligibility for state building aid even though the total amount of the debt would already have provided an eligibility in a previous year. In my opinion the legislature intended no such anomaly.

In essence, it has been, and continues to be my belief that the legislation establishing the state school building aid procedure contemplates a yearly partnership between the state and local school districts, each of which are called upon to annually provide, through tax sources, for the ensuing school year capital foundation program. This procedure for an equal, annual tax effort does not envision the introduction of non-revenue receipt items such as bonds or notes to establish eligibility. While I appreciate that municipalities may prefer to maintain a stable tax rate, I do not believe that the alternative which is apparently contemplated is permissible under existing law."

Bayonne then requested the Commissioner to review that determination, and its officials were accorded the opportunity of presenting their contentions to him. On February 2, 1968, he wrote the local school board stating that he concurred in the Assistant Commissioner's determination. He, too, noted that non-revenue receipt items, such as bonds or notes, did not accord with the concept projected in the School Building Aid Law. He said that:

"If the device here proposed [a school bond issue] were permissible, the net result would be that the State would pay State building aid twice on the same amount of local fair share: first, on a local fair share raised by a bond issue, and second, on the annual payments of interest and principal on the same bonds. The Commissioner can find no justification in the statutes for such double payment. The statutes cannot be construed to produce an anomalous result."

In other words, were Bayonne to issue bonds in order to raise its 1968-69 school year local share, it would not only qualify for the state school building aid contribution for that school year but, in addition, would be incurring an indebtedness whose annual debt service payments would establish an additional eligibility under the School Building Aid Law.

Bayonne appealed the Commissioner's determination to the State Board which, as noted, unanimously affirmed his action.

Examination of the School Building Aid Law establishes the soundness of the administrative determination here under review.

The school building aid concept was first enacted into law by *L.* 1956, *c.* 8 (*N. J. S. A.* 18:10–29.49 *et seq.*), whose title pointed out its essential purpose:

"An Act to authorize the payment of State grants-in-aid to certain school districts, for school facilities, and requiring the State Treasurer to maintain capital reserve funds for the administration of such grants-in-aid and through monies applicable thereto, supplementing Title 18 ["Education"] of the Revised Statutes."

The Statement to the bill (Senate Bill 2) read:

> "The purpose of this bill is to carry out the essential recommendations of the Eighth Report of the Commission on State Tax Policy. It provides for the accumulation of capital reserve funds at the option of school districts, and for State aid applicable to such reserves and to debt service and capital outlay expenditures."

The Eighth Report of the Commission on State Tax Policy (May 1955), to which the Statement referred, was devoted exclusively to the subject of "Financing School Buildings in New Jersey." In that report the Commission, after pointing out the urgency of school building needs in many parts of the State, said that the time had come "when the financing of capital requirements should be planned in an orderly way and at a minimum cost to the state and its local school districts, if we are to avoid recurring emergencies as new school facilities become necessary." The Commission made two basic proposals, only the first of which concerns us here:

> "First: Establish an annual capital foundation program at a level calculated to spread the cost of modest, but adequate, school facilities over the useful life of those facilities and provide for state-local sharing of the capital foundation program costs *according to the taxable resources of local school districts in the same manner as presently provided in the sharing of current operating foundation program costs* [*N. J. S.* 18A:58–1 *et seq.*, formerly *N. J. S. A.* 18:10–29.30 *et seq.*]" (*page* VII; italics ours)

In its summary of the capital foundation program, where the proposal just quoted was repeated, the Commission went on to explain that

> "The local fair share *tax rate* for the support of the capital and current foundation programs shall be increased from the 5 mills to 5.5 mills per dollar of full valuation of taxable property in the school district (from 50 cents to 55 cents per $100) as equalized by the State Division of Taxation." (at *page* X; italics ours)

It is entirely clear from the above, as well as chapter II ("A Plan of Action") of the Commission's Eighth Report (at *pages* 13 through 21), that what the Commission proposed was a uniform, annual local tax effort that would provide a constant annual response to capital requirements.

It was in direct response to the Eighth Report that the State Building Aid Law (*L.* 1956, *c.* 8) was passed the following year. That act clearly reflected the concept of an annual tax effort by the State and by local school districts. The new "capital foundation program" was expressly defined as "the amount annually determined pursuant to section 4 of this act." *N. J. S. A.* 18:10–29.50. Section 4 (*N. J. S. A.* 18:10–29.52) provided that

> "The capital foundation program shall be computed *annually* for each school district as the sum of the amount appropriated by or for the school district *in each school budget or in a municipal budget* for purposes of capital outlay, debt service and net addition to its capital reserve fund, but not exceeding $30.00 per pupil in average daily enrollment." (Italics ours)

(Section 4 presently appears as *N. J. S.* 18A:58–23, the last part of the quoted section now reading "* * * for purposes of (1) debt service, (2) capital outlay

and (3) net addition to its capital reserve fund, but not exceeding $45.00 per pupil in resident enrollment.")

Section 5(a) of the act (*N. J. S. A.* 18:10–29.53, now *N. J. S.* 18A:58–24) prescribed the formula by which the school district's local share was to be determined, the remainder constituting the district's building aid allowance to be contributed by the State:

> "(a) There shall be deducted from the amount of the capital foundation program of each district a local share equal to $0.05 per $100.00 (½ mill per $1.00) upon the equalized full valuation of the taxing district or districts within the school district, as certified by the Director of the State Division of Taxation to the Commissioner pursuant to law, for the year in which the calculation is required to be made. The remainder shall constitute the district's building aid allowance."

(By amendment, the $0.05 has been changed to $0.075 per $100, or ¾ mills per $1.)

The "building aid allowance" or State's share, mentioned in section 5(a), was defined, in section 2 of the 1956 act, as an allowance to be computed and determined annually in accordance with the act. See *N. J. S. A.* 18:10–29.50, now *N. J. S.* 18A:58–21. And section 10 (*N. J. S. A.* 18:10–29.58, now *N. J. S.* 18A:58–29) directed that the Commissioner of Education make a determination on or before November 15 in each year of the maximum building aid allowance available to each school district, and estimate the amount the State would have to appropriate to carry out the provisions of the act for the succeeding school year. He was to make such determination and estimate upon the basis of the average daily enrollment (now resident enrollment) of the district, and determine the local fair share for the current calendar year. He was then promptly to certify to each school district the maximum building aid allowance so determined, that the school district might include the amount certified in its next ensuing school budget as anticipated revenue (see *N. J. S. A.* 18:10–29.59, now *N. J. S.* 18A:58–30). All sums so received or set aside for a board of education or municipality were to be applied "first, to debt service on bonds issued by such board of education or municipality for school purposes; secondly, to capital outlay for school purposes; and lastly, to addition to the capital reserve fund of such school district." *N. J. S. A.* 18:10–29.59, now *N. J. S.* 18A:58–30.

It is immediately apparent that the School Building Aid Law is founded upon principles of annual financing: the "capital foundation program" is the sum of three annual appropriations; the "local share" is computed annually on the basis of the equalized full valuation of the taxing district or districts within the school district; the "building aid allowance" is to be incorporated into the annual budget as anticipated revenue for the next school year, and the funds when received are to be applied annually for certain designated purposes. As Bayonne was informed by the Assistant Commissioner and the Commissioner of Education, the use of non-revenue receipt items such as bonds is incompatible with the annual budget concept—an interpretation finding complete support in the legislative history of the act, based as it was upon the Eighth Report of the State Tax Policy Commission.

We therefore conclude that the "local share" is an appropriation which must be raised by taxation.

The matter may be viewed in yet another light. *N. J. S.* 18A–24–5 (formerly *R. S.* 18:6–66), applicable to municipalities like the City of Bayonne, provides that "projects for which bonds may be issued * * * shall be as follows": (1) the acquisition or construction of buildings and the improvement of their sites; (2) the reconstruction, remodeling, alteration, enlargement, or addition to or major repair of buildings and the improvement of their sites; (3) the acquisition and improvement of lands for school purposes, and (4) the purchase of furniture, equipment and apparatus for school purposes. See, also, *N. J. S.* 18A:24–61, which provides for the issuance of renewal or refunding bonds. What Bayonne seeks to do here is to issue bonds so that it may obtain state school building aid, a purpose not authorized by the sections of the Education Act just cited. The fact that Bayonne intends to use the state funds in projects for which bonds could be issued is of no moment; the intervening step (application for and receipt of state aid under the School Building Aid Law) has taken the proposed bond issue outside the strict limits of the statute.

Accordingly, the determination of the State Board of Education is affirmed.

100 *N. J. Super.* 87, 241 *A. 2d* 248.

In the Matter of the Annual School Election Held in the School District of Glen Rock, Bergen County

Commissioner of Education

Decision

The announced results of the balloting for candidates for membership on the Board of Education for 3 full terms of 3 years at the annual school election held February 13, 1968, in the school district of Glen Rock, Bergen County, were as follows:

	At Polls	*Absentee*	*Total*
Joseph Dunn	1114	20	1134
Barbara A. Wolfson	1330	22	1352
Leonard Pfeiffer, Jr.	1395	24	1419
Joan Eileen Tierney	453	1	454
Robert M. Kemp	1129	5	1134
Dorothy Anne Cella	422	2	424

Pursuant to a request from Joseph Dunn and Robert M. Kemp and at the direction of the Commissioner of Education, a recount of the votes cast on the voting machines for the above-named candidates was conducted by an authorized representative of the Commissioner on February 26, 1968, at the warehouse of the Bergen County Board of Elections.

Preceding the above-mentioned recount, the absentee ballots cast in the election were recanvassed by the members of the Bergen County Board of Elections, pursuant to a court order directing the recanvass.

The Commissioner's representative reports that, at the conclusion of the recount of the voting machine totals and the checking of the report of the recanvass of the absentee ballots, as certified by the Bergen County Board of Elections, the official count stood as follows:

	At Polls	*Absentee*	*Total*
Joseph Dunn	1116	19	1135
Barbara A. Wolfson	1330	22	1352
Leonard Pfeiffer, Jr.	1495	24	1519
Joan Eileen Tierney	453	1	454
Robert M. Kemp	1229	5	1234
Dorothy Anne Cella	422	2	424

The Commissioner finds and determines that Leonard Pfeiffer, Jr., Barbara A. Wolfson and Robert M. Kemp were elected on February 13, 1968, to seats on the Glen Rock Board of Education for full terms of 3 years each.

COMMISSIONER OF EDUCATION

March 5, 1968

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE CLEARVIEW REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY

COMMISSIONER OF EDUCATION

DECISION

The announced results of the voting for two members of the Board of Education of the Clearview Regional High School District for full terms of 3 years each at the annual school election held in the constituent district of Mantua Township on February 6, 1968, were as follows:

	At Polls	*Absentee*	*Total*
Raymond F. Akers	187	0	187
Robert W. Barrett	198	0	198
Thomas O. Worrell, Sr.	191	0	191
Richard W. Parker	194	0	194

Pursuant to a letter request dated February 9, 1968, from Candidate Worrell, and countersigned by Candidate Akers, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct a recount of the votes cast. The recount was conducted, by direction of the Assistant Commissioner, by a hearing examiner on February 29, 1968, at the office of the County Superintendent of Schools in Clayton. At the conclusion of the recount, with 20 ballots reserved for determination, the tally of the uncontested ballots stood as follows:

	At Polls	*Absentee*	*Total*
Raymond F. Akers	187	0	187
Robert W. Barrett	199	0	199
Thomas O. Worrell, Sr.	191	0	191
Richard W. Parker	193	0	193

One personal choice (write-in) vote was recorded for William Delaney. This vote was not reported on the summary Report of Proceedings.

The 20 ballots reserved for determination fall into three categories, as follows:

Exhibit A, consisting of 16 ballots, have votes cast for more than two candidates. Since only two candidates were to be elected, it was agreed that these ballots could not be counted for any candidate.

Exhibit B, 3 ballots, have proper marks in the squares at the left of the names of two candidates and erasures in the square at the left of the name of a third candidate. These ballots are referred to the Commissioner for determination.

Exhibit C is one ballot on which proper marks are placed in the squares at the left of the names of two candidates, but the square at the left of a third candidate's name has been blacked out by a series of horizontal lines partially obliterating an *X* in the square. This ballot is also referred to the Commissioner for determination.

* * * * * * *

The Commissioner has reviewed the report of the recount as set forth, and finds as follows:

The 3 ballots in *Exhibit B* contain erasures in a square at the left of a candidate's name. The erasure in each case is complete to the extent that it is clear that the voter did not intend to vote for that candidate, but did intend to cast his vote for the two candidates before whose names the marks are clear and properly placed. Title 19, Elections, of the New Jersey Statutes, by which the Commissioner is guided in such matters, provides in *N. J. S. A.* 19:16–4 that a ballot which contains an erasure shall not be declared void unless the officer conducting the recount is satisfied that the erasure was intended to identify or distinguish the ballot. The Commissioner is satisfied that there was no such intention, and holds that these 3 ballots shall be counted as cast.

Exhibit C consists of one ballot on which an *X* in one square is essentially obliterated by being blacked out, with proper marks placed for two other candidates. As in the case of Exhibit B, *supra*, the Commisisoner, relying upon *N. J. S. A.* 19:16–4, holds that the marking on this ballot was not intended to identify or distinguish the ballot, and directs that it be counted as cast.

When the votes cast in *Exhibits B* and *C*, *supra*, are added to the previous totals, the results stand as follows:

	At Polls	*Absentee*	*Total*
Raymond F. Akers	188	0	188
Robert W. Barrett	200	0	200
Thomas O. Worrell, Sr.	194	0	194
Richard W. Parker	196	0	196
William Delaney	1	0	1

The Commisioner finds and determines that Robert W. Barrett and Richard W. Parker were elected at the annual school election on February 6, 1968, to

full terms of three years each on the Board of Education of Clearview Regional High School District from the constituent district of Mantua Township.

The Commissioner observes that in the preparation of the summary Report of Proceedings as required by *N. J. S.* 18A:14–61, the name of one person who received one personal choice vote was omitted, although such vote was shown on the Report of Proceedings from the polling district. The Commissioner calls attention to the requirement of the statute that the reports from all polling places should be combined in such a way as to "canvass the entire vote in the school district."

COMMISSIONER OF EDUCATION

March 5, 1968

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for candidates for three seats in the Board of Education of Clinton Township, Hunterdon County, for full terms of three years, at the annual school election on February 13, 1968, were as follows:

Agnes Baccaro	131
William H. Fess	131
Joseph F. McMahon	168
Sarah T. Sigler	132

Pursuant to a written request from one of the candidates, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct a recount of the ballots. The recount was held at the Hunterdon County Office Building, Flemington, on February 28, 1968. The election of William McMahon was conceded and the recount was confined to a check of the votes for the remaining three candidates.

At the conclusion of the recount, with all but three ballots counted, the tally stood:

Agnes Baccaro	128
William H. Fess	131
Sarah T. Sigler	129

The three remaining ballots have a cross marked at the right of and following the name of three candidates. No mark of any kind appears in the voting square to the left and before the name of any candidate.

It has been consistently held in numerous cases of contested elections that such ballots cannot be counted, for the reason that the statutory requirement to mark a cross, plus, or check in the voting square is mandatory and not a directory provision which can be waived. While the Commissioner is not

bound by Title 19, Elections, he is guided by the provisions therein. *R. S.* 19:16–3c provides:

> "If no marks are made in the squares to the left of the names of any candidates in any column, but are made to the right of said names, a vote *shall not be counted* for the candidates so marked * * *." (Emphasis added.)

See also *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Delaware, Camden County*, 1957–58 *S. L. D.* 92.

The Commissioner finds and determines that Joseph F. McMahon, William H. Fess, and Sarah T. Sigler were elected at the annual school election on February 13, 1968, to seats in the Clinton Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 7, 1968

JOSEPH B. PETERS, JR., NORMA E. D'ALESSANDRO, CELIA MEYER, AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

Respondent.

For the Petitioners, Field, Trimble & Clarke (John W. Trimble, Esq., of Counsel)

For the Respondent, Guy Lee, Jr., Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioners are residents of the school district of Washington Township who complain that transportation to schools in the Township is furnished on a discriminatory basis, and that their children are required to walk to school over routes that are hazardous. They seek an order requiring respondent to provide transportation to all children attending Bells Lake School and to desist from any discrimination in transportation. Respondent denies all charges of discrimination, and asserts that its transportation policy is within its discretionary authority and in accordance with law.

The facts in this matter were presented at a hearing conducted at the office of the Gloucester County Superintendent of Schools in Clayton on January 16, 1968, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Washington Township, until recently largely a rural area, has now experienced a rapid population growth, with several discrete clusters of population identifiable. This growth has necessitated the construction of several new schools, including the establishment and construction of a high school, to accommodate the burgeoning pupil enrollment. This construction continues,

with a new elementary school having been opened in September 1967 and another under construction, with occupation anticipated in September 1968.

From the testimony of the Assistant Superintendent of Schools it is clear that respondent Board of Education has had the dual problem of providing for sufficient current pupil facilities and planning pupil assignment areas with the further anticipated development and growth of the several housing areas in mind. Thus, the Bells Lake School, which opened in 1967, is so situated that in the current school year it serves most of the elementary pupils from sections known as Bells Lake, Wedgewood and The Birches. However, this school cannot accommodate all such pupils without exceeding the State Board of Education limit of 25 pupils for kindergartens operating less than four hours daily but approved for State Aid purposes as full time classes. (See "Rules and Regulations of the State Board of Education," January 1964, Section 5, page 11.) Thus, in order to find suitable accommodations until an additional school is available, respondent, on the recommendation of its administrators, has provided facilities in its high school building for two kindergarten sections of pupils from the Bells Lake School area, and has assigned other kindergarten and first grade pupils to other schools in the district. Such pupils are furnished transportation either because of the distance to be traversed, or because of the necessity to cross heavily trafficked major highways. The selection of these pupils to be assigned and transported out of their normal attendance areas, it was testified, was based upon factors other than distance alone, such as the "stable" or "changing" nature of population concentrations, economy of bus routes, and probable school assignments in future years. It is not denied, therefore, that in the exercise of this policy, some pupils who are transported to other schools from the Bells Lake School attendance area traverse lesser distances than some who are required to walk to Bells Lake School. On the other hand, it was testified that all pupils who walk to Bells Lake School live less than two miles from that school, and have the use of routes (not necessarily direct) which provide either sidewalks or walkways, or a safe path which does not require walking along a roadway itself. Petitioners complain that the use of such routes is in many cases roundabout, although there was no testimony that this resulted in increasing the distance to be traversed beyond two miles. Moreover, petitioners testify, one of the paths leads through a wooded area along a 30-degree incline to a creek. To utilize sidewalks, it was testified, pupils must cross and recross the streets or roads. Petitioners contend that buses for both elementary and high school pupils are not utilized to full capacity, and that by redesigning bus routes and possibly changing school hours, transportation of pupils to Bells Lake School could be provided on a basis equitable with that provided to pupils attending other schools. Respondent testified that it had considered many route alternatives and pupil assignment plans, and selected those which provided the necessary flexibility to meet rapidly changing enrollment problems, and provided routes which were economical in terms of travel time and number of stops. Changes in school hours, respondent testified, are not feasible because of the requirements for arranging for private school transportation.

* * * * * * *

The Commissioner has reviewed the report of the hearing examiner as set forth above. He finds therein no evidence of an arbitrary, capricious, or unreasonable determination by respondent Board in establishing attendance

areas or transportation routes and facilities in the school district. There is no evidence or allegation that respondent has failed to provide transportation for pupils living remote from school. The furnishing of transportation for pupils living at distances less than remote is a matter within the discretion of the Board of Education. *N. J. S.* 18A:39–1.1 Such transportation may not be furnished on a discriminatory basis. *Klastorin* v. *Board of Education of Scotch Plains*, 1956-57 *S. L. D.* 85; *Dorski* v. *Board of Education of East Paterson*, 1964 *S. L. D.* 36, affirmed State Board of Education 39 But a board of education may establish reasonable categories based on conditions other than distance for the furnishing of transportation for less-than-remote distances. *Iden* v. *Board of Education of West Orange*, 1959-60 *S. L. D.* 96; *Frank* v. *Board of Education of Englewood Cliffs*, 1963 *S. L. D.* 229 In considering the allegation of discriminatory transportation policy in *Schrenk* v. *Board of Education of Ridgewood*, 1960-61 *S. L. D.* 185, the Commissioner said:

> "* * * Petitioners contend that granting transportation to these pupils and denying it to their children is discriminatory. In order to establish discrimination, there must be a showing that one group in entirely the same circumstances as another is given favored treatment.
>
> "In the Commissioner's judgment, a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Such differences need not be great in classification, but no classification may be unreasonable, arbitrary or capricious."

The evidence in the instant matter, as in *Schrenk*, is convincing that the Board of Education has evaluated the conditions affecting the travel of pupils assigned to other schools from the Bells Lake School attendance area, and has found that such conditions warrant provision of transportation, even though in some cases the actual distance from home to school may be less than that of some other pupils who are required to walk to Bells Lake School.

As to the complaint of hazards along the routes walked by pupils to Bells Lake School, the Commissioner shares the concerns of parents for safe conditions of travel, but repeats the statement made in *Schrenk, supra*, as follows:

> "The provision for safe conditions of travel is a municipal function. A board of education is limited to educational functions. It can provide instruction in safety in order to inculcate habits of safety. It is not within its authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc., to meet the requirements of safe travel for school children. It can and should point out to the responsible governmental body the traffic hazards and other dangers to which pupils may be exposed."

The Commissioner finds and determines that the evidence does not establish that respondent Board of Education has improperly or unlawfully discriminated against petitioners in establishing its transportation policy and routes. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

March 8, 1968

In the Matter of the Annual School Election Held in the School District of Roselle Park, Union County.

Commissioner of Education

Decision

The announced results of the balloting for candidates for three seats on the Roselle Park Board of Education for full terms of three years at the annual school election held February 13, 1968, were as follows:

	At Polls	*Absentee*	*Total*
Dr. Jerome Panzer	558	1	559
Herbert F. Ehrich	614	1	615
William Schmelz, Jr.	280	3	283
Olive Kaplan	215	0	215
Dorothea Scanlon	194	0	194

Pursuant to a letter request from Candidate Scanlon, hereinafter petitioner, dated February 16, 1968, alleging irregularities in the conduct of the election, the Commissioner directed the Assistant Commissioner in charge of Controversies and Disputes to inquire into the matter. The inquiry was held on February 29, 1968, at the office of the Union County Superintendent of Schools in Elizabeth.

Petitioner alleges that a sample ballot prepared by the Secretary of the Board of Education tended to mislead the voters by creating the impression that only one irregular (write-in) ballot instead of three could be cast. She alleges also that taping a copy of the sample ballot to the election table was improper. Petitioner alleges further that during the course of the voting an adhesive tape arrow pointing to the third write-in slot was affixed to the face of the voting machine. Later in the balloting petitioner avers she saw an even larger arrow pointing to the smaller one on the machine. She testified further that names of write-in candidates were also written on various parts of several voting machines.

Testimony of the Board's Secretary reveals that whereas there were three vacant seats on the Board, only two candidates, Jerome Panzer and Herbert E. Ehrich, filed nominating petitions and thus only those two names appeared on the ballot strip on the voting machine. The Secretary testified that under the circumstances it was obvious that many voters would cast one or more personal choice votes for unnominated persons. For that reason, he testified, he prepared the so-called sample ballot in order to help voters understand how to cast a write-in choice on the voting machine. The sample ballot in question is a mimeographed reproduction of the face of the machine and shows the names of the two candidates nominated, a third vacant space and three slots above numbered one, two, and three. At the bottom there appears these instructions:

> "To vote for a person whose name does not appear on the Ballot, *PUSH UP SLIDE* at top of machine over corresponding number and write in name of person for whom you wish to vote."

The Commissioner finds no reason to question the form of the sample ballot or the use to which it was put. It depicts in simple style the arrangement of the names and personal choice slots on the voting machine and the instructions provided are clear and correct. If it appears to favor the two named candidates it is hard to conceive how such a possibility could be avoided. Indeed, the fact that they had been nominated and that their names appeared on the ballot strip was in itself an advantage. But the opportunity to be nominated and have a name appear on the ballot was open to all who wished to avail themselves of it. The Commissioner fails to find any basis to hold that the Secretary's sample ballot influenced the voters in any improper way. Having found it to contain fair, impartial and accurate information with respect to the voting, the Commissioner finds no further reason to question its being displayed at the polling place if the election officials, in the exercise of their discretion, deemed it appropriate.

The presence of arrows, writings or any other extraneous material on the face of the voting machine, on the other hand, is entirely improper. Only such material and information as is provided by statute and is prepared and placed in the machines by those officials in whose charge they are kept, is lawful. Once the election is under way it is the duty and responsibility of the election officials to check the face of the machine after each voter.

> "* * * The district election officer attending the machine shall inspect the face of the machine after each voter has cast his vote, to see that the ballots on the face of the machine are in their proper places and have not been damaged. * * *" *R. S.* 19:52–2

In this case it appears that the officials charged with the proper conduct of the election failed to perform the regular inspection called for by the law. The Commissioner urges the Board of Education to call this requirement to the attention of its election officials in order that this duty may be properly performed and such allegations as those made herein are not repeated.

Petitioner's allegation of improper markings on the machines has not been refuted but neither has it been established that the irregularity was of so grave a nature or had such an influential effect that the experession of the will of the electorate was suppressed or thwarted thereby. The Commissioner deplores the existence of irregular procedure of any kind no matter how minute. He cannot find herein, however, evidence that the will of the people was not given full and fair expression despite improper markings on the voting machines. The results of the election will stand, therefore, as announced.

The Commissioner finds and determines that Jerome Panzer, Herbert F. Ehrich and William Schmelz, Jr., were elected on February 13, 1968, to seats on the Roselle Park Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 13, 1968

In the Matter of the Annual School Election Held in the Township of Lower Alloways Creek, Salem County

Commissioner of Education

Decision

At the annual school election held in the School District of the Township of Lower Alloways Creek, Salem County, on February 13, 1968, three members were to be elected to the Board of Education for full terms of three years each. Only two candidates filed nominating petitions. The announced results of the tally of votes for them were as follows:

Earl B. Pancoast	89
Clarence A. Woolbert	86

The names of seven other citizens were written in as personal choice votes for the third vacant seat. The announced tally of the personal choice votes was as follows:

Edward B. Fogg	60
George C. Stiles	45
Frank Burt	1
David Osborn	1
Samuel Donelson	7
David A. Fogg	1
Waddington B. Ridgway	1

Pursuant to a letter request from George C. Stiles dated February 19, 1968, the Commissioner of Education ordered an authorized representative to conduct a recount of the ballots cast. The recount which was, by agreement, limited to the personal choice ballots, was conducted on March 6, 1968, at the office of the Salem County Superintendent of Schools. The Commissioner's representative reports that the recount disclosed a number of acceptable variations in the spelling of the names written in. Variations, however, such as misspellings, failure to use the full name or initials, etc. do not invalidate the ballot. Title 19, Elections, to which the Commissioner looks for guidance in deciding election problems provides:

> "No ballot cast for any candidate shall be invalid * * * because the voter in writing the name of such candidate may misspell the same or omit part of his Christian name or surname or initials." *R. S.* 19:16–4

See also *Joseph Flach, In Re Madison Borough School Election*, 1938 *S. L. D.* 176; *In the Matter of the Annual School Election Held in the Borough of Butler, Morris County*, 1966 *S. L. D.* 25.

At the conclusion of the recount the tally of personal choice votes as announced was confirmed.

The Commissioner finds and determines that Earl B. Pancoast, Clarence A. Woolbert and Edward B. Fogg were elected at the annual school election on February 13, 1968, to seats on the Lower Alloways Creek Board of Education for full terms of three years each.

Commissioner of Education

March 13, 1968

In the Matter of the Annual School Election in the Township of Waterford, Camden County

Commissioner of Education

Decision

The announced results of the balloting at the annual school election held February 13, 1968, in the school district of the Township of Waterford, Camden County, for three members of the Board of Education for full terms of three years and for one member for an unexpired term of two years were as follows:

For Full Terms of Three Years

Joseph DeCerbo	333
James E. Zook	321
Kate Gallagher	126
Edward Toussaint	285
Michael B. Johnson	214
Loubert DeSorte	283
Rocco G. Pace	95

For Unexpired Term of Two Years

Ruth L. Bevan	282
Joseph M. Palladino, Jr.	285

Pursuant to letter requests from Candidates Loubert DeSorte and Ruth L. Bevan, dated February 14 and February 26, 1968, respectively, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast. The recount was held March 1, 1968, at the office of the Camden County Superintendent of Schools, in Pennsauken. At the conclusion of the recount, with twenty ballots referred to the Commissioner of Education for determination, the tally of uncontested ballots stood as follows:

For Full Terms of Three Years

Joseph DeCerbo	333
James E. Zook	316
Kate Gallagher	125
Edward Toussaint	285
Michael B. Johnson	213
Loubert DeSorte	281
Rocco G. Pace	94

For Unexpired Term of Two Years

Ruth L. Bevan	282
Joseph M. Palladino, Jr.	283

The ballots referred to the Commissioner were grouped into six categories and are decided as follows:

Exhibit A: Four ballots which are voted for more than three candidates for full terms of three years but only one candidate for the unexpired term of two years.

The votes for the candidates for three-year terms obviously cannot be counted for any candidate as only three are to be elected, and it is impossible to determine the voters' choices. The votes for the candidates for the two-year unexpired term can be counted since the number of candidates voted for in each case does not exceed the number to be elected. Title 19 of the Revised Statutes, to which the Commissioner looks for guidance in determining disputed elections, provides in *R. S.* 19:16–3f as follows:

> "If a voter marks more names than there are persons to be elected to an office * * * his ballot shall not be counted for that office, but shall be counted for such other offices as are plainly marked."

See also *R. S.* 19:16–4; *In the Matter of the Annual School Election in the Borough of Jamesburg, Middlesex County*, 1955-56 *S. L. D.* 111. The Commissioner finds that the votes for the candidates for three-year terms cannot be counted, but that the vote for the candidate for the unexpired term of two years is valid and will be added to the tally.

Exhibit B: Two ballots on each of which votes for candidates for the full three-year terms and the unexpired two-year term are properly marked. On one of these ballots an erasure has been made in the square before the word "YES" and on the other, rough lines have been drawn through the square and the word "NO" before the Proposal appearing at the bottom of the ballot.

The only basis for rejecting these ballots would be finding that they were so marked by the voters for the purpose of identifying their ballots. Part of *R. S.* 19:16–4 is relevant to this question:

> "No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots, or the * * * officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot."

On these ballots it appears clear that the voter merely attempted to correct his vote because he made an error, changed his mind, or had some other reason. There is no reason to suspect that these marks were made with the intent to distinguish the ballots. *In re Annual School Election in the Borough of Bloomingdale*, 1955-56 *S. L. D.* 103; *In the Matter of the Annual School Election Held in the Township of Randolph, Morris County*, 1965 *S. L. D.* 66

The Commissioner determines that these two ballots are valid and the votes properly marked for candidates thereon will be added to the tally.

Exhibit C: One ballot on which the squares before the names of the candidates voted for are completely filled with pencil markings.

The Commissioner determines that this ballot cannot be counted because the statutory requirement of a proper mark in the square to the left and in front of the candidates' names has not been met. *R. S.* 19:16–3g provides:

> "* * * No vote shall be counted for any candidate * * * unless the mark made is substantially a cross ×, plus + or check ✓ and is substantially within the square."

See also *In the Matter of the Annual School Election in the Township of Union, Union County*, 1939-49 *S. L. D.* 92; *In the Matter of the Annual School Election of the Township of Monroe, Gloucester County*, 1957-58 *S. L. D.* 79.

Exhibit D: Nine ballots on eight of which marks appear to the right and following the names of the candidates voted for, but no mark of any kind appears in the squares to the left and in front of the names of the candidates, except on one of the ballots in the square before the name of Candidate Palladino, Jr. With the exception of the one vote for Candidate Palladino, Jr., these ballots cannot be counted as the statutory requirement to cast a vote has not been met. *R. S.* 19:16–3c provides:

> "If no marks are made in the squares to the left of the names of any candidates in any column, but are made to the right of said names, a vote shall not be counted for the candidates so marked, but shall be counted for such other candidates as are properly marked * * * *."

It has been consistently held by the Commissioner in numerous election decisions that a ballot cannot be counted when the statutory requirement that a cross (×) plus (+) or check (✓) mark must be made in the square before the name of the candidate has not been met. The Commissioner determines therefore that only the vote for Candidate Palladino, Jr. is properly marked and valid and will be added to the tally. *In the Matter of the Annual School Election in Union Township, Union County*, 1939-49 *S. L. D.* 92; *In the Matter of the Annual School Election in the Borough of Stratford, Camden County*, 1955-56 *S. L. D.* 119

Exhibit E: Three ballots which are voted for both candidates for the unexpired term of two years but which are voted for not more than three candidates for the three full terms of three years.

The votes cast for the two-year unexpired term obviously cannot be counted for either candidate as only one is to be elected and it is not possible to determine the voters' choices. The votes cast for the candidates for full terms of three years can be counted since the number voted for does not exceed the number to be elected. See *R. S.* 19:16–3f and 19:16–4, *supra*.

The Commissioner determines that the votes on these ballots for candidates for full three-year terms are valid and will be added to the tally.

Exhibit F: One ballot having a cross (×) extending partially outside the square before the name of Candidate DeSorte. It is the Commissioner's judgment that the failure of the voter to place the cross (×) entirely within the square resulted from careless and hurried marking. The cross (×) is, how-

ever, substantially within the square and can be counted for the candidate since it unquestionably meets the standard required by *R. S.* 19:16–3g:

> "If the mark made for any candidate * * * is substantially a cross ×, plus + or check √ and is substantially within the square, it shall be counted for the candidate * * *."

The Commissioner finds that this vote is valid and can be counted for Candidate DeSorte.

When the votes of the referred ballots determined to be valid are added to the tally, the final result is as follows:

		Exhibits						
	Uncontested	*A*	*B*	*C*	*D*	*E*	*F*	*Total*
Joseph DeCerbo	333		1					334
James E. Zook	316					2	1	319
Kate Gallagher	125		1					126
Edward Toussaint	285		1					286
Michael B. Johnson	213		2			1	1	217
Loubert DeSorte	281		1			1	1	284
Rocco G. Pace	94					1		95
Ruth L. Bevan	282	3	2					287
Joseph M. Palladino, Jr.	283				1		1	285

The Commissioner finds and determines that Joseph DeCerbo, James E. Zook and Edward Toussaint were elected on February 13, 1968, to the Waterford Township Board of Education for full terms of three years each and that Mrs. Ruth L. Bevan was elected to fill the unexpired term of two years.

COMMISSIONER OF EDUCATION

March 14, 1968

IN THE MATTER OF THE TENURE HEARING OF HUGH MULLEN, SCHOOL DISTRICT OF MADISON TOWNSHIP, MIDDLESEX COUNTY

For the Complainant, Alfred J. Hill, Esq.

COMMISSIONER OF EDUCATION

DECISION

Respondent, a custodial employee of the Madison Township Board of Education, is charged with unauthorized absence from his work and intoxication. The charges were certified to the Commissioner of Education in a resolution of the Board of Education dated December 5, 1967, which states that the Board suspended respondent from his employment without pay for a 30-day period from December 7, 1967, to January 5, 1968.

In a letter to the Division of Controversies and Disputes of the New Jersey Department of Education received on December 18, 1967, respondent stated

that he did not wish to contest the charges. Therefore, complainant Board was directed to file with the Commissioner and serve upon respondent such affidavits as would support its charges. Respondent was given opportunity to file answering affidavits of his own, or to enter his objections, if any, to this procedure. The affidavits of the custodial supervisor and the Secretary of the Board together with the minutes of a special meeting of complainant Board held on December 5, 1967, were filed on January 17, 1968. No response having been received from respondent thereafter, the Commissioner proceeds now to a determination.

The sworn statements contained in the affidavits show that on the afternoon of October 17, 1967, the custodial supervisor sought out respondent to give him a special assignment. Not finding him at the place where he was supposed to be at work, the supervisor went to the adjacent shopping areas to look for him. The supervisor located respondent in a tavern, in an intoxicated condition and unfit for work. He rejected the supervisor's offer of transportation home, and indicated his intention to stay at the tavern. The supervisor thereafter filed written charges against respondent.

At an informal conference between respondent and the Board on November 28, 1967, respondent admitted the charges and offered no defense. A public meeting of the Board was held on December 5, 1967, which respondent was given opportunity to attend and be heard with respect to the charges. He did not attend the meeting, and the Board proceeded to a determination that the charges and evidence in support thereof were sufficient to warrant dismissal or a reduction in salary. The Board thereupon imposed a 30-day suspension without pay, and certified the charges to the Commissioner.

In consideration of the sworn statements contained in the affidavits, and in view of the complete and expressed absence of any defense thereto, the Commissioner finds the charges as stated to be true in fact. The Commissioner further finds the misconduct of respondent to be sufficient to warrant the 30-day suspension already imposed upon respondent, and affirms this penalty as if the Commissioner had originally ordered it.

COMMISSIONER OF EDUCATION

March 19, 1968

ABRAHAM L. FRIEDMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,

Respondent.

For the Petitioner, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent, Cummis, Kent & Radin (Clive S. Cummis, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a resident of respondent's school district, is the father of a 12-year-old girl who attends a nonpublic school in another municipality. He alleges that the transportation service provided by respondent to his daughter is neither reasonable, adequate nor safe and fails to fulfill respondent's duty to his child under the law. In its Answer respondent contests the constitutionality and validity of the applicable statute but maintains that it has met the requirements of the law and has offered appropriate transportation to petitioner's daughter.

Testimony and documentary evidence were presented at a hearing before the Assistant Commissioner in charge of Controversies and Disputes on November 21, 1967, at the office of the Essex County Superintendent of Schools, East Orange. Counsel also filed briefs.

There is substantial agreement on the facts. Petitioner moved to South Orange-Maplewood on August 2, 1967. In contemplation of this relocation he had already applied to respondent for transportation for his 12-year-old daughter to the Beard School in the City of Orange, a nonprofit private school at a remote distance but less than 20 miles from petitioner's home. The Board replied by letter dated August 3, signed by its Secretary, (P-1) which stated in part that the school district would

"subsidize the cost of transportation on the following public carriers:

Bus Routes 25, 31, or 52 to South Orange Center and transfer to #20 bus to Tremont Avenue

or

Erie-Lackawanna R.R. from Maplewood or South Orange to Highland Station, Orange.

"This subsidy will be paid twice a year, at the end of January and at the end of the school year. Reimbursement will be based on the daily cost of the round trip fare on the public carrier, times the number of days your son

or daughter was in attendance at school. At the end of each half year period the Board of Education will submit a voucher to the parent showing the amount of reimbursement to be paid. This form will contain a declaration to be signed by a parent certifying that the funds for this transportation on public carriers have been expended by the parents. If public carriers are not used, no subsidy will be paid. Before final payment is made at the end of the year, the record of bus tickets or railroad tickets purchased must be presented to the Board of Education Business Office."

Petitioner did not permit his daughter to use the means of transportation offered by the Board for the reason that he considered it to be so hazardous and so physically demanding as to be unreasonable. In the alternative he arranged to have his child transported to and from school by bus operated by the private school which she attends. The charge for such service is $110 per semester, for which amount petitioner has received a bill. Petitioner seeks to have similar service provided his daughter by respondent at public expense.

Petitioner's claim to transportation at public expense is grounded in the enactment of *Chapter* 74, *Laws* of 1967 (*N. J. S.* 18A:39–1), the relevant portions of which read as follows:

"Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the state not more than 20 miles from the residence of the pupil regardless of whether such transportation is along established public school routes. It shall be the obligation of the parent, guardian or other person having legal custody of the pupil attending a remote school, other than a public school, not operating for profit in whole or in part, to register said pupil with the office of the secretary of the board of education at the time and in the manner specified by rules and regulations of the state board in order to be eligible for the transportation provided by this section. * * * Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the state board as governs transportation to any public school."

While respondent challenges the validity of the statute on constitutional grounds, it does not press that issue before the Commissioner of Education but reserves it for such time as it may be raised before a more appropriate tribunal. For the purposes of this hearing and adjudication there is no dispute with respect to petitioner's eligibility for or respondent's duty to provide transportation for his daughter to the relevant private school at public expense. It is conceded that the Beard School is a nonprofit private school and that it is located at a remote distance but less than 20 miles from petitioner's residence.

Petitoner contends that respondent has failed to meet the obligations to his daughter imposed upon it by the statute for the reasons that (1) the mode of transportation requiring use of at least two separate public busses, traversing a dangerous intersection, and walking at both ends of the route is unreasonable and hazardous to the child's health and safety; (2) requiring petitioner's child to use public carriers when other pupils are transported by contracted school bus discriminates against petitioner; and (3) respondent has not provided transportation as required but has merely set up a system of reimbursement of fares on public carriers months after the expenditure has been made by the parents.

Respondent maintains that it has fulfilled its duty to petitioner's daughter. It argues that (1) the distance the pupil must walk is reasonable and within State standards; (2) the area to be traversed presents no unusual hazards to a child of the age of petitioner's daughter; and (3) its arrangement to reimburse petitioner twice a year is a logical and reasonable system which has been devised and is in use generally in the public school districts in Essex County.

The first question to be decided is whether the transportation arranged for petitioner's daughter by respondent is reasonable, safe and adequate.

If petitioner's daughter were to avail herself of transportation at respondent's expense, she would walk from her home to the public bus stop a distance of 8 to 10 blocks (petitioner's estimate) or .75 miles (respondent's measurement). She would ride the public carrier route to South Orange Center where she would disembark and cross the intersection to board a second public bus. The second bus would carry her to a point .3 miles from her school, which distance she would have to walk. Petitioner maintains that the area required to be walked is not level, that it is hazardous in slippery weather to a child carrying books and lunch, and that exposure to cold and wet weather while walking and waiting for the bus is a threat to his daughter's health. He contends, too, that the intersection at South Orange Center which his daughter has to cross presents unusual hazards to her safety.

Through its witnesses respondent testified that an inspection of the route arranged for petitioner's daughter had been made and determined to be reasonable and safe. According to respondent the distance petitioner's daughter would have to walk in going to school is .75 miles from her home to the bus and .3 miles from the bus to the schoolhouse, a total of 1.05 miles. Such a distance, respondent urges, is well within the maximum of 1½ miles which elementary school pupils may be required to walk to and from a bus under standards established by the State Board of Education.

Respondent testified further that in determining eligibility for transportation it has consistently and rigidly applied the mileage standards set forth in the regulations of the State Board of Education. As a result, respondent asserts, there are pupils in the district who walk one mile each way four times daily to its public elementary schools and some who walk 2.4 miles to its high school. Under such circumstance it finds nothing unusual in requiring petitioner's daughter to walk 1.05 miles twice a day. Respondent says further that the walk in question is along paved streets with adequate sidewalks and on grades which are in no wise excessively steep. Respondent testified further that there are not only traffic lights but also traffic control policemen at the South

Orange Center intersection at the time petitioner's daughter would be crossing to board a second bus. Many of the public elementary and junior high school pupils cross this same intersection, respondent points out, in walking to and from their schools.

Finally, respondent's witnesses testified with respect to the time required to traverse the subject route. According to their investigations it would take approximately 12 minutes to walk to the bus stop, 7 minutes ride on one bus, and 5 minutes on the other, and 6 minutes to walk from the bus to the school, or a total of 30 minutes. It was also determined that the two bus routes run on 8 and 12 minute schedules, respectively. The times required, therefore, according to respondent's calculations would be between 30 minutes minimum and 50 minutes maximum.

The Commissioner finds no basis for finding this arrangement to be unreasonable, inadequate, or hazardous for a 12-year-old child. The distance to be walked is well within established limits, the area to be traversed is by adequate sidewalks, and the intersections where traffic is heavy are properly policed and controlled. Nor is the time required excessive. The arrangement may be inconvenient when compared to portal-to-portal service, but it is well within the capabilities of and the expectations which may be made of a 12-year-old pupil.

The second question to be determined is whether respondent has discriminated against petitioner by requiring his daughter to use public busses when the public school pupils for whom transportation is provided are carried by bus under contract to the Board of Education.

There is no merit to this charge of discrimination. The testimony reveals that respondent supplies transportation to only 19 pupils, all of whom reside in a particular area of the district more than 2½ miles from the high school and are, therefore, entitled to transportation at public expense. In respondent's opinion use of public carriers for this purpose is neither logical nor desirable and it, therefore, advertised for and received bids and awarded a contract to a private carrier for this service.

The testimony further reveals that respondent provides transportation for some 305 pupils who live in the district to at least 10 different nonpublic schools. Fewer than one third of these pupils are transported by privately owned busses under contract, and more than 200 ride on public carriers. It was also testified that most of these pupils have some walking at both ends of the route. Respondent also asserts that there is a total of fifteen children in the district who attend the same school as petitioner's daugher, all of whom are assigned to public transportation routes.

To establish a charge of discrimination, petitioner would be obliged to show that his child was treated differently from others similarly situated. See *Schrenk* v. *Ridgewood Board of Education*, 1960-61 *S. L. D.* 185, 187. This he has not done. Petitioner does not live in the area serviced by the high school bus nor does his child attend the high school. The transportation arrangements made by respondent for all of his daughter's schoolmates are similar. The Commissioner finds no evidence of discrimination against petitioner in this case.

The final question to be answered is whether respondent's system of reimbursement meets the requirements of the law. The system which petitioner challenges is set forth in respondent's letter to him, *supra*. (P-1) The procedure, in essence, provides for the payment to the parent upon proper voucher, twice yearly for transportation actually utilized by the pupil.

Petitioner contends that this system fails to meet the obligations imposed upon respondent by the statute, *supra*, to provide transportation to children to and from a nonpublic school. Petitioner argues that providing transportation means carrying children to and from school and cannot be construed to mean reimbursing parents at a future date after expenditures have been made for the use of public transportation.

The Commissioner cannot agree. Boards of education have provided transportation for children to and from school by both private contracted bus and public carrier for many years. Public franchised routes are not always available, but where they are, school districts have tended to use their services rather than duplicate facilities for the sole purpose of transportation to and from school. The most efficient method for handling the payment of pupils' daily fares has been the subject of considerable study among school officials. Some schools have purchased rolls of tickets and supplied tickets in advance to pupils. This system has proved wasteful many times when students have accepted the tickets but did not use them on days when they were absent or when they drove or were driven to school by automobile, etc. Other methods similarly failed to provide a proper and adequate accounting of pupils transported and daily fares paid. The system challenged herein was devised by a group of school business officials as the most effective way to insure that pupils' fares on public carriers would be paid and accounted for from public funds without waste. The system eliminates the waste inherent in other methods and results in complete reimbursement to each parent for fares paid on every day his child attends school. As such the Commissioner finds it to be a logical, reasonable, and proper method of transacting the public business called for. While this system requires parents to make an outlay of money to be subsequently reimbursed, there is no reason to believe that such prepayment constitutes an unreasonable burden or hardship. The Commissioner holds that respondent's system of arranging transportation by public carrier for those pupils who can be serviced thereby and its system of reimbursement to parents for transportation fares paid is a reasonable, logical and lawful exercise of its discretionary authority.

For the reasons stated the Commissioner finds and determines that (1) respondent has provided suitable and adequate arrangements for the transportation of petitioner's daughter to nonpublic school; (2) the arrangements made do not discriminate against petitioner; and (3) the arrangements for transportation made by respondent and its system of reimbursing petitioner for expenditures incurred by him for the payment of fares, are a proper fulfillment of its obligations under the law.

The petition is dismissed.

COMMISSIONER OF EDUCATION

March 19, 1968

Affirmed by the State Board of Education without written opinion, February 5, 1969.

In the Matter of the Annual School Election Held in the School District of Gibbsboro, Camden County

Commissioner of Education

Decision

The announced results of the voting for three members of the Board of Education for full terms of three years each at the annual school election on February 13, 1968, in the school district of Gibbsboro, Camden County, were as follows:

William B. Wolfe	206
Mary Jean Braddock	176
Paul K. Whitcraft	173
Gary Biemiller	172
Henry P. Martinsek	152
Ralph Vizoco	126

Pursuant to letter requests from Candidates Biemiller and Whitcraft dated February 13 and 16, 1968, respectively, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct a recount of the votes cast. The recount was conducted by direction of the Assistant Commissioner, by an authorized representative on March 13, 1968, at the office of the Camden County Superintendent of Schools in Pennsauken.

The recount disclosed several ballots which, it was agreed, could not be counted for one or more of the following reasons:

1. ballots on which no votes for any candidates were cast *R. S.* 19:16–4
2. ballots with cross, plus, or check marks to the right of the names of candidates voted for, but with no marks in the squares to the left of the names *R. S.* 19:16–3c
3. one ballot on which votes were cast for all six candidates *R. S.* 19:16–3f, 19:16–4

At the conclusion of the recount of the remaining ballots the tally stood:

William B. Wolfe	204
Mary Jean Braddock	175
Paul K. Whitcraft	171
Gary Biemiller	171
Henry P. Martinsek	151
Ralph Vizoco	124

The Camden County Board of Elections reported that no absentee ballots were voted.

The Commissioner finds and determines that William B. Wolfe and Mary Jean Braddock were elected to seats on the Gibbsboro Board of Education for full terms of three years each. He further finds that there was a failure to

elect a member to one vacant seat on the Board. The Camden County Superintendent of Schools is therefore authorized under the provisions of *N. J. S.* 18A:12–15, and is hereby directed, to appoint from among the residents of the school district of Gibbsboro a citizen who holds the qualifications for membership to a seat on the Board of Education, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

March 25, 1968

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF STAFFORD, OCEAN COUNTY

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for members of the Board of Education for full terms of three years each at the annual school election held on February 13, 1968, in the school district of the Township of Stafford, Ocean County, were as follows:

Louis Novotny, Jr.	184
William G. Kidd	169
Ernest Boerner	161
Edward P. Dodds, Jr.	159

The Ocean County Board of Elections reported that no absentee ballots were voted.

Pursuant to a letter request received from Candidate Edward P. Dodds, Jr., on February 16, 1968, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct a recount of the votes cast. The recount, which was confined to a check of the votes cast for Candidates Boerner and Dodds, was conducted, by direction of the Assistant Commissioner, by an authorized representative on March 4, 1968, at the office of the Ocean County Superintendent of Schools in Toms River. At its conclusion, with 15 ballots reserved for determination, the tally stood as follows:

Ernest Boerner	156
Edward P. Dodds, Jr.	156

The 15 ballots reserved for determination fall into the following categories:

Exhibit A: Nine ballots on which the marks made by the voters in the squares before the candidates' names are somewhat less than perfectly made. There are instances of: failing to extend the legs of cross (×) marks; superimposing one cross (×) over another; extending the extremities of cross (×) or check (✓) marks beyond the limits of the squares; embellishing a cross (×) with an additional line; failing to place the cross (×) or check (✓) entirely within the square; and retracing a cross (×) one or more times, resulting in heavier or rougher marks than would appear normally.

It is the Commissioner's judgment that these votes must be counted. Although the marks are crudely and poorly made, they are substantially those required by *R. S.* 19:16–3g which provides in part as follows:

> "If the mark made for any candidate or public question is substantially a cross ×, plus + or check ✓ and is substantially within the square, it shall be counted for the candidate or for or against the public question, as the case may be * * *."

Such marks as these are not uncommon and are obviously the result of unskilled calligraphy, infirmity, poor vision or visibility, rough writing surface or some other cause rather than any attempt to distinguish the ballots. Each of the marks is substantially a cross (×) or check (✓), is substantially within the square and clearly was not made for an improper purpose.

> "* * * the rule may be stated broadly to be that, where there has been an attempt in good faith to follow the law in making the cross or other mark specified by the statute, the fact that the cross or other mark is imperfect will not prevent the ballot from being counted, provided the intention of the voter is ascertainable.
>
> * * * *
>
> "Applying these general rules, it has been held that a ballot should not be rejected because the marking is double or irregular, or indistinct, blurred, or faint * * *." 29 *C. J. S.* 499, 500

See also *In the Matter of the Recount of Ballots Cast at a Special School Election in the Township of Tewksbury, Hunterdon County*, 1939-49 *S. L. D.* 96; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Watchung, Somerset County*, 1960-61 *S. L. D.* 170; *In the Matter of the Annual School Election Held in the Township of Maurice River, Cumberland County*, 1965 *S. L. D.* 45; *In the Matter of the Annual School Election Held in the Township of Randolph, Morris County*, 1965 *S. L. D.* 66.

The Commissioner finds and determines that, there being no reason to reject these ballots, they will be counted and added to the tally.

Exhibit B: Two ballots, on one of which the voter has placed a check (✓) mark to the right and following the name of one candidate and on the other the voter has written the word "yes" after the names of three candidates. On both ballots no mark of any kind appears in the squares where the votes are required to be recorded to the left and in front of the names of the candidates.

These ballots are invalid and cannot be counted as the statutory requirement to cast a vote has not been met. *R. S.* 19:16–3c provides:

> "If no marks are made in the squares to the left of the names of any candidates in any column, but are made to the right of said names, a vote shall not be counted for the candidates so marked * * *."

It has been consistently held by the Commissioner in numerous decisions that a ballot cannot be counted because the statutory requirement that substantially a cross (×), plus (+), or check (✓) mark must be made substantially within the square before the name of the candidate has not been met. *In the Matter of the Recount of Ballots Cast in the Annual School Election in*

the Township of Union, Union County, 1939-49 *S. L. D.* 92; *In Re Recount of Ballots Cast at the Annual School Election in the Borough of Stratford, Camden County*, 1955-56 *S. L. D.* 119

Exhibit C: Two ballots on which check (✓) or cross (×) marks have been placed in the squares to the left of the names of the three candidates voted for, but on each ballot a check (✓) mark appears to the right of the name of one candidate.

These ballots can be counted because the statutory requirement for a proper mark in the square to the left and in front of the name of each candidate voted for has been met. *R. S.* 19:16–3b provides:

> "If proper marks are made in the squares to the left of any names of any candidates in any column and in addition thereto, proper marks are made to the right of said names, a vote shall be counted for each candidate so marked; but if the * * * officer conducting a recount thereof, shall be satisfied that the placing of such marks to the left and right of the names was intended to identify or distinguish the ballot, then the ballot shall not be counted and shall be declared null and void."

There is no reason to suspect that these additional marks were made with the intent to distinguish or identify the ballots. Such marks are commonly found on ballots. *In the Matter of the Recount of Ballots Cast at the Annual School Election in Ocean Township, Monmouth County*, 1949-50 *S. L. D.* 53; *In Re Recount of Ballots Cast in the Annual School Election in the Borough of Bloomingdale*, 1955-56 *S. L. D.* 103; *In the Matter of the Annual School Election Held in the Township of Randolph, Morris County, supra*

The Commissioner determines that these ballots are valid, and the votes will be added to the tally.

Exhibit D: One ballot which is properly marked with cross (×) marks in the square before the names of the three candidates voted for but also is marked with (✓) marks to the left of and outside the squares. This ballot must be counted because, in the opinion of the Commissioner, the extra check (✓) marks were not intended to distinguish the ballot. *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, Union County, supra; In Re Recount of Ballots Cast in the Annual School Election in the Borough of Bloomingdale, Passaic County, supra*

The Commissioner finds this ballot valid, and the votes thereon can be counted.

Exhibit E: One ballot on which the mark in the square to the left of the name of each candidate voted for consists of a single straight diagonal line running from the lower left of the printed square to the upper right thereof. It is the opinion of the Commissioner that this ballot cannot be counted for the reason that the mark made in each case is not substantially a cross (×), plus (+), or check (✓). *R. S.* 19:16–3g See also *Petition of Wade*, 39 *N. J. Super.* 520 (*App. Div.* 1956), 121 *A. 2d* 552 (1956); *In Re Annual School Election in the Township of Union, Union County, supra; In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Berkeley Heights, Union County*, 1952-53 *S. L. D.* 76.

The Commissioner finds and determines that this ballot cannot be counted.

When the votes in Exhibits A, C, and D are added to the previous totals, the results stand as follows:

		Exhibits			
	Uncontested	*A*	*C*	*D*	*Total*
Ernest Boerner	156	4	2		162
Edward P. Dodds, Jr.	156	4	1	1	162

The Commisisoner finds and determines that Louis Novotny, Jr., and William G. Kidd were elected to seats on the Stafford Township Board of Education for full terms of three years each. He further finds and determines that there was a failure to elect a member to one vacant seat on the Board. The Ocean County Superintendent of Schools is therefore authorized under the provisions of *N. J. S.* 18A:12–15, and is hereby directed, to appoint from among the residents of the Township of Stafford a citizen who holds the qualifications for membership to a seat on the Stafford Township Board of Education, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

March 26, 1968

CLINTON F. SMITH, DOMINICK LAURICELLA, WILLIAM J. PASCRELL, CHARLES M. LONG, AARON FISH, JAMES W. WELLEN, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS OF PARTIES ORGANIZED IN AN UNINCORPORATED ASSOCIATION KNOWN AS THE ASSOCIATION OF CAREER TEACHERS OF THE BOROUGH OF PARAMUS,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS AND GEORGE HODGINS, SUPERINTENDENT OF SCHOOLS OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,

Respondents.

For the Petitioners, Robert D. Gruen, Esq.

For the Respondents, Wittman, Anzalone & Bernstein (Walter T. Wittman, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Individual petitioners are teachers in the school system administered by respondents, who dispute respondents' authority to require them to perform certain extra-classroom duties. Petitioners allege that the performance of supervisory duties in connection with extracurricular activities is a voluntary act which they are free to terminate at will without exposure to the imposition

of sanctions by respondents. They also contend that respondents have acted in a discriminatory manner in the assignment of various staff members to such duties.

Testimony and documentary evidence were presented at a hearing before the Assistant Commissioner in charge of Controversies and Disputes on October 31, 1967, at the Bergen County Court House, Hackensack. Thereafter, briefs of counsel were filed.

The issues raised in this controversy are of more than usual importance and have particular significance for the effective operation of the public schools. It is agreed that the questions to be determined may be stated as follows:

1. What constitutes a teacher day?
2. What constitutes an extracurricular or cocurricular (as termed by respondents) activity?
3. Are petitioners legally bound to perform extracurricular or cocurricular activities assigned them by respondent Board of Education?
4. Is the manner in which assignment by respondents of extracurricular or cocurricular activities to some but not all of the teacher employees a discriminatory practice?

The record discloses that in addition to the regularly scheduled classes, a wide variety of nonclassroom activities is regularly provided for pupils in respondents' schools. These extracurricular, cocurricular, or student activities, as they are commonly called, include interscholastic and intramural sports programs, student government, clubs, publications, dramatics, band, orchestra and other music groups, school dances, concerts, etc. Clubs may be chartered by the Student Council upon receipt of a petition signed by at least fifteen interested students. Some of the activities take place during normal school hours. Others, such as interscholastic athletics, school dances, concerts, and dramatics involve late afternoon, evening, or Saturday time.

Each student activity is supervised by one or more faculty members assigned thereto. Assignment of faculty to the various activities is made by the school administration at the beginning of each school year or as new activities are initiated. A handbook which provides detailed information with respect to the entire extracurricular program is prepared and distributed to each faculty member at the beginning of the school year. It contains, among other things, a list of the activities to be carried on, dates on which functions such as concerts, dramatic productions, dances and other special events will occur, and faculty assignments to supervision of these events.

In their pleadings petitioners list the extracurricular activities to which they are assigned as follows:

"Clinton F. Smith	Senior Class Committee, 1 afternoon meeting per week (1 hr.) Assignment to chaperone a school dance
Dominick Lauricella	Advisor, International Relations Club, bi-weekly after school, occasional Saturdays, and at least one full weekend

William J. Pascrell	Idyller and Literary Magazine, 2 hours per week
Charles M. Long	Photo Club, weekly after school Conservation Club, weekly after school Assignment to chaperone school dance
Aaron Fish	Advisor Sophomore Class, occasional after school meetings
James W. Wellen	Assignment to chaperone school dances"

Petitioners take the position that while admittedly they are employees of the respondent Board, the fact that they are professionally trained persons dictates that the employer-employee relationship must function in a consensual atmosphere. Thus, they assert, there must necessarily be a large element of discretion in defining the scope of mutual duties and obligations beyond the normal classroom responsibilities of the teacher. Petitioners maintain that the education statutes of this State recognize the professional status of a teacher and restrict the power of a board of education to diminish that status. That being so, petitioners contend that they are not legally bound to perform extracurricular activities at all, and that the extent to which they consent to participating in such duties is a matter of professional judgment which lies within the discretion of each teacher.

Respondents' position is that the extracurricular activities assigned to petitioners are typical of the normal and customary kind of secondary school duties that have always been assigned to and performed by teachers as an essential part of their employment obligations. In respondents' view the extracurricular activities program constitutes a supplement to the regular courses of studies conducted in the classroom and is a valid and vital part of the total education program offered to their pupils.

A board of education is authorized to (1) employ such teachers as it shall determine (*N. J. S.* 18A:16–1); (2) makes rules governing the employment of teaching staff members for the district; and (3) change, amend or repeal such rules. The employment of any person in any such capacity and his rights and duties with respect to such employment are dependent upon and are to be governed by the rules in force with reference thereto. (*N. J. S.* 18A:27–4) Further, boards of education may make, amend and repeal rules for the government and management of the public schools and perform all acts and do all things necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district. (*N. J. S.* 18A:11–1) Boards may also prescribe the number of hours required in each day for full-time employment. (State Board of Education rule, section 28, p. 161, pursuant to *N. J. S.* 18A:29–6)

The above cited statutes and rule clearly establish the power of the board to prescribe the school curriculum and the length of the school day necessary to its accomplishment. In determining the curriculum to be offered the board is not and should not be limited to a designation of the specific courses of study to be pursued in a formal classroom setting. Certain elements of the curriculum such as United States History, New Jersey history and geography, and physical education are mandated by statute. *N. J. S.* 18A:35–1 *et seq.*, 18:6–2 and 3 But the public school curriculum is not restricted to the few areas of study which the Legislature has prescribed. Boards of education are free to

determine whatever other learning experiences are suitable to the pupils to be served and will best achieve the aims and objectives of the schools. In pursuit of the goal of the highest degree of self-realization possible for each individual, the schools have traditionally sought an even greater diversity than is provided by formal classroom learnings. Thus, they have provided opportunity for a wide variety of extra-classroom activities in which pupils are encouraged to explore and pursue individual interests. Historically, these pursuits became known as "extracurricular," unfortunately connoting something which was tacked on and of minor importance compared with the classroom teaching program. Later, resort was had to use of the term "cocurricular" in an effort to establish the parallel significance of these curriculum elements. The semantics used are of no moment. In *Willett* v. *Colts Neck Board of Education*, 1966 *S. L. D.* 202, 206, the Commissioner held that school affairs such as dances, concerts, dramatic productions, athletic events and the like, although generally referred to as "extracurricular" were better designated "extra-classroom," and are certainly part of the total curriculum. In *Dallolio* v. *Vineland Board of Education*, 1965 *S. L. D.* 18, 20, 21, the Commissioner observed that:

> "Teachers in public schools customarily direct or supervise a variety of activities which are a part of the curriculum but which are not necessarily directly related to their classroom teaching assignment. These activities are not limited to the coaching of teams in the various sports but might include an assignment to direct (or coach) the school dramatic productions, to advise the student council, to sponsor one or more school clubs, to direct the school assembly programs, to direct the school orchestra, band, or chorus, to supervise school publications, and many others. In some instances, these extra responsibilities are considered part of the teacher's total assignment, and no remuneration other than the basic contractual salary is paid for performing them. In most cases, however, and particularly for those assignments which require the expenditure of much additional time beyond the normal school day, such as coaching athletics, extra compensation is customary."

The existence of a board and well-developed program of student activities is an essential factor in the approval or accreditation of any secondary school. The Commissioner notes that the "Guidelines for Approval Through Self-Study for New Jersey Secondary Schools," a manual developed by the Office of Secondary Education for use in the evaluation and approval of New Jersey secondary schools, pursuant to *N. J. S.* 18A:45–1, clearly demonstrates that a full and well-conducted program of student activities is a vital element in the assessment of the effectiveness of the school program. Similarly the *Evaluative Criteria*, 1960 Edition, of the National Study of Secondary School Evaluation, which provides the basis for accreditation of New Jersey secondary schools by the Middle Atlantic States Association of Colleges and Secondary Schools, devotes a full section to the student activity program (pages 241-256), and states as one of the "guiding principles" (page 241):

> "The school provides for two general kinds of educational experiences, the regular classroom activities and those called extracurricular or cocurricular. Together they form an integrated whole aimed toward a common objective * * *."

In the Commissioner's judgment, therefore, boards of education are not only permitted under the law, but have an affirmative duty and responsibility to develop a broad program of pupil activities beyond formal classroom instruction as an essential part of the curriculum offered.

Such pupil activities require leadership, participation, and supervision by members of the professional staff. While lay persons with particular skills or knowledge may be called upon to contribute, it is properly the duty of professionally trained and licensed teachers to plan, guide, direct, evaluate and supervise the extracurricular activities of pupils. These are functions of teachers which cannot be delegated. If, therefore, there is to be an effective extracurricular program, it must be staffed by teachers. As stated by the New York State Commissioner of Education:

> "The school district is under an obligation to safeguard the health, safety and welfare of the children participating in the function. In this respect, it owes a duty to the parents of the children participating to insure adequacy of supervision over the activity. Supervision of children lies squarely within the responsibility of the teachers. Moreover, the requirement that teachers perform such duty has been considered a customary duty of teachers over a long period of time." *In the Matter of Robert Schultz*, decision of the New York State Commissioner of Education, June 1, 1967

Boards of education have a duty to provide a thorough and efficient system of free public schools. (New Jersey Constitution, Article VIII, section 4, paragraph 1) They must necessarily provide to as great an extent possible an extensive program of student activities as an essential element in the achievement of that objective, and the proper supervision of such activities can be performed only by the school's professional staff.

Petitioners herein do not take the untenable position that all extracurricular activities are worthless and should be abandoned, although several of the teacher witnesses denigrated out-of-classroom activities in expressing their belief that their time was more importantly given to preparation of classroom subject matter. Rather, they urge that only those activities be programmed which members of the professional staff voluntarily elect to supervise. From petitioners' point of view, a teacher's first responsibility is to the pupils who comprise the classes he is assigned to teach. In order to do justice to those pupils, petitioners assert, they must refresh their training, keep abreast of new developments, materials, and techniques, engage in research, correct and grade pupil work, and prepare the lessons for their classes, among other duties and in addition to time required for personal obligations. Because these commitments and the time required to discharge them vary with the individual, each teacher, they maintain, must therefore be permitted to decide for himself how best he can perform and the priorities he should attach to his time and energies. Thus, petitioners urge, each teacher must be permitted to decide how many and what extra duties beyond his classroom assignments he can assume and perform competently. This, they maintain, is an aspect of academic freedom. Petitioners urge that such academic freedom means, among other things, that a teacher has the right to inform his principal that he cannot devote time to a student activity because he is busy preparing for and conducting his classes. In petitioners' view this is a matter of personal and professional judgment which each teacher must be permitted to make.

In the Commissioner's judgment, while petitioners' contentions may be proper subjects for philosophical discussion and debate, they do not rise to the status of legally enforceable rights. While it is true that the contract under which they are employed by the Board does not expressly make the performance of extracurricular activities mandatory, it cannot be doubted that each of petitioners had knowledge at the time of his employment that he would be expected to perform extra-classroom assignments. Indeed, the application form which each petitioner completed before being employed contains an inquiry with respect to what extracurricular activities he felt competent to direct or organize. There are also a number of references in various publications prepared by respondents and supplied to their teachers which make the existence of a pupil activities program and the teacher's responsibility with respect to it abundantly clear.

But even more importantly, the Commissioner must reject the contention that a teacher's employment obligation begins and ends with the satisfactory discharge of his assigned classroom duties. The board of education has an indisputable statutory right to define the working day and to assign members of the professional staff to perform the various services and responsibilities with respect to pupils which, in the board's judgment, contribute to the effective accomplishment of the objectives which it has set for the schools. In terms of the expectations of the community which it represents, limitation on its powers in this respect could not be tolerated. In the adoption and administration of rules, assignments and requirements the board is constrained, of course, to act reasonably and fairly. But basically, the establishment of a program of extracurricular activities to supplement the regular program of classes for the benefit of students in a public school is certainly not a unique, capricious or arbitrary practice on the part of a board of education. The expectation and requirement that supervision of the various activities that comprise the extracurricular program be performed by members of the professional staff cannot be considered unreasonable. Such duties, as noted, are part of the expected function of teachers.

The principle enunciated by the Court in *Bates* v. *Board of Education*, 72 *P.* 907 (*Calif. Sup. Ct.* 1903), and quoted with approval in *McGrath* v. *Burkhard*, 280 *P.* 2*d* 864 (*Calif. App.* 1955), bears repeating here:

> " 'The public schools were not created, nor are they supported, for the benefit of the teachers therein, * * * but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.' "

While the issues herein have never been raised heretofore in New Jersey, they have come before the courts in other jurisdictions. For example, in *Pease* v. *Millcreek Township School District*, 195 *A.* 2*d* 104 (*Pa.* 1963), a teacher was assigned to supervise a bowling group after school hours at a private establishment at some distance from the school, to which each pupil paid his own transportation and the cost of his individual bowling. In sustaining the teacher's refusal to supervise this activity the Court drew a distinction between student activities which are related to the school program and those which are not. In that case it found that the particular activity, as it was constituted, was not so related. In its opinion, however, the Court accurately observed that:

> "School teachers must realize that they are subject to assignment by the school board to any activity directly related to the school program; class-

room duties in school hours do not constitute all their duties. On the other hand, school boards must realize that their power of assignment of school teachers to extracurricular duties is not without limitation and restriction; * * * the activity to which a school teacher is assigned must be related to the school program and the assignment must be fairly and reasonably made."

Teachers raised issues similar to those herein in the case of *McGrath* v. *Burkhard, supra.* The opinion in that case contains language which is specifically applicable to the matter here under review as the following excerpt will reveal:

"* * * Teachers are engaged in a professional employment. Their salaries and hours of employment are fixed with due regard to their professional status and are not fixed upon the same basis as those of day laborers. The worth of a teacher is not measured in terms of a specific sum of money per hour. A teacher expects to and does perform a service. If that service from time to time requires additional hours of work, a teacher expects to and does perform it. If that service from time to time requires additional hours of work, a teacher expects to and does put in the extra hours, without thoughts of measuring his or her compensation in terms of a given sum of money per hour. A teacher's duties and obligations to students and the community are not satisfied by closing the classroom door at the conclusion of a class. The direction and supervision of extracurricular activities are an important part of his duties. All of his duties are taken into consideration in his contract for employment at the annual salary. All of this is, of course, subject to the test of reasonableness. * * * What is reasonable must necessarily depend upon the facts of the situation and the teachers are protected in that regard by the appropriate administrative and judicial procedure. Supervising the students and being present to protect their welfare at school athletic and social activities, conducted under the name and auspices of the school, is within the scope of the contract and such assignments are proper so long as they are distributed impartially, they are reasonable in number and hours of duty and each teacher has his share of such duty." *McGrath* v. *Burkhard*, 280 *P. 2d* 864, 870 (*Calif. App.* 1955) See also *Parrish* v. *Moss*, 106 *N. Y. S. 2d* 577 (*Sup. Ct.* 1951).

The Commissioner concurs and endorses the principles above enunciated as equally applicable to the schools of New Jersey. He therefore finds that petitioners' obligation to perform reasonable extra-classroom duties is mandatory, not consensual.

Finally, petitioners allege unfair discrimination in the extracurricular assignments made by respondents. They contend that some faculty members are unassigned to any such duty and that others, who are assigned, are paid extra compensation for their services. Respondents deny any discrimination with respect to assignments and cite in refutation the system the Board has established by which service credits toward salary scale advancement may be earned by staff participation in the student activity program.

The Commissioner finds no evidence of unfair practices as alleged by petitioners. The testimony fails to support the first allegation that some teachers are not assigned or required to supervise any student activity. Members

of the administrative staff could recall no instance within their recollection of any faculty member who was not so assigned.

The second allegation that some staff members are paid extra for performing extracurricular duties is unquestionably true. However, in any instance wherein a faculty member was so compensated the duties performed were of a nature to warrant the extra pay. In no instance was it shown that teachers who performed extracurricular assignments without extra pay were entitled thereto.

It is to be recognized that it is an administrative responsibility to see that assignments to extracurricular responsibilities are reasonably and equitably distributed among faculty members. Where an extracurricular assignment constitutes an inordinate demand beyond that which may reasonably be expected of all teachers, it is customary and proper to offer compensation for the extra burden carried in addition to the staff member's base salary. See *Dallolio* v. *Vineland Board of Education, supra.* Moreover, as noted, there is a "Service Credit Plan" in operation in this school district whereby teachers who assume duties which exceed normal expectations may earn credit toward advanced placement on the salary schedule. Teachers may, in fact, choose to earn such service credits instead of receiving extra compensation for those services for which extra pay is established. Finally, in this connection, the Commissioner points out that where instances of inequities are believed to exist, teachers have recourse to grievance procedures established by the local school district to effect a satisfactory resolution of the problem. The Commissioner finds the charge of unfair and discriminatory conduct unsupported by the evidence.

In the summary, the Commissioner finds and determines that (1) the teacher's day is comprised of the minimum hours set by the employing board of education plus the amount of time required for discharge of such duties and services as may be reasonably expected and required of a member of the professional staff of a public school; (2) extracurricular or cocurricular activities comprise all those events and programs which are sponsored by the school and may reasonably be characterized as a supplement to the established program of studies in the classroom in order to enrich the learning and self-development opportunities of pupils; (3) petitioners are legally bound to perform such activities as may be reasonably assigned them by the Board of Education; and (4) there is no evidence in this case to disclose that any discrimination in the assignment of teachers to extracurricular duties has been practiced.

The petition is dismissed.

COMMISSIONER OF EDUCATION

March 28, 1968

Affirmed by the State Board of Education without written opinion, February 5, 1969.

In the Matter of the Annual School Election in the School District of Voorhees Township, Camden County

For the Board, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

Commissioner of Education

Decision

The announced results of the voting for three members of the Board of Education of Voorhees Township, Camden County, for full terms of three years each at the annual school election on February 13, 1968, were as follows:

Claire M. Eagan	290
Albert Mann	323
Dorothy M. Hann	257
Robert W. Anderson, Jr.	279
Joseph G. Brady	394
Charles M. Wagner	285
Raymond Warner	1
Thomas McGeoy	1
John Dunwoody	1
Hazel Reed	1

Pursuant to letter dated February 14, 1968, from Candidates Wagner and Anderson, the Commissioner of Education directed that the ballots cast for Board members be recounted. Such a recount was conducted on March 7, 1968, at the office of the Camden County Superintendent of Schools, Pennsauken, by an authorized representative of the Commissioner. The report of the recount is as follows:

As a result of the recount of the uncontested ballots cast, with 32 ballots referred to the Commissioner, the tally stood as follows:

Claire M. Eagan	278
Albert Mann	310
Dorothy M. Hann	253
Robert W. Anderson, Jr.	276
Joseph G. Brady	384
Charles M. Wagner	277
Raymond Warner	1
Thomas McGeoy	1
John Dunwoody	1
Hazel Reed	1

The Camden County Board of Elections reported that no absentee ballots were voted.

The 32 ballots referred to the Commissioner for determination are grouped into 11 categories, as follows:

Exhibit A—6 ballots, on which cross, plus, or check marks appear at the right of candidates' names, but no marks appear in the spaces at the left of the names.

Exhibit B—2 ballots, on one of which a cross mark and a plus mark have been superimposed one upon the other in the spaces at the left of the names of three candidates. On the other ballot a cross mark and a check mark are superimposed in like manner.

Exhibit C—6 ballots, on each of which the voter has voted for more than three candidates.

Exhibit D—1 ballot, on which the vertical stroke of the check mark lies outside the space at the left of a candidate's name with the diagonal stroke passing through the space.

Exhibit E—5 ballots, on each of which two burn or scorch marks appear, one on or near the top fold or crease of the ballot, and the other on or near the bottom fold or crease of the ballot. An affidavit has been filed by the chairman of the election officers at the polling place at which these ballots were cast. The affidavit states that just prior to the closing of the polls, a voter accidentally dropped ashes from his cigarette into the ballot box. When the box was opened at the closing of the polls, says affiant,

> "it was discovered that several ballots in the ballot box were still smoldering. The smoldering ballots were quickly extinguished; however, several ballots did have 'burn marks' on them."

Exhibit F—2 ballots, on each of which the voting marks for Board candidates are properly placed, but the voting marks on the appropriation questions are improperly placed.

Exhibit G—1 ballot, on which the marks in the spaces before the names of two candidates are clearly check marks, but a mark before a third candidate's name is a diagonal line, rather than a cross, plus, or check mark.

Exhibit H—1 ballot, on which cross marks appear before three candidates' names. In the space at the left of a fourth candidate's name, a series of horizontal lines partially obliterates a cross mark.

Exhibit I—6 ballots bearing proper marks in the spaces at the left of three candidates' names, with an erasure in the space at the left of a fourth candidate's name.

Exhibit J—1 ballot, on which the squares at the left of three candidates names are smudged and gray. A cross mark appears clearly in each of these squares.

Exhibit K—1 ballot, on which an erasure appears in one of the squares at the left of the current expense question. The spaces are properly marked for three Board candidates.

* * * * * * *

The ballots referred for determination by the Commissioner have been examined, and the Commissioner finds as follows:

Exhibit A—These ballots cannot be counted. The Commissioner has held in many cases that a ballot cannot be counted unless a cross, plus, or check mark appears in the square or space at the left of the candidate's name. *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Delaware, Camden County*, 1957-58 *S. L. D.* 92 See also *N. J. S. A.* 19:16–3c, by which the Commissioner is guided in such matters.

Exhibit B will be discussed at the conclusion of this determination.

Exhibit C—These ballots cannot be counted for any candidate, since a voter may not vote for more names than there are persons to be elected. *N. J. S. A.* 19:16–3a; *In re Recount of Ballots Cast at the Annual School Election in the Borough of Jamesburg*, 1955–56 *S. L. D.* 111

Exhibit D—The fact that the check mark does not lie wholly within the square at the left of the candidate's name will not invalidate this ballot. The intent of the voter to place the mark substantially in the square is clear. This ballot will be counted.

Exhibit E—The Commissioner is satisfied from the affidavit submitted that the burn or scorch marks on these ballots occurred accidentally after the ballots were cast, and were not intended to distinguish or identify them. These ballots will be counted.

Exhibit F—Even though these ballots are improperly marked as to the public questions submitted to the voters, and could not be counted for or against those questions, the votes for Board candidates are properly marked. The commissioner finds no reason to determine that the improper marks were intended to distinguish or identify the ballots. *N. J. S. A.* 19:16–4 These ballots will be counted for the Board candidates.

Exhibit G—It has been previously held that a single diagonal line cannot be considered substantially a cross, plus, or check mark, and cannot be counted for the candidate. *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Berkeley Heights, Union County*, 1952–53 *S. L. D.* 76 However, the votes properly marked for two other candidates must be counted. *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, Union County*, 1939–49 *S. L. D.* 92

Exhibit H—The marking on this ballot indicates an intent of the voter to obliterate a cross which he had put in the voting square. It does not indicate to the Commissioner an intent to distinguish or identify his ballot. *N. J. S. A.* 19:16–4 See also *In the Matter of the Annual School Election Held in Clearview Regional High School District, Gloucester County*, decided by the Commissioner on March 5, 1968. This ballot will be counted for the three candidates properly marked.

Exhibit I—As in Exhibit H, above, the erasures on these ballots are not found to distinguish or identify the ballots. The Commissioner has held in numerous cases that under such circumstances erasures do not invalidate a ballot. See *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, Union County, supra*, 95.

Exhibit J—This ballot containing smudges in the squares at the left of three candidates' names together with proper crosses, will be counted for the same reasons as set forth for Exhibits I and J, *supra*.

Exhibit K—This ballot will be counted for the same reason as set forth for Exhibit J, *supra*.

When the ballots in Exhibits, D, E, F, G, H, I, J, and K are added to the previous total, the result is as follows:

		Exhibits							
	Uncontested	*D*	*E*	*F*	*G*	*H*	*I*	*J*	*K*	*Total*
Claire M. Eagan	278		1			1	5	1	1	287
Albert Mann	310		5	1	1		3	1	1	322
Dorothy M. Hann	253					1	2			256
Robert W. Anderson, Jr.	276			2	1		1			280
Joseph G. Brady	384		5	1			5	1	1	397
Charles M. Wagner	277	1	4			1	2			285
Raymond Warner	1									1
Thomas McGeoy	1									1
John Dunwoody	1									1
Hazel Reed	1									1

Since the inclusion or exclusion of the ballots in Exhibit B would not change the outcome of the election, it is unnecessary to determine their validity.

The Commissioner finds and determines that Claire M. Eagan, Albert Mann, and Joseph G. Brady were elected to full terms of three years each on the Board of Education of Voorhees Township at the annual school election on February 13, 1968.

COMMISSIONER OF EDUCATION

March 28, 1968

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE SCHOOL DISTRICT OF RIVERSIDE TOWNSHIP, BURLINGTON COUNTY

COMMISSIONER OF EDUCATION

DECISION

The announced results of the voting for three members of the Board of Education for full terms of three years each at the annual school election held in the school district of Riverside Township, Burlington County on February 13, 1968, were as follows:

	At Polls	*Absentee*	*Total*
Paul G. Kanigowski	257	0	257
Louis Kaniecki	288	0	288
Victor J. Mueller	317	0	317

Pursuant to a letter request dated February 15, 1968, from John E. Mongon, Jr., who was a "write-in" candidate for election, alleging irregularities in the conduct of the election and the canvass of the ballots, the Commissioner directed that an inquiry into the election be conducted. Such an inquiry was held on February 27, 1968, at the office of the Burlington County Superintendent of Schools, Mount Holly, by a hearing examiner appointed for that purpose. The report of the hearing examiner is as follows:

Mr. John E. Mongon, Jr., the complainant in this matter, asserts that he entered the contest for Board membership as a write-in candidate. He alleges (1) that during the first hour and a half of the election, voters who sought instructions from the election officers on the procedure for casting a write-in or personal choice ballot on the voting machines used in the balloting were refused such instruction; (2) that when election officials did later give such instruction, it was inaccurate or inadequate; (3) that pencils were not available in the voting machines, even after election officials were asked to supply them; (4) that voters and the complainant himself were improperly harassed or obstructed by challengers for other candidates; (5) that one voting machine did not function properly, so that not all votes were recorded; and (6) that as a result of the confusion, harassment, and turmoil at the polling place, some voters left without casting their ballots.

The testimony of the complainant and of 13 other witnesses who voted at various times during the election hours, confirms all but one part of one of the complaints; namely, that not all votes were recorded on one of the machines. On that count, the testimony was purely speculative, arising out of the difficulty some voters experienced in moving some of the levers on the machine. There was no testimony establishing that if a vote was properly cast, it was not recorded on the counters of the machine. The certificates of the election officers show that the number of ballots cast as recorded on the protective counters of each machine correspond exactly with the numbers recorded by the public counters.

However, it is clear to the hearing examiner that from the opening of the polls at 2 p.m. until after 3 p.m., voters seeking instruction on the procedure for casting a personal choice ballot were told that such instruction could not be given. Thereafter, election officers gave instructions by standing before a voting machine, but facing away from it and pointing over their shoulder toward the machine while explaining the operation of the releases to open the slide to write in a personal choice vote. When some voters asked which slot to use, or had difficulty opening a particular slide, they were told to use any slide that would operate, or that it did not matter which slide they used. There is no evidence that the election officials had present, displayed or made use of the instruction model which is supplied with the voting machine for demonstration purposes. It is also clear that no pencils were available in the machines, that pencils were denied to voters who requested them of election officers, and that loud and boisterous protests were made by at least one of the challengers when one voter offered to lend her pencil to another voter. Supporters of Mr. Mongon who offered pencils and write-in instructions to prospective voters outside the polling place—at least 100 yards away from the entrance, it was testified—were challenged.

Testimony concerning the conduct of two challengers, one of them a candidate, was that they were loud and argumentative, that one of them "literally jumped" at a voter who offered assistance to another voter, that challengers shouted when voters stayed too long inside the voting machine, and that as a result of the pressure and tension created by the challengers, some voters left the machine before completing their ballots, or did not vote at all. The chairman of the election officers testified that she asked one of the challengers to lower his voice. The testimony also shows that at least one of the challengers participated with or instructed the election officers in the performance of their duties.

At the conclusion of the balloting, the paper tapes on which personal choice votes were written were spread on the floor to be counted. It is clear from the testimony of the chairman of the election officers that there was uncertainty about how such votes should be counted, that confusion and tension attended the canvass of votes, and that the decision on the counting or rejection of votes was influenced by challengers and an employee of the County Board of Elections who was present. No record of the canvass of personal choice ballots was made on the official Report of Proceedings prepared and signed by the secretary and chairman of the election officers. Candidate Mongon testified that he was informed by a challenger for another candidate that he had received 185 write-in votes, but that he had read a different figure in newspaper reports of the election. Only one of the "return sheets" for the individual voting machines reports any votes—35—cast for Mr. Mongon.

The chairman testified that at the conclusion of the canvass of ballots, Mr. Mongon had received a total of 60 votes. An additional 125 votes were voided by the election officers on account of their alleged misplacement on the tapes. The chairman offered no explanation of the absence of any report of the canvass of write-in votes, for Mr. Mongon and five other persons, on her official report of election proceedings.

The election materials were placed in *unsealed* envelopes and transmitted to the Secretary of the Board of Education. See *N. J. S.* 18A:14–61. The chairman testified that overnight she felt such dissatisfaction with the tally of write-in votes that on the following morning, accompanied by the election secretary, she went to the Board Secretary's office and obtained the envelopes. She and the election secretary proceeded then and there to recount the write-in votes. The tally of valid and voided ballots corresponded to that of the night before, and the election materials were then, and only then, sealed in envelopes. The only other persons present at this "recount" were the Board Secretary and an unidentified Board clerk.

The election materials transmitted to the County Superintendent of Schools were not accompanied by a summary report by the Secretary of the Board of Education showing the addition of absentee ballots cast, or any further report of the canvass of write-in ballots. See *N. J. S.* 18A:14–61. The hearing examiner secured from the County Superintendent a carbon copy of the official canvass by the County Board of Elections of civilian absentee and military service ballots. This report shows that Candidates Kanigowski and Kaniecki each received two votes, and Candidate Mueller received one vote.

Mr. Mongon waived a recount of the ballots cast, and accepts the testimony of the election chairman that 185 votes were cast for him, of which 60 were

counted as valid and 125 rejected. It is his contention, however, that the election should be set aside because of irregularities of such seriousness that he was deprived of the benefit of additional votes which were not cast for him, for the reasons alleged.

On the basis of the canvass of ballots as reported on the Report of Proceedings, supplemented by the chairman's sworn testimony concerning the count and unauthorized "recount" of write-in votes, and by the report of absentee ballots cast, the hearing examiner concludes that the tally of votes for candidates for Board membership is as follows:

	At Polls	*Absentee*	*Total*
Paul G. Kanigowski	257	2	259
Louis Kaniecki	288	2	290
Victor J. Mueller	317	1	318
John E. Mongon, Jr.	60	0	60
---- Mueller	4	0	4
Dave Giammaria	1	0	1
Freeman Metzer	1	0	1
Michael Kirk	1	0	1
---- Gross	1	0	1

There is no necessity to consider the validity of the 125 votes cast for Mr. Mongon, but not counted in his favor, since even if all votes were counted, they would not be sufficient to change the announced results.

In conclusion, the hearing examiner finds that the irregularities complained of reflect an excess of zeal, an arrogant disregard by certain candidates and challengers for the proprieties of election procedure, ignorance of or indifference to procedural requirements on the part of some officials and human error arising in an atmosphere of emotional tension rather than deliberate fraud or corruption in the conduct of the election.

* * * * * * *

The Commissioner has carefully considered the report of the examiner in this inquiry. The evidence portrays an election conducted with grave disregard for established and orderly procedures, and shocking carelessness and indifference to the specific requirements of the statutes governing the conduct of elections. The obvious zeal on the part of contesting candidates and their challengers may be an explanation, but not an excuse, for failure both to provide voters with instruction and equipment to which they are entitled, and to prevent unwarranted intrusion in the voting process. Interference with the canvass of ballots by candidates, challengers, and others cannot be tolerated; if error in counting occurs, recourse through appropriate administrative channels is available. The requirement that the work products of the election be sealed immediately after the canvass of the vote is a reasonable one designed to protect the integrity of the election; there can be no sufficient excuse for neglecting this duty. The so-called "recount," even though motivated by the best intentions, was utterly without authority. And the failure of both the election officers and the Board Secretary to complete the full reports of the election required by the statutes reflect an unconcern for procedure which cannot be condoned.

The Commissioner vigorously condemns the procedural faults which have been described in this inquiry. Scrupulous attention to the procedures which have been designed for the orderly conduct of elections is vital to the preservation of and high regard for this phase of the democratic process. The Commissioner directs the attention of the Board of Education of Riverside to the necessity of taking such steps as will insure that future elections will be conducted in full accord with the requirements of law.

Yet the Commissioner cannot find in the evidence presented that the will of the people was suppressed and could not be fairly determined. It is purely speculative to propose that if conditions had been different, the results would have been different. The Commissioner has consistently declined to set aside contested elections unless it can be shown that the irregularities clearly affected the result of the election.

> "* * * it has been held that gross irregularities when not amounting to fraud do not vitiate an election." 15 *Cyc.* 372

See also *Application of Wene*, 26 *N. J. Super.* 363 (*Law Div.* 1958); *Sharrock* v. *Keansburg*, 15 *N. J. Super.* 11 (*App. Div.* 1951); *Love* v. *Freeholders*, 35 *N. J. L.* 269 (*Sup. Ct.* 1871); *In the Matter of the Annual School Election in the Township of Jefferson, Morris County*, 1960-61 *S. L. D.* 181; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Lumberton, Burlington County*, 1959-60 *S. L. D.* 130.

The Commissioner finds and determines that the irregularities attendant upon the annual school election held in the Township of Riverside do not constitute sufficient grounds to set aside the election as petitioner requests. He therefore finds that Paul G. Kanigowski, Louis Kaniecki, and Victor J. Mueller were elected to membership on the Riverside Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

April 3, 1968

GLADYS M. RHINESMITH,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,

Respondent.

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Grabow, Verp & Rosenfelt (Martin Verp, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner is a principal under tenure in respondent's school system. She alleges that an action of the Board of Education at a meeting in May 1966,

requiring her to work an additional month each year, had the effect of reducing her salary in violation of her rights under the Teacher Tenure Act. She asks that respondent be directed to pay her additional compensation commensurate with the additional work time imposed. Respondent maintains that petitioner has been employed full-time for a number of years and that its action in no way altered her status.

The facts of the matter were established through the testimony of witnesses and documents submitted at a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes at the office of the Passaic County Superintendent of Schools on September 21, 1967. Both parties waived the filing of briefs and submit the issues for adjudication on the record and the pleadings.

Petitioner, hereinafter "the principal," has been employed in respondent's schools for 43 years and for the last 13 years has been the non-teaching principal of the larger of its two elementary schools. The system is headed by a Superintendent, which position is now vacant, and there is also a teaching principal in charge of a second small elementary school.

At a meeting on May 31, 1966, respondent adopted a motion which provided that the principal's position be on an 11 months' basis beginning with the 1966-67 school year. That summer petitioner reported for work at the school from July 1 to 15 and from August 15 to 30. On September 27, 1966, respondent voted to increase petitioner's salary from $9,900, which she had received in the previous school term, to $10,500. Petitioner responded by sending a letter to the Board expressing her thanks "for the adjustment that was made in my salary for the year 1966-67." (Exhibit R-3)

It was testified that respondent's resolution setting an 11-month work year for petitioner's position was the only such action taken with respect to an employee then, before or since. It was testified further that most of the professional staff is employed on a 10-month schedule, that the Superintendent works on a 12-month basis, and that petitioner is the only employee on an 11-month schedule.

Petitioner testified that early in October 1966, she wrote a letter to the Superintendent as a reminder that she had worked four weeks in the summer for which she had not been reimbursed. The Secretary of the Board also admitted that petitioner had raised the question of additional pay for her summer work in various informal ways and finally wrote respondent on February 6, 1967, as follows:

> "I would like a clarification of my position as to the number of months I am to work. Under the last school year it was on a ten month basis at $990.00 per month. Without any formal notification, my work year has been changed to eleven months thereby reducing my pay to $954.00 per month."

Introduced in evidence were five documents, each of which is headed "Re-appointment of Gladys Rhinesmith." (Exhibits P-1, 2, 3, R-1 and 2) The first sentence on each of these exhibits is similar, notifying petitioner that she has been reappointed by the Board of Education as principal. (Such notification is, of course, legally unnecessary for the reason that petitioner had ac-

quired tenure in the position of principal and "reappointment" under such circumstances is a meaningless action.) The second sentence states the salary for the year and the number of installments in which it is to be paid. In the third sentence the starting and ending dates of the "contract" are set forth. Each of the documents, except the one for 1967-68, was signed and returned to respondent by petitioner. The variations in these five exhibits with respect to salary, installments and dates of service can be shown most clearly in tabular form, as follows:

Exhibit	Year	Salary	Installments	Beginning & Ending Dates
P-1	1957–58	$ 6,400	10 monthly	Sept. 1–June 30
P-2	1961–62	8,100	20 semi-monthly	Sept. 1–June 30
P-3	1962–63	8,450	20 semi-monthly	Sept. 1–June 30
R-1	1965–66	9,900	not shown	July 1–June 30
R-2	1967–68	10,500	24 semi-monthly	July 1–June 30

No exhibit was introduced for the 1966-67 school year when petitioner's salary was set at $10,500 after the year began. The reappointment notice for 1965-66 (Exhibit R-1) differs from the others in the respect that the form lists two periods of service, (1) July 1, 1965, to June 30, 1966, and (2) September 1, 1965, to June 30, 1966. Respondent points out that the second period has been crossed out by a typewriter leaving July 1 to June 30 as the period agreed upon. Petitioner testified that she did not notice this detail when she signed the form. Petitioner returned, unsigned, R-2 for 1967-68, issued after the petition herein was filed, which bore an inserted typewritten statement "Reappointed on twelve month basis with one month's vacation."

The testimony also discloses that for approximately six years petitioner has been paid on a twelve-month basis, receiving a semi-monthly salary check beginning July 15 each year based on the current year's compensation. Petitioner avers that this was done at her request and that she is the only employee on less than a twelve-month basis who is paid in this manner.

Petitioner's position is that she has suffered a reduction in salary, contrary to the protection afforded her under the tenure laws, by reason of respondent's action requiring her to work an additional month without corresponding compensation therefor. Although she concedes that ever since she became principal she has worked during the summertime in order to have her school in readiness for the fall term, such service, she urges, has been at her own discretion and at times of her own choosing. Much of such work, petitioner testified, was taken from the school to her home and completed there. Petitioner contends, now that the Board has seen fit, by formal action, to require her to report to the school each working day for an additional month of duty, that she is entitled to a commensurate increase in salary. Otherwise, she argues, to require her to work an additional month at the same annual compensation has the effect of a reduction in salary and as such is in violation of her statutory rights.

Respondent denies that its resolution of May 31, 1966, increased petitioner's duties or reduced her salary. It maintains that petitioner had performed services essential to the operation of her school every summer since she became principal, that such services were considered a part of her re-

sponsibilities and were taken into account in the salary increments which she received at various times. It contends that this has been so since March 1960, when her reappointment was on a twelve-month basis and is so indicated in the minutes. Additional proof is found, respondent says, in the reappointment form for 1965-66 which calls for service from July 1 to June 30 (Exhibit R-1), which petitioner accepted, as evidenced by her voluntary signature. According to respondent, it was only when some question arose with respect to the requirements of her position as principal that the Board acted to clarify and regulate the matter by the adoption of the resolution on May 31, 1966. That resolution, respondent alleges, in no way altered petitioner's status, duties, time requirements, or salary, but merely spelled out and formalized the generally understood and accepted conditions of petitioner's employment. Nor was the subsequent $600 increase in her salary in September 1966, intended as a recognition and reimbursement for extra duties performed as a result of the May resolution, according to respondent. Petitioner had been paid for at least the last six years for 11 months of work, respondent declares, and any increment she received was at the discretion of the Board in recognition of her work generally. However, respondent says, petitioner had no vested right to such an increment and if she is to prevail in this action, the Board takes the position that the $600 already received is to be applied to any additional salary to which she may be found to be entitled.

The testimony in this case is conflicting. Similarly, the records pertinent to the issue raised are unclear and fail to disclose exactly what petitioner's status with respect to work requirements has been for the last six years. To be considered on the one hand is the testimony that (1) petitioner's appointment for 1960-61 was for a twelve-months' term; (2) petitioner worked each summer prior to 1966 although not on a fixed schedule; (3) petitioner signed an agreement for the 1965-66 year which defined her term at 12 months; (4) for the last six years salary payments to petitioner have been made on a twelve-months' schedule beginning with July 15 each year and that no other employee, except those on a twelve-months' term, is so paid; and (5) the Board had considered petitioner to be a twelve-month employee and acted, not to alter her status, but clarify and formalize what had been in effect for some years. On the other side is (1) petitioner's admission that she worked every summer but her contention that she did so at her own discretion and under no obligation to the Board; (2) petitioner's testimony that she failed to notice the twelve-month employment period called for in the 1965-66 agreement and her contention that she accepted that condition unknowingly; and (3) the lack of any clear definition in the Board's records, prior to the May 1966 resolution, of the exact term of petitioner's employment.

Despite the sometimes conflicting testimony and the lack of clarity of the records of the Board of Education with respect to the exact status of petitioner's employment since 1960, the Commissioner concludes that the weight of the evidence favors respondent. Petitioner's proofs fail to support clearly her claim that her duties were altered or increased by reason of respondent's resolution of May 31, 1966. The evidence tends rather to support respondent's contention that whereas it had been content to have petitioner perform her summer duties in an informal manner and according to her own schedule, it became desirable to formalize the responsibility and regulate the time when the principal could be expected to be available at the school. The Commis-

sioner concludes, therefore, that respondent's action had the mere effect of clarifying petitioner's duties and in no way added to the responsibilities or the amount of time required of her since the 1960-61 school year. Petitioner is therefore entitled to the increase in her annual salary approved by respondent in September 1966, but she has no ground on which to demand additional compensation by reason of an increase in the amount of time or work required of her.

The Commissioner finds and determines that petitioner's compensation has not been reduced by reason of the imposition of additional responsibilities or time required of her by respondent. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

April 3, 1968

BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE,
Petitioner,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,
Respondent.

For the Petitioner, Hayden & Gillen (Eugene F. Hayden, Esq., of Counsel)

For the Respondent, Alfred D. Antonio, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *N. J. S.* 18A:22–37 certifying to the County Board of Taxation a lesser amount of appropriation for the 1968-69 school year than the amount proposed by the Board in its budget which was twice rejected by the voters. The facts of the matter were submitted to the Assistant Commissioners in charge of the Division of Business and Finance and the Division of Controversies and Disputes on April 10, 1968, at the State Department of Education, Trenton.

At the annual school election on February 13, 1968, the legal voters of the School District of the Borough of Sayreville rejected the appropriations for school purposes proposed by the Board. Thereafter, in accordance with law, the same proposals were again presented to the legal voters and were again rejected. The proposed appropriations presented to the legal voters of the School District were as follows:

Current Expense	$4,159,478.00
Capital Outlay	106,593.00
	$4,266,071.00

The amount to be raised by local taxation for payments of principal and interest on previously authorized bonded indebtedness was originally fixed at $702,144.00. By two resolutions establishing and later amending the local municipal budget, the amount of $697,108.80 was appropriated by Council to reduce the amount to be raised by local taxation for school debt service to $5,035.20.

Within the time prescribed by law, the Council conferred with the Board and after extensive discussion determined that the amounts to be raised by local taxation be reduced as follows:

	From	*To*	*Reduction*
Current Expense	$4,159,478	$3,804,323	$355,155
Capital Outlay	106,593	94,593	12,000
Total	$4,266,071	$3,898,916	$367,155

The Council, in keeping with the guiding principles laid down by the Supreme Court in *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), set out certain items which it suggested could be reduced. The sum of the suggested reductions amounts to the total reduction of $367,155, as follows:

Item	*Budgeted by Board*	*Recommended by Council*	*Amount Reduced*
110J—Supervisor Bldgs. & Grounds	$ 12,500	0	$ 12,500
212 —Salary of Coordinator	9,975	0	9,975
213 —Salaries of Teachers	2,680,122	$2,542,122	138,000
213A—Bedside Teachers	18,750	15,000	3,750
214B—Individual Supplementary Instruction	91,215	70,215	21,000
216 —Other Salaries, Instruction	28,100	19,400	8,700
230C—Audio-Visual Materials	25,134	20,634	4,500
240 —Teaching Supplies	125,000	108,820	16,180
520C—Field Trips	20,000	0	20,000
610A—Salaries, Janitors	292,710	259,160	33,550
1113—Special Projects—Salaries, Summer School, Adult School	28,340	16,340	12,000
1240C—Equipment, Instruction	59,893	47,893	12,000
Surplus (anticipated)	99,000	24,000	75,000
			$367,155

After having considered the facts presented and having considered the arguments of counsel as to the legal principles applicable to this matter, the Commissioner finds and determines as follows:

In order to provide a thorough and efficient system of education in the School District of Sayreville, it is necessary that the following amounts be restored to the school budget from the amounts reduced by the Council:

Item	*Reduction by Council*	*Amount Restored*
213 —Salaries of Teachers	$138,000	$106,000
213A—Bedside Teachers	3,750	3,750
214B—Individual Supplementary Instruction	21,000	21,000
216 —Other Salaries, Instruction	8,700	8,700
520C—Field Trips	20,000	15,000
610A—Salaries, Janitors	33,550	25,050
		$179,500

The Commissioner therefore directs that there be added to the certification of $3,804,323 for current expenses previously made by the Council to the Middlesex County Board of Taxation the amount of $179,500, making the total certification of the amount to be raised by local taxation for the School District of Sayreville as follows:

Current Expenses	$3,983,823.00
Capital Outlay	94,593.00
Debt Service	5,035.20
	$4,083,451.20

COMMISSIONER OF EDUCATION

April 15, 1968

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held February 13, 1968, in the school district of the Township of Waterford, Camden County, for one member of the Board of Education for an unexpired term of two years were as follows:

Ruth L. Bevan	282
Joseph M. Palladino, Jr.	285

Pursuant to a letter request from Candidate Bevan dated February 26, 1968, the Commissioner directed an authorized representative to conduct a

recount of the ballots cast. A recount was held March 1, 1968, at the office of the Camden County Superintendent of Schools, in connection with a recount to determine the ballots cast for three members for the full term of three years. Unfortunately, through some mischance, Candidate Palladino was not notified that the recount was to take place and he was, therefore, not present or represented. It also appeared that ballots contested at this recount (Exhibit B) for the three-year terms were incorrectly added to the tally for Candidate Bevan. Under such circumstances the Commissioner ordered a recount of the balloting for the unexpired term at which both candidates could be present. Thereafter, on April 3, 1968, a second recount limited to the votes cast for a member of the Board of Education for the unexpired two-year term was held at the office of the Camden County Superintendent of Schools with both candidates present. At the conclusion of the recount, with all ballots counted and none referred for the Commissioner's determination, the final tally was as follows:

Ruth L. Bevan	285
Joseph M. Palladino, Jr.	285

The Commissioner finds and determines that there was a failure to elect a member to fill the unexpired two-year term on the Waterford Township Board of Education. The Camden County Superintendent of Schools is therefore authorized under the provisions of *N. J. S.* 18A:12–15, and is hereby directed, to appoint from among the residents of the school district of Waterford Township a citizen who holds the qualifications for membership to a seat on the Board of Education, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

April 19, 1968

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF SOUTH RIVER, MIDDLESEX COUNTY

For the Petitioner (Golaszewski), Robert A. Blanda, Esq.

For the Board of Education of the Borough of South River, Daniel L. Golden, Esq.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for candidates for three seats in the Board of Education of the Borough of South River, Middlesex County, at the annual school election held February 13, 1968, were as follows:

	At Polls	*Absentee*	*Total*
Alexander Lach	758	0	758
George Wykpisz	602	0	602
Joseph M. Bodnar	534	1	535
Milton Golaszewski	533	1	534
Claire H. Miller	411	1	412

Pursuant to charges of irregularities in the conduct of the election filed by Candidate Golaszewski, hereinafter petitioner, by letter dated February 14, 1968, an inquiry was held by the Assistant Commissioner in charge of Controversies and Disputes at the Middlesex County Court House, New Brunswick on March 5, 1968. From the testimony heard and the documentary evidence received the following facts are elicited.

When the polls were declared open at the junior high school at 2 p.m., the voting machine could not be operated. Two telephone calls were made to the office of the Secretary of the Board of Education who was making a round of the five polling places. After receiving the message the Secretary arrived at the junior high school at approximately 2:30 p.m. Using the "Instruction Manual" (Exhibit R-1) supplied by the Middlesex County Board of Elections and in company with the election board chairman, the Secretary was able to make the machine operative. Three votes were then cast. At that point the instruction model had not been removed from the rear of the machine and placed on the election table. In order to open the compartment housing the instruction model, the election official turned the key in lock #2 down. This resulted in locking the machine so that it was again inoperative. A call was then placed to the warehouse of the Middlesex County Board of Elections for a repairman who arrived at about 3 p.m. and placed the machine in operating condition. It appears, therefore, that except for the brief period in which three votes were cast, the voting machine was out of operation for approximately one hour. There was no further difficulty or delay and the voting proceeded normally from then on.

Several witnesses testified that a number of voters who appeared at the junior high school polling place were unable to remain until the voting machine was fixed because they had to report to work at the 3 p.m. shift at local industrial plants. Petitioner submitted affidavits from seven voters professing their inability to remain at the polls and their reasons therefor.

The testimony also reveals that two voters at the Lincoln School polling place signed affidavits that they were properly registered voters although their names did not appear in the signature copy registers. They were accordingly permitted to cast a ballot. A subsequent check at the Middlesex County Board of Elections disclosed that the registration of one of the voters had been inactive since 1966 and that the second voter was registered at a different address than the one supplied in his affidavit. (Exhibit P-1) Petitioner further testified that the unregistered voter was transported to the polls by Candidate Bodnar.

Petitioner contests the election as it pertains to Candidate Bodnar and himself and asks that the result be set aside. He contends that a number of voters were prevented from casting their ballots because of the inoperative voting machine and avers that if this had not been so, the result of the election would have been otherwise. The result would likewise have been different, petitioner believes, had the two voters who improperly signed affidavits not been permitted to vote.

The Commissioner finds no ground to void the election because of the inoperative voting machine. Unfortunate though this occurrence was with its consequent delay for some voters and loss of opportunity to vote by others, it

cannot be clearly shown to have had a direct bearing on the ultimate result. All voters who appeared at this polling place while the machine was inoperative suffered the same inconvenience. It is a fair inference that some were able to remain and voted, some may have been able to return later to vote, and others could not wait or return and failed to cast a ballot. There is, however, no way to ascertain what votes would have been cast for which candidates had the machine's malfunction not occurred. The Commissioner holds, therefore, that the election cannot be set aside on the grounds of voting machine malfunction in the junior high school polling place.

A more serious problem, however, is presented by the vote of the unregistered voter. *N. J. S.* 18A:14–44 requires of a voter that he "be *registered* to vote in an election district included within the school district or the respective polling district of the school district * * *." The signature copy registers used in school elections are derived from the register of voters of the last preceding general election. See *R. S.* 19:12–4 and *N. J. S.* 18A:14–47. Since the voter in question here was on the "inactive" list, she was not a registered voter and her name would not have been on the list forwarded by the proper county election official to the school election officials. A person whose registration lapses—by reason of his not having voted in any general election during four consecutive years or for any other reason—cannot be permitted lawfully to vote unless he has reregistered. See *R. S.* 19:31–15.

Since the voter in question was on the inactive list and had not properly reregistered, she was not a properly qualified voter under *N. J. S.* 18A:14–44 and her vote cannot be counted.

It cannot reliably be determined for whom the unregistered person voted. But, since even one vote is enough to affect the outcome of the election as between candidates Bodnar (535) and Golaszewski (534), the election cannot be regarded as conclusive with respect to either of them. See *In re: Dorgan*, 44 *N. J.* 440 (1965). The vacancy thus created must be filled by the county superintendent of schools pursuant to *N. J. S.* 18A:12–15.

Having reached this conclusion, the Commissioner finds no necessity to consider the matter of the second voter whose affidavit gave an incorrect address.

The Commissioner finds and determines that the will of the electorate cannot be fairly and clearly determined with respect to the election of a third candidate to a seat on the South River Board of Education and such seat is, therefore, declared to be vacant. The Middlesex County Superintendent of Schools is directed to fill the vacancy in the Board by the appointment of a qualified citizen who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

April 23, 1968

IN THE MATTER OF "T," BY HER PARENTS AND NATURAL GUARDIANS,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY,
BERGEN COUNTY,
Respondent.

For the Petitioners, Daniel I. Lubetkin, Esq.

For the Respondent, Tennant and LaSala (George G. Tennant, Jr., Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioners are the parents of a handicapped daughter, hereinafter "T," now 11 years old, who is receiving her education in a program provided by respondent Board in a special class in a nearby school district. Petitioners allege that the educational program thus provided is unsuited to their daughter's particular needs, and seek an order directing respondent to provide suitable facilities and programs of education for her. Respondent denies that the program that it has provided is unsuitable, and asserts that the classification and placement of the child conform to the requirements of the statutes and the rules and regulations of the Commissioner and State Board of Education for the education of handicapped children.

Testimony and documentary evidence were presented at hearings conducted at the County Administration Building, Hackensack, on November 2 and December 13, 1967, and March 5, 1968, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

"T" was born on December 1, 1956. In the spring of 1962, her parents requested that she be placed in the public schools of respondent's district. In October of that year, after studying reports from a psychologist, a neurologist, and a speech therapist, and after his own examination, the school district's psychological examiner concluded that the child was "severely organically impaired and mentally retarded." (Tr. 319) He classified the degree of mental retardation as functionally in the "trainable" range. As a result of this classification, "T" was placed in a class for trainable children conducted by the Northvale public schools. She has continued in that class to the present time. The school psychological examiner, now a member of respondent's child study team, testified that the child has been periodically reevaluated at least four times since the initial classification, and that these reevaluations gave no indications for a change of classification.

The thrust of petitioners' complaint is that (1) "T" has been improperly classified as a trainable retarded child, and (2) the educational program in which she has been placed as a result of such classification is not suitable for her needs.

The testimony establishes that the child suffers from a neurological impairment which interferes with her "ability to perform and utilize incoming information" (Tr. 11); that is to say, she has perceptual disorders (Tr. 20) which are evidenced by various visual motor difficulties (Tr. 22, 24, 32, 33). There is mental retardation, which the psychiatric testimony describes as a "secondary disability" in relation to the primary disability of neurological impairment (Tr. 25), but which, for educational purposes, causes her to be classified by respondent as "trainable" mentally retarded. (Tr. 186, 319, 338, 343) While there is no basic disagreement that no meaningful intelligence quotient (IQ) can be determined for a child with "T's" perceptual disabilities, respondent's psychological examiner originally, and its child study team subsequently, have determined that for educational purposes she functions within an IQ range of 25 to 40. It was the unqualified belief of the psychologists and teachers who testified on behalf of respondent that the child will not advance to the classification of "educable." Petitioners' witnesses, on the other hand, believe that her potential, under suitable educational circumstances, is at a higher level than that at which she is presently performing. (Tr. 223, 228, 231, 273, 280)

It is the contention of petitioners that the present educational placement of their daughter in a trainable class does not make adequate provision for the development of the potential which they contend she possesses. They call attention to several characteristics of the class at Northvale in support of this contention, including (1) the age span (from 6 to 12 years) of the seven pupils in the class, (2) the presence of five mongoloid children in the class, (3) the alleged insufficiency and inadequacy of teaching materials of the particular kind needed for training in perceptual and visual motor skills, (4) the allegedly insufficient amount of time available to the teacher for individualized attention to "T's" educational needs, and (5) the implied orientation of the teacher and the program to the needs of the mentally retarded, as such, rather than to the special needs of the neurologically impaired. The testimony of a private teacher who specializes in working with neurologically impaired children, and a clinical psychologist, both of whom have worked with this child, is that she has made significant progress in speech, in eye-hand coordination, and in body coordination under conditions in which the teacher was individually addressing the child's needs, with materials particularly adapted to a program for a child with her perceptual handicaps. The witnesses expressed their conviction that placement of "T" in a class with other children like her, with supplemental individual instruction, would best serve her needs.

"T's" present teacher, on the other hand, believes that she is presently performing at her capacity, and that her presence in a class with mongoloid children and with younger children does not interfere with her educational progress because her "problems are the same as the other children in the class." (Tr. 152)

During the 1966-67 school year, respondent arranged to have "T" given daily supplemental instruction by a teacher of neurologically impaired children. The purpose of this instruction was "to supplement her education in the developmental areas and to see if intensive work in these specific areas of difficulty would raise her whole level of functioning." (Tr. 369) At the end of this period of supplemental instruction, the teacher concluded that there is no "reasonable hope that T's condition will improve to the extent that she

could be reclassified out of and apart from the class of trainable children." (Tr. 377, 378) The teacher further recommended that this program of supplemental instruction be discontinued, because of her feeling that the child was not profiting sufficiently from it. (Tr. 399, 400)

* * * * * * *

The Commissioner has carefully reviewed and considered the report of the hearing examiner as set forth above. He recognizes the problem herein as one in which there may conceivably be wide differences of professional opinion. He further recognizes and shares with petitioners their deep concern that their daughter may have such educational opportunity as will help her to develop to her fullest potential. There has been no lack of such concern upon the part of respondent and its administrators, specialists, and teachers.

The statutes of New Jersey have, since 1954, made specific provision for the identification, classification, and education of public school children having learning handicaps, whether they be caused by mental or physical impairment. See *N. J. S.* 18A:46–6 through 46–19. Boards of education are required to provide suitable educational programs for pupils so classified. *N. J. S.* 18A:46–13

On the basis of the testimony presented in this matter, the Commissioner concludes, and so finds, that "T" was properly classified by respondent for educational purposes as trainable mentally retarded, and as such was placed by respondent in a class for trainable children. The petition herein is accordingly dismissed.

COMMISSIONER OF EDUCATION

April 25, 1968

Appeal pending before State Board of Education.

IN THE MATTER OF THE TENURE HEARING OF VICTOR J. MASTRONARDY, BERGEN COUNTY VOCATIONAL-TECHNICAL SCHOOL, BERGEN COUNTY

For the Complainant, Frank J. Cuccio, Esq., County Counsel (James Checki, Jr., Esq., of Counsel)

For the Respondent, Clapp & Eisenberg (Jerome C. Eisenberg, Esq. and Stuart L. Pachman, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Respondent, a teacher under tenure in the Bergen County Vocational-Technical School, is charged with conduct unbecoming a teacher in connection with a student "strike" at the school in May 1966. The charges were made in a letter from the Superintendent of Schools to the Vocational Board of Education, and were certified to the Commissioner by that body on May 13, 1966, as being sufficient, if true in fact, to warrant dismissal of respondent.

After a lengthy period during which counsel carried on pre-hearing discovery proceedings, this matter came to hearing on September 22, 1967, at the County Administration Building, Hackensack, before a hearing examiner appointed for the purpose. Subsequent sessions of the hearing were held on October 16 and 17 and December 4, 1967, and on January 30, 1968. The report of the hearing examiner is as follows:

It is stipulated that the charges against respondent in this matter are as set forth in a letter from the Superintendent of Schools to the Board of Vocational Education, dated May 12, 1966, which reads in relevant part as follows:

> "I have accumulated evidence to support my allegation that Mr. Mastronardy has been instrumental in instituting a student's strike at the school which occurred on May 4, 1966. Information has come to my attention from teachers and students that on the day preceding the strike, during the strike and on the day after the strike, Mr. Mastronardy discussed the details and sequence thereof with many students. Initially, he encouraged them to go on strike; thereafter he told them that they had acted properly; and finally he advised them that he would help the students who had done the good organizational work in the strike to pass the course."

The testimony makes it clear that the strike referred to in this letter, which began on May 4 and continued in a lesser degree for two more days, developed as a protest against a proposal to lengthen the school day at the beginning of the 1966-67 school year. While the testimony does not establish precisely when the administration became aware of the impending strike, it is clear that the subject was discussed among many of the students before it actually occurred. Not surprisingly, some of this discussion was carried into classrooms, and teachers became aware that a strike was being considered by the pupils. Respondent testified that he first heard of the possibility of the strike while talking with other teachers on May 2, that there was talk in his classes on May 3 about a strike, and that as he left the building on May 3 he saw signs on the walls announcing a strike for the following day.

On the first day of the strike, many pupils remained outside the building, some carrying signs and picketing. Teachers were requested by the school's principal to endeavor to get their pupils to come into their homerooms and to attend classes. Later in the morning a student assembly was called in the gymnasium, where the pupils' concerns were discussed. Later in the day the administration met with members of the Student Council, and with the faculty. On May 5 and 6 some of the pupils returned to their classes, but because of false fire alarms and "bomb scares," classes were dismissed early on both days. Classes resumed normally on the following Monday, May 9, although the Superintendent testified that the "confusion and upset carried through for the remainder of the school year."

It is understandable that the school administration determined to investigate the causes and responsibility for this student misconduct. It is the testimony of the Superintendent and principal that respondent's name, among others, was given in interviews with students. One such interview involved a pupil who had been met by respondent at his classroom door. As a result of what he said to her, she went to a telephone and called her parents. Her parents came to the school, and they, with their daughter, were interviewed by the

school administration. The pupil testified that at the time of the strike, she understood respondent to have said that she and the classmates accompanying her should go outside and stay outside. In her testimony at the hearing, however, she testified that the teacher had "said to go out and get the rest of the students that were outside." (Tr. 350) This incident, it was testified, led the administration to investigate respondent's connection, if any, to the strike. Their investigation led to the charges specified in the letter of the Superintendent recited *supra*.

The evidence in support of the charges rests largely upon statements made to the principal or Superintendent by pupils enrolled in respondent's ninth grade mathematics classes. Some pupils testified that the respondent had said in class, prior to the strike, "If I were you I would go out on strike." However, those who so testified either qualified their testimony to the effect that that is what they *thought* he had said, or *understood* he had said, or testified that they had made their statements to the administration under threat of, or in fear of suspension, or had later made retracting or equivocal statements. Two other pupils who reported to respondent's homeroom on May 4 testified that he had asked them why they weren't outside with the other pupils, and that if they wanted to disapprove of the strike, that was up to them. Other pupils, on the contrary, testified that the respondent had said, "If I were you I would *not* go out on the strike but . . .," in some cases completing the sentence "—I would have my parents write letters to the Board of Education." The hearing examiner does not find that the weight of credible evidence supports the charge that the respondent "encouraged" the pupils to go on strike.

On the charge that respondent had supported the strike by telling the pupils that they had acted properly and that he would help them pass his course, the evidence likewise does not support the charge. Respondent does not deny saying to his pupils, following the strike, that they had had their fun, that they had made their point, and that they had had the administration "on the run." However, his statement that in these remarks he was merely repeating the principal's statements at the student assembly during the strike was unrefuted. He further testified that he had made these remarks as a premise for urging them to return to normalcy and their school work. Further, there is no clear evidence that his offer to help pupils pass their course was related to the strike or its participants. From the beginning of the school year, he testified, he had told his pupils not to worry about failing, that if they would try their best they had nothing to fear. The pupil's statement to the Superintendent (P-5) which asserted this purported promise of help, was later retracted in another statement (R-1), in such a manner that the testimony of the pupil at the hearing cannot be afforded credibility. The hearing examiner finds that the weight of credible evidence does not support the charge that respondent gave his approval to the conduct of the strike or offered special academic treatment to its participants.

In summary, the hearing examiner finds that the charges of unbecoming conduct by respondent Victor J. Mastronardy in connection with the student strike at Bergen County Vocational-Technical School in May 1966 are not sustained by the weight of credible evidence.

* * * * * * *

The Commissioner has carefully considered the report of the hearing examiner and concurs therein. Charges of such gravity as those made against

respondent herein must clearly be supported by convincing evidence. In a matter such as this, where the testimony of pupils is crucial, especial concern must be given to the nature of their statements. See *Palmer* v. *Board of Education of Audubon*, 1939-49 *S. L. D.* 183, 188. The Commissioner is satisfied that the hearing examiner heard ample evidence presented by both parties on the charges herein, and had full opportunity to observe the demeanor of the witnesses. The Commissioner therefore finds and determines that the charges against Victor J. Mastronardy have not been established as true, and that said charges must therefore be dismissed. He directs that respondent be reinstated in his employment by the Bergen County Board of Vocational Education, with all such rights as are assured to him by the statutes.

COMMISSIONER OF EDUCATION

April 25, 1968

JOHN SCHER,

Peitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WEST ORANGE, ESSEX COUNTY,

Respondent,

For the Petitioner, Bernard A. Kuttner, Esq.

For the Respondent, Samuel A. Christiano, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a pupil in the twelfth grade of respondent's high school, became involved in an altercation with a teacher on January 25, 1968. His right to attend school was thereupon suspended by the principal, who so notified petitioner's parents by letter dated January 26, 1968. According to petitioner's pleadings, the letter was received on January 29. Petitioner engaged counsel who attempted to arrange a meeting with the school authorities. On February 2, such a conference was held, at which petitioner's parents and counsel met with the high school principal, two other school officials and counsel for the Board of Education. The school officials refused to lift petitioner's suspension pending consideration of the occurrence and action by the Board of Education.

Petitioner's attorney attempted, through respondent's President, to have the matter considered at a meeting on February 5, but was unsuccessful. It appears that the Board met with members of the school staff that evening in a conference session not open to the public. Petitioner thereupon filed an application for interim relief in the form of an order staying his suspension *pendente lite*. Affidavits in opposition to petitioner's application were filed by respondent, and counsel for both parties were heard by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the State Department of Education, Trenton, on February 7, 1968.

Counsel for petitioner asked for immediate reinstatement of petitioner pending final determination of the controversy in order that petitioner's educational progress and ultimate graduation at the end of this school year would not be jeopardized. Respondent opposed the interim relief requested on the grounds that petitioner's behavior constituted a serious breach of school discipline, that his reinstatement in school before the Board of Education had had sufficient opportunity to act on the matter would be inappropriate and undesirable, and that the Board of Education was prepared to and had already scheduled meetings to act on the matter. Counsel for respondent represented further that the Board of Education conferred with members of its staff on February 5, that it had scheduled a meeting on February 8 to which petitioner and his parents had been invited to be heard, and that the Board intended to take formal action with respect to the matter at a meeting called for February 12.

On the representation of counsel that respondent was prepared to take appropriate measures to hear both sides of the dispute and intended to make a prompt determination, the Commissioner found no compelling necessity warranting his immediate intervention and denied petitioner's application for temporary relief.

Respondent held a meeting on February 8 with petitioner, at which his parents and his counsel were present and were afforded an opportunity to be heard. Respondent made no attempt to hold a full-scale trial in the manner of an adversary proceeding with testimony under oath, cross-examination of witnesses, etc. It did, however, hear petitioner, his counsel, and a guidance counselor who spoke in petitioner's behalf. The teacher who was involved in the incident which precipitated the appeal herein and the high school principal also made statements.

Respondent met again on February 12 but deferred action on the matter herein until the following evening. At that meeting, February 13, the Board adopted a course of action which was communicated the next day to petitioner's parents and counsel by the Superintendent of Schools at a conference in his office and confirmed by the following letter to petitioner's parents dated February 16 over the signature of the Superintendent:

> "At this conference, I, at the Board's direction, expressed to you the Board's position concerning your son John, which is that John not be permitted to return to school because of the serious nature of the incident, together with the boy's previous record. In view of this, the Board is concerned that John may be suffering from some form of disturbance or maladjustment. Therefore the Board requires that John be re-examined by our child study team as per Chapter 29, P. L. 1966. If, as a result of the examination, it is determined that John is suffering from some form of disturbance or maladjustment, the Board is prepared to demonstrate its concern for continuing his education by providing homebound instruction. Upon successful completion of the program of homebound instruction, and when requirements for graduation have been met, a Mountain High School diploma will be awarded."

Petitioner's parents rejected the proposal to have their son examined, and his suspension continued in effect. Petitioner then filed the subject petition of

appeal in which he alleges that his suspension was unjust and that continuing him in such status without a full hearing is unlawful. Before this appeal was heard, respondent called a meeting at 8:15 a.m. on March 1 and by formal action expelled petitioner from its schools.

A hearing of this appeal was commenced on March 7 before the Assistant Commissioner in charge of the Division of Controversies and Disputes at the East Orange High School. By mutual agreement the hearing was limited to the alleged procedural defects in respondent's action and a decision of the Commissioner thereon, with subsequent determination to be made with respect to the need for further hearing.

Petitioner reserves any rights he may have to contest the merits of respondent's action but seeks initially herein to have the procedural validity of his expulsion determined. While he does not contest the principal's authority to suspend him temporarily, petitioner argues that respondent should have taken immediate action to determine the merits of the matter and should have taken prompt action either to reinstate him or to afford him a hearing. Petitioner contends that he is entitled to a formal hearing before the Board at which he would have opportunity to call all available witnesses and to cross-examine them. To date no such opportunity has been afforded him, petitioner avers, and although he was permitted to appear before respondent to present his version of the incident, no other witnesses were permitted, and therefore, he was given no opportunity for cross-examination.

Respondent takes the position that it has made a careful investigation of this matter; that it has heard all persons having knowledge of the facts, including petitioner and his witnesses; that in the light of all the information obtained, including petitioner's complete school record, it believes that petitioner's continued attendance at school might constitute a danger to himself and to the welfare of the other students and staff; and that, therefore, it afforded petitioner an opportunity and required him to have an appropriate examination at the expense of the school district before the matter of his school status would be determined. Petitioner having refused and failed to comply with the condition of a mental health evaluation, respondent maintains it had no recourse but to expel him. In doing so, respondent points out, it gave petitioner and his parents full opportunity to be heard. Respondent admits that no full-scale formal trial was held but contends that such a hearing is not required and cannot be demanded as a matter of right.

The important question raised herein is whether a public school pupil whose expulsion is under consideration is entitled to a hearing, and if so, what form such a hearing must take. This question has been considered by the courts in a number of cases. See *Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution*, 58 *A. L. R.* (2*d*) 903; *Dismissal of Students: Due Process*, 70 *Harvard L. Rev.* 1407 (1957). While most of the court cases involve students at the college level, the principles enunciated are applicable generally to the rights of pupils in the public schools. While in several cases it has been held that no hearing of any kind is required, *Smith* v. *Board of Education*, 182 *Ill. App.* 342 (1913); *Ingersoll* v. *Clapp*, 81 *Mont.* 200, 263 *P.* 433 (1928); *Dixon* v. *Alabama State Board of Education*, 186 *F. Supp.* 945 (*D. C. Ala.* 1960), the majority of courts take the position that some kind of hearing is required prior to expul-

sion. As far back as 1902, in *Morrison* v. *City of Lawrence*, 181 *Mass.* 127, 63 *N. E.* 400 (1902), the court reaffirmed an earlier case (*Bishop* v. *Inhabitants of Rowley*, 43 *N. E.* 191 (*Sup. Jud. Ct. Mass.* 1896)) and quoted from it as follows:

> "'* * * The power of exclusion is not merely an arbitrary power to be exercised without ascertaining the facts; * * * The school committee should have given the plaintiff or his father a chance to be heard upon the facts; or, in other words, should have listened to his side of the case.'"

The Commissioner holds, therefore, that a hearing is a necessary antecedent of an expulsion action.

What form must such hearing take? In *State ex rel. Sherman* v. *Hyman*, 180 *Tenn.* 99, 171 *S. W.* 2*d* 822 (1942), cert. den. 319 *U. S.* 748 (1943), which considered the nature of the hearing required in the expulsion of medical students for having sold final examination questions to other students, the court laid down the following guidelines:

> "We think the student should be informed as to the nature of the charges as well as the names of at least the principal witnesses against him when requested, and given a fair opportunity to make his defense. He cannot claim the privilege of cross-examination as a matter of right. The testimony against him may be oral or written, not necessarily under oath, but he should be advised as to its nature, as well as the persons who have accused him."

In *Dixon* v. *Alabama State Board of Education*, 294 *F.* 2*d* 150 (*5th Cir.* 1961) the court set forth the following standards:

> "The notice should contain a statement of the specific charges and grounds which, if proved, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. * * * By its nature, a charge of misconduct * * * depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board * * * an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report of the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. * * * If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled."

See also *Wasson* v. *Trowbridge*, 382 *F.* 2*d* 807 (*2d Cir.* 1967); *Madera* v. *Board of Education of New York*, 386 *Fed. Rep.* 2*d* 778 (*2d Cir.* 1967).

Applying these principles to the instant case, it is apparent that respondent has complied with the essential elements of due process in its action with respect to petitioner. Petitioner was informed of the charges against him; his parents and counsel attended one conference with the school authorities; petitioner, his parents, his witness, and counsel appeared before respondent and were given full opportunity to speak in petitioner's behalf; and his counsel was afforded a further chance to be heard at a subsequent Board meeting prior to the formal action to expel. The Board also considered the statements of members of its staff who witnessed the incident in question and interviewed other persons including, respondent avers, two pupils whose names were supplied by petitioner. The testimony of witnesses was reduced to writing in the form of affidavits which were supplied to petitioner. Moreover, respondent offered to reserve final decision pending an appropriate mental health evaluation of petitioner, which petitioner rejected. Under these circumstances the Commissioner holds that respondent has fulfilled the procedural requirements prior to an expulsion action demanded by due process.

The Commissioner notes, also, that it is not only within the authority but it is also the duty of a local board of education to administer the procedures for diagnosis and classification of pupils who give evidence of emotional disturbance or social maladjustment. *N. J. S.* 18A:46–6, 8, and 11 Pupils may be refused admission to, or be excluded temporarily from school for a reasonable time pending such examination and classification. *N. J. S.* 18A:46–16 In this case, respondent has taken the position that petitioner's continued presence in the school would constitute a hazard to the physical well-being of himself, his fellow students and the school personnel. The Board asserts also that its psychiatrist, who had examined petitioner previously when he was in sixth grade, had advised that petitioner not be readmitted until a reexamination is made. Under such circumstance the Commissioner holds that respondent's requirement of a mental health evaluation is a proper exercise of its statutory authority.

The Commissioner is constrained to comment further, however, with respect to certain aspects of the manner in which this matter was handled. He can see, for instance, no justification for a delay of five weeks from the time of the suspension to respondent's ultimate determination. Such a hiatus, in a pupil's senior year in high school particularly, can severely damage chances of satisfactory completion of his studies and graduation and his ability to achieve a class standing acceptable for admission to post-secondary school educational opportunities. If such delay is necessary before a final determination is made, the Commissioner suggests that some kind of opportunity to keep up with class work be afforded during such period, either at home, after school hours, in another school, or by other suitable means.

Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which members of a board of education, most of whom have had little specific training in education, psychology, or medicine are called upon to make. The board's decision should be grounded, therefore, on competent advice. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an

essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school. It is obvious that a board of education cannot wash its hands of a problem by recourse to expulsion. While such an act may resolve an immediate problem for the school, it may likewise create a host of others involving not only the pupil but the community and society at large. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The Commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation. In the case under review, the Commissioner calls attention to the fact that although the Board ordered an evaluation of petitioner by its mental health team, it made its determination with respect to his status before such an examination and the recommendations emanating therefrom could be accomplished. The Commissioner suggests that the decision should have been left open until after it had received the results of the examinations and the recommendations made by the examiners.

For the reasons stated, the Commissioner finds and determines that the procedures employed by respondent to expel petitioner from its schools were consistent with the law.

COMMISSIONER OF EDUCATION

April 25, 1968

DECISION OF STATE BOARD OF EDUCATION

On January 25, 1968, petitioner, a twelfth-grade pupil at Mountain High School, West Orange, New Jersey, was suspended from school for allegedly assaulting and battering a teacher. Pursuant to *N. J. S. A.* 18A:37–1 et seq., several "conferences" took place before the local board in the course of which written and oral evidence was presented by both sides resulting in the board's determination on February 13, 1968, that petitioner should not be permitted to return to school.

The contention of the petitioner, sharply disputed by the respondent, is that he did not have an opportunity to present all the evidence in his favor before the local board and the Commissioner of Education of New Jersey on the question of whether an assault and battery did, in fact, take place. He claims, in paragraphs 3, 4 and 5 of his petition of appeal to have had affidavits of eye witnesses and other evidence denying the assault and battery which he was not permitted to bring before the local board or the Commissioner.

Ambiguities in the record leave doubt as to whether such was the case. In order to resolve the matter fully, we remand this proceeding to the Commissioner of Education with the direction to permit petitioner an opportunity to present the additional evidence referred to in paragraphs 3, 4 and 5 of the petition of appeal.

THE STATE BOARD OF EDUCATION

September 4, 1968

JOHN HADDAD, A MINOR, BY HIS PARENTS AND NATURAL GUARDIANS, JOSEPH L. HADDAD AND REGINA HADDAD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY; CHARLES POST, PRINCIPAL OF THE CRANFORD HIGH SCHOOL; HENRY DOSCHER, ASSISTANT PRINCIPAL OF THE CRANFORD HIGH SCHOOL; AND CLARK W. MCDERMITH, SUPERINTENDENT OF SCHOOLS, TOWNSHIP OF CRANFORD, UNION COUNTY,

Respondents.

For the Petitioner, Ira D. Dorian, Esq.

For the Respondents, Sauer and Kervick (George S. Sauer, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a pupil at Cranford High School, appeals from a suspension from school during final examination week in June 1967, and the alleged adverse consequences thereof upon his final grades for the 1966-67 school year. Respondents answer that the suspension was appropriate and necessary, and that any change in petitioner's grades under the circumstances would be harmful and unjustifiable.

A hearing was conducted on January 15, 1968, at the office of the Union County Superintendent of Schools, by a hearing examiner appointed for that purpose. The report of the hearing examiner is as follows:

Petitioner, a junior at Cranford High School in 1966-67, was given an opportunity on June 8, 1967, to make up an English test which he had missed by reason of an earlier absence from school. The test paper was given to him by his English teacher, and the test was written under the supervision and in the presence of a study hall teacher. During the course of the period, petitioner engaged in conversation with another boy who was also taking a make-up test. Petitioner testified that he engaged in the conversation because he was confused about which essay question to answer, since the question typed on the test paper had been crossed out and another question had been handwritten on the paper. (R-1) He said that he asked the classmate only which question he should answer, since he knew that the classmate had already taken that test, and that the classmate answered his query. Petitioner asserts that he does not know why he did not seek assistance from the study hall teacher rather than from his classmate. The teacher saw the incident and advised both boys to tell their English teacher about it before he did. Petitioner duly reported the incident to his English teacher, who indicated that the circumstances would have an adverse effect on his grade in the test. It is significant to note that while petitioner does not regard his conduct in this instance as cheating,

he is aware of the interpretation placed upon his actions by both the study hall teacher and his English teacher.

On the following day, June 9, 1967, during his English class period, petitioner learned from his teacher that he had received a grade of zero on the test for the reason that he was "cheating." Petitioner denied to the teacher that he had cheated, admittedly became angry, and, as he returned to his seat, called the teacher "stupid" and "a jerk." At that time the class period ended, and as petitioner left the room, he made a vulgar remark about the teacher which at least the teacher and one classmate heard. The remark is admitted by petitioner, and because of its clearly vulgar nature, will not be repeated here. As petitioner moved to his next class, the teacher directed him to go instead to the administrative office. Petitioner refused to do so. He testified that he does not know why he disobeyed, suggesting only that he "wasn't thinking." In any event, the vice-principal was informed of the incident and summoned petitioner to his office. Petitioner told the vice-principal what had happened and admitted that he had called the teacher "stupid" and "a jerk," but when asked if he had said anything else, he told the vice-principal that he had not said "anything foul" to the teacher. The vice-principal, after consulting with the teacher and discussing the matter with the principal, told petitioner he was going to recommend a five-day suspension, and asked petitioner if he realized the probable consequences of suspension during final examinations, which were about to begin. Petitioner asked that his parents not be informed, because of his father's ill health. Accordingly, arrangements were made by telephone with petitioner's mother for a conference with the English teacher and the vice-principal on the following Monday, June 12, 1967. Upon the vice-principal's recommendation that petitioner be suspended for profanity, the principal suspended petitioner for five days. The principal testified that it was school policy to suspend pupils for insubordination, open defiance of authority, profanity, or any good cause, and that the grounds on which he based petitioner's suspension were "profanity, open defiance of authority, and for good cause."

The vice-principal testified that at the conference with petitioner's mother on June 12, 1967, he discussed the effect of petitioner's not being permitted to take his final examinations, and explained that petitioner could take two subjects in the 1967 summer school session, and two others in the summer of 1968 (after petitioner had graduated). This would permit petitioner to earn a passing grade in Spanish, which he was clearly failing, and to earn grades in history, chemistry, and mathematics to offset the adverse effects of not taking final examinations on account of the suspension. Petitioner's mother, in rebuttal testimony, did not recall this discussion and explanation about summer school. Petitioner did, in fact, repeat Spanish in the 1967 summer session and earned a passing grade. However, he took no other subject in that session.

At a further conference on June 14, 1967, in which both of petitioner's parents, their counsel, the Superintendent of Schools, and the principal and vice-principal participated, the suspension was reaffirmed. Thereafter, on June 15, 1967, and again on September 18, 1967, petitioner, through his attorney, requested the Board of Education to afford him a hearing on the suspension. (P-1, 3) No hearing was held, but the Board's attorney indicated in a letter dated September 20, 1967, (P-4) that the Board supported the action of the staff. The petition herein followed on October 2, 1967.

In a bulletin to petitioner's teachers dated June 12, 1967, the vice-principal directed petitioner's several teachers to assign an "F" as the final examination grade for petitioner in each subject. (R-2) The bulletin continues:

> "* * * This penalty is severe, and deserved. However, it is not our intention to make the penalty unbearable.
>
> "From examining Jay's record to date, even with 'F's' in all of his exams he should be able to pass all of his subjects for the year except Spanish.
>
> His average for the year will be adversely affected."

In a later general bulletin addressed to all teachers (R-3), the vice-principal directed that:

> "Pupils suspended during an exam should have 'F's' for exams with numerical values not less than 50."

On that basis, petitioner's grade record for the academic year 1966-67 is as follows: (P-5)

	Marking Period Grades				Final	Final
Subject	1	2	3	4	Exam	Grade
Physical Education	B	A	B	B	F	B
Chemistry	C	D	B	D	F	D
U. S. History	C	C	C	C	F	D
English	D	C	C	C	F	C
Spanish	F	F	F	F	F	F
Mathematics	C	B	B	C	F	C

It is petitioner's contention that the suspension was unduly harsh in the light of the offense and the vice-principal's directive, and that the suspension, affecting as it did petitioner's opportunity to take all of his final examinations, takes on a disproportionate severity to a penalty for a similar offense at any other time of the academic year. Petitioner therefor seeks to have the suspension set aside and to be given an opportunity either to prepare for and take all final examinations for 1966-67, except in Spanish, or, in the alternative, to have his grades for the year averaged only on the basis of the four marking period grades, which, he says, will result in grades of "C" instead of "D" in history and chemistry.

In support of the petition, counsel contends additionally that the punishment in this case is arbitrary and unreasonable in its harshness, in its lack of relevance to the offense, in its employment of academic grades as a means of punishment, and in causing disrespect for the authority of the school. Counsel further contends that the grounds for suspension do not fall within the grounds authorized by the statute, *R. S.* 18:14–50 (now *N. J. S.* 18A:37–2 in part) which reads as follows:

> "Pupils in the public schools shall comply with the regulations established in pursuance of law for the government of such schools, pursue the prescribed course of study, and submit to the authority of the teacher. Continued and willful disobedience, open defiance of the authority of the teacher, or the habitual use of profanity or obscene language shall be good cause for suspension or expulsion of any pupil from school."

It is argued that petitioner had not in fact cheated, that he had been unfairly accused of doing so, that his language did not constitute "habitual use of profanity or obscene language," and that his conduct was not "open defiance" of the teacher's authority. Counsel cites the Commissioner's decisions in *Hoey* v. *Lakewood Board of Education*, 1938 *S. L. D.* 678; *Pasko* v. *Dunellen Board of Education*, 1961-62 *S. L. D.* 188; and *Wermuth* v. *Livingston Board of Education*, 1965 *S. L. D.* 121, in support of petitioner's contentions. Petitioner further contends that the opportunity to "make up" grades in summer school is impractical and imposes an unreasonable burden upon him.

Respondent maintains that its suspension policy is a reasonable exercise of its authority, that petitioner's suspension is consistent with that policy, and that while the adverse effects of a similar suspension earlier in the year could be offset in the class performance which followed, summer school, in an instance such as this, presents not only an opportunity to offset the adverse effects, but even to improve the final grade.

The hearing examiner finds that:

1. Petitioner was not shown to have "cheated" by receiving substantive information, but it is undisputed that he communicated improperly and without permission with another pupil during a test.

2. Petitioner's language to and about his English teacher was within the hearing of other pupils as well as of the teacher herself, and was abusive, disrespectful, and intentionally vulgar. The hearing examiner cannot accept petitioner's statement that he did not know at the time that his statement about the teacher was "foul." While he may not have known its exact meaning, it strains credibility to conclude that he was not aware of its connotation.

3. Petitioner willfully disobeyed his English teacher's order to report to the administrative offices.

4. The suspension which was recommended by the vice-principal but imposed by the principal was grounded upon petitioner's use of profanity, and his open defiance of authority.

5. The effect of assignment of a grade of "F" for the final examination grade was to lower petitioner's final grades in chemistry and history, but not in English, mathematics, and physical education.

6. Opportunity was and is available to petitioner to endeavor to raise his grades in summer session under respondent's grading policy.

* * * * * * *

The Commissioner has carefully reviewed the findings of fact reported by the hearing examiner, and concurs with the conclusions reached. The Commissioner holds that the suspension imposed upon petitioner was based upon proper grounds. Petitioner's communication with a classmater during an English test, whatever its purpose, was clearly improper, and imposed upon his teacher the almost impossible duty of determining whether he had or had not "cheated." Whether or not petitioner was, in fact, cheating, his subsequent disagreement with his English teacher, even in his admitted emotional state, did not justify the public use of grossly abusive, insulting, and vulgar remarks to or about her. Nor can his willful disobedience of his teacher's order to report to the administrative office be condoned.

There is no procedural defect in the imposition of the suspension. In today's large, complex schools, the employment of a vice-principal, as here, to investigate and recommend action to the principal is well-recognized procedure. The principal, upon ascertaining the facts, exercised that statutory authority to suspend petitioner. That written notice of the action did not go to the parents was clearly in deference to the ill health of petitioner's father, and does not constitute a defect in the procedure. Indeed, two parent conferences were held, one with counsel present. The Commissioner knows of no requirement in law that a hearing be afforded a pupil and/or his parents by the board of education in the case of a suspension under circumstances such as those herein. It is shown that the Board was informed of the suspension and acquiesced in the action of the principal.

Under ordinary circumstances, then, it is clear that the suspension in question would be justifiably and properly imposed. The Commissioner is asked, however, to consider the consequential effects on the student's grades and to hold that the punishment of suspension, because of those effects, was too severe. This would amount to a holding that during a particular period of the academic year—final examinations—a school's right to impose what would otherwise be a reasonable penalty for a serious infraction is limited. This the Commissioner will not do.

The Commissioner's decisions in *Hoey* v. *Lakewood Board of Education* and *Pasko* v. *Dunellen Board of Education*, *supra*, are relevant only in that they represent the exercise of the Commissioner's authority to review the severity of punishment. In both cases the Commissioner found that expulsion, or, in *Hoey*, suspension tantamount to expulsion, was not warranted. In the instant matter, the Commissioner holds that a five-day suspension in itself does not constitute an unreasonable exercise of authority for the offenses committed in spite of the consequential grade effect. Although it is preferable for a student to be allowed to participate in examinations, the school authorities cannot be deprived of their discretion to assure order in school affairs and to control the pupils even to the extent of exclusion from examinations. The Commissioner holds that this discretion was not abused in this case.

But it is the policy of the Commissioner that grades themselves are not to be used as a means of punishment. In *Wermuth* v. *Livingston Board of Education*, *supra*, the Commissioner considered the impact of suspension upon academic achievement. In this connection, he said, at page 128:

> "The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired results and is educationally not defensible. Whatever system of marks and grades a school may devise will have serious inherent limitations at best, and it must not be further handicapped by attempting to serve disciplinary purposes also. Attention is called to the statement of the Office of Secondary Education of the New Jersey State Department of Education in its publication 'Secondary School Bulletin,' Volume 20, No. 5, dated March 1964 and entitled: 'Suspension and Dropouts.'
>
> "This enunciation of a philosophy with respect to suspension and marks should not be interpreted as an erosion of either authority of the school staff or of the desirability of maintaining good order and high standards of behavior in public schools. 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. Such results are attained, to the Commissioner's knowledge, by the great majority of school staffs through use of a variety of techniques adapted to the particular pupil and problem without having to resort to frequent suspensions and grade penalties."

The issues in this case are thus narrowed to the following: Given a valid suspension, does the consequential adverse effect on the student's grades amount in itself to the proscribed use of grades as a punishment and, therefore, require some form of mitigation? If so, was there reasonable and sufficient mitigation in the school's provision for summer school make-up?

The Commissioner finds that the punitive effect of the grade consequence, although incidental to the suspension, cannot be denied. The vice-principal's own directive (R-2, 3) clearly acknowledges the obvious fact that petitioner's grades would be "adversely affected." It is worthy of note that the harm to the petitioner's academic standing stems principally from the timing of the infraction and not the infraction itself. There appears no justifiable reason why the grade effect should be superimposed upon the suspension penalty. The academic consequences of the suspension reach well beyond the limits proposed by the Commissioner in *Wermuth*.

Some form of reasonably available remedy, therefore, was in order. The proposal for summer school cannot be regarded as such a reasonable remedy, requiring as it did a minimum of twelve weeks of additional study, half of it after graduation, to recapture some of the loss resulting from a week's suspension.

The Commissioner will not propose specific procedures for dealing in the future with the kind of problem presented here, believing, as he said in *Wermuth, supra*, that the purposes of correction are best served "through use of a variety of techniques adapted to the particular pupil and problem." However, having found that the suspension of petitioner herein had an acknowledged and anticipated adverse effect upon his final grades which became a part of the punishment itself, contrary to the principle established in *Wermuth*, the Commissioner will direct a remedy.

Of the alternate proposals offered by petitioner, the Commissioner selects that which will require him to complete the work of the 1966-67 school year. Therefore, he directs that petitioner be given reasonable time to prepare for, and then submit to final examinations comparable in form and difficulty to those which he would have taken in June 1967, in Chemistry, United States History, English, and Mathematics—but not Spanish, since he has subsequently repeated that subject in summer school. The marks or grades earned in the final examinations will then be employed in determining his final grades in the same manner as if he had taken the examinations at the usual time.

COMMISSIONER OF EDUCATION

April 26, 1968

In the Matter of the Annual School Election Held in the School District of Manasquan, Monmouth County

For the Petitioner, Carton, Nary, Witt & Arvanitis (Stephen C. Carton, Esq., of Counsel)

Commissioner of Education

Decision

The announced results of the voting for three members for full terms of three years each on the Board of Education of the Borough of Manasquan at the annual school election held on February 13, 1968, were as follows:

	At Polls	*Absentee*	*Total*
Walter A. Schlamp	373	6	379
Frederick J. Beam	332	6	338
Clifford C. Ferguson	315	5	320
Eleanor K. Kovats	314	1	315
Frances R. Meyers	300	1	301

Pursuant to a letter request dated February 15, 1968, and a second letter dated February 17, 1968, from Candidate Eleanor K. Kovats, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct an inquiry into the election. The inquiry was conducted by a hearing examiner on March 11, 1968, at the office of the County Superintendent of Schools in Freehold. The report of the hearing examiner is as follows:

The petitioner asks that the Commissioner set aside the annual school election held in Manasquan on February 13, 1968, as null and void on the following grounds: (1) the number of polling places was insufficient and less than required by law; (2) the polling place was not suitable; (3) the number of voting machines was insufficient to accommodate the large number of voters, resulting in long and confusing lines of persons waiting to vote; (4) the signatures of voters on the poll lists were not compared with those in the signature copy registers; (5) unauthorized persons were permitted to examine the poll lists during the election; (6) the chairman of the election did not announce the canvass of the ballots, as required by statute. The hearing examiner will report his findings on the six allegations in order.

1. The four municipal election districts in the Borough of Manasquan are combined into one school election district, with the polling place located in Manasquan High School. The record of ballots cast at school elections beginning in 1965 is as follows:

1965 Annual School Election	123
1966 Annual School Election	94
1967 Annual School Election	688
1967 Special Referendum	1,200 (approx.)
1968 Annual School Election	508

The relevant statute, *N. J. S.* 18A:14–5, reads in part as follows:

> "Whenever at two consecutive *annual school elections* more than 500 ballots shall be cast in a polling district, the board shall establish a polling district and polling place for each 500 ballots or part thereof cast at the last annual school election * * *." (Emphasis added.)

The hearing examiner finds that the record of the votes cast at the 1966 and 1967 *annual school elections* did not establish a requirement for more than one polling place for the 1968 annual school election. The Secretary of the Board of Education acknowledges that the number of votes cast in the 1967 and 1968 annual elections will necessitate an additional polling district and polling place for the 1969 annual election. (Tr. 69)

2. The statutes require that the polling place for school elections be located "in a schoolhouse or other convenient public place." *N. J. S.* 18A:14–4 The voting in the election contested herein took place in the cafeteria of the High School. On the same evening the Manasquan High School basketball team played an important and heavily attended game in the school's gymnasium. While the Superintendent of Schools testified that the game spectators were separated from the voters by "zoning" gates, it is clear that the parking areas on the school grounds, except for a driveway near the area of the polling place, were crowded with automobiles belonging principally to game spectators. Petitioner and other witnesses testified that voters could not park near the polling place, and that the resulting inconvenience, augmented by cold winds, discouraged voters from exercising their franchise. The Superintendent and Board Secretary testified that the coincidence of the two events in the same building on the same evening could not be satisfactorily avoided, and that in anticipation of crowded traffic conditions, arrangements were made for extra traffic police, and directional signs were prepared to aid voters and game spectators.

3. Two voting machines were provided for the election. Signature copy registers were located at tables by municipal election districts, with signs to direct voters to their respective tables. After the voters had signed the poll lists and received voting authorization slips, they formed into lines leading to the voting machines. It was testified that the voting machines were not separately designated for voters from particular districts, but were used on the basis of availability to a voter having an authorization to vote. The testimony establishes that during the first hour of voting, when many voters were present, the lines waiting to cast their ballots at times became intermingled and confused with the lines of voters waiting to sign poll lists and receive voting authorization slips. That there was confusion, especially during the first hour of voting, is evident. However, the hearing examiner finds no evidence that any voter was thereby deprived of his right to vote, or that any vote was improperly cast as a consequence of the confusion. While it was testified that the voting during the first hour is typically heavy in this school district, there is no clear evidence that for the total number of votes cast in this election, the two machines which were provided were inadequate. *Cf. N. J. S.* 18A:14–21.

4. There is no doubt that the election officers did not in all cases compare the signatures on the poll lists with those in the signature copy registers. Some witnesses testified that their own signatures were not compared, and that they

saw other voters receive voting authorizations without such a comparison of signatures. Other witnesses testified that their signatures were compared. The chairman of the election testified as follows: (Tr. 120)

> "Q Now, Mr. Miller, you have heard the testimony today with respect to the election. Is there anything you wish the Commissioner to know about the way the election was conducted?
>
> "A Yes. Mr. Newman, the Board Clerk, stated that all members of the Board of Election were members of the regular Election Board, that is Primary, General Election, for quite a few years.
>
> "While doing that, you become familiar with the persons in your district to a certain extent. If you know each person that comes up there, practically know them, you would naturally know they were registered and voted before.
>
> "For that reason, some of the signatures were not verified. But any voter in the district, if you didn't know, weren't sure of, he was told to give the address and then they would check with the signature—the signature would be checked from the register.
>
> "That way, all the districts knew practically everybody that been coming in year after year for both Primary and General and whatever special elections there were."

The hearing examiner finds that the election officers did not, as required by statute (*N. J. S.* 18A:14–51 and 56), compare the signatures of all voters before issuing voting authorizations. However, no challenger testified that he had challenged any voter's qualifications to vote, nor is there any evidence that any unqualified person cast a ballot in the election.

It is petitioner's contention, however, that a voter is not eligible to receive a ballot until his signature has been compared and found proper. *N. J. S.* 18A:14–51 Thus, petitioner argues, those persons whose signatures were not so compared were, in fact, ineligible voters, and the entire election should therefore be set aside. (Tr. 28)

5. Several witnesses testified that on more than one occasion during the course of the voting a person not officially associated with the election or appointed as a challenger examined one or more of the poll lists bearing the signatures of those who had voted. No evidence was offered to show that this activity, even if not authorized, in any way affected the outcome of the election.

6. The petitioner in this matter asserts that she was unable to determine clearly the outcome of the voting at the conclusion of the canvass of ballots cast on the voting machines. The difficulty arose not from a failure to announce the canvass of the votes cast on the voting machines (Tr. 88), but because the final totals which would decide the contest between Candidates Kovats and Ferguson could not be obtained until the canvass of civilian absentee and military service ballots became available. The Secretary of the Board testified that he received this information from the County Superintendent of Schools at approximately 9:45 a.m. on February 14, the day following the election. The relevant statutes (*N. J. S.* 18A:14–59 and 61) require the judge of the election to announce publicly the results of the voting in the district.

To this total the Secretary adds the results of the absentee voting as certified to him by the county board of election and compiles a canvass of the entire vote, and announces the result thereof. The hearing examiner finds no evidence of failure in performance of duty on this charge.

In conclusion, the hearing examiner reports that he finds no evidence that any of the conditions complained of by petitioner, even where there was a clear failure to compare signatures as required by statute, changed the result of the election. While the confusion of large crowds, and the awkwardness occasioned by lack of nearby parking space are regrettable, the evidence fails to support an inference that any person was deprived of his vote, or that any improper vote was cast.

* * * * * * *

The Commissioner has reviewed the findings of the hearing examiner as reported above and concurs therein.

It is unfortunate that the combination of circumstances present in the election herein was such as to generate confusion and inconvenience, and give rise to a conclusion that had conditions been otherwise, the outcome would have been different. The evidence does not support such a conclusion. The Commissioner is deeply concerned that in many school elections only a small percentage of the qualified voters cast their ballots on matters vitally affecting the educational welfare of the children of the State. To the end that no voter may be discouraged from exercising his franchise because of avoidable inconvenience, the Commissioner urges boards of education to make all reasonable preparations to provide for foreseeable voting needs.

However, it is well established that an election will be given effect and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love* v. *Board of Chosen Freeholders*, 35 *N. J. L.* 269 (*Sup. Ct.* 1871); *Petition of Clee*, 119 *N. J. L.* 310 (*Sup. Ct.* 1938); *Application of Wene*, 26 *N. J. Super.* 363 (*Law Div.* 1953), affirmed 13 *N. J.* 185 (1953) There has been no such showing herein. The departure from statutory requirements in the admitted failure of the election officers to compare all signatures cannot be construed to disfranchise qualified voters.

"Failure of election workers to compare signatures as provided by statute cannot be upheld or condoned. It does not constitute an irregularity for which the election in this case can be set aside, however, absent a showing that the omission resulted in the casting of illegal votes which could have affected the outcome. *Purdy* v. *Roselle Park Board of Education*, 1949-50 *S. L. D.* 34; *In re Clee supra*; *In re Wene supra*; *Sharrock* v. *Keansburg*, 15 *N. J. Super.* 11 (*App. Div.* 1951)." *In the matter of the Annual School Election Held in the Borough of Totowa*, 1965 *S. L. D.* 62, 65

The Commissioner admonishes the election officers here, as in all school districts, to give full and scrupulous observerance to all requirements of the statutes, and so to conduct and maintain order during the election and the counting of the ballots thereafter that there may be no taint of mistrust or doubt.

The Commissioner finds and determines that Walter A. Schlamp, Frederick J. Beam, and Clifford C. Ferguson were elected at the annual school election on February 13, 1968, to full terms of three years each on the Board of Education of the Borough of Manasquan. The petition herein is accordingly dismissed.

COMMISSIONER OF EDUCATION

April 30, 1968

PRESTON K. MEARS, JR., INDIVIDUALLY AND AS CO-CHAIRMAN AND REPRESENTATIVE OF A CLASS KNOWN AS THE MORRIS COUNTY CLERGY AND LAYMEN CONCERNED ABOUT VIET NAM; THE MORRIS COUNTY CLERGY AND LAYMEN CONCERNED ABOUT VIET NAM; SANFORD CLARKE, LAURA CLARKE, BERNARD KIPPERMAN, AND JOHN RYDER,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,

Respondent.

For the Petitioner, Lewis Stein, Esq. (Leonard Etz, Esq., of Counsel)

For the Respondent, Bertram J. Latzer, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioners' application for the use of the auditorium of the Boonton High School on May 14, 1968, for a lecture has been denied by respondent. They contend that respondent's denial of its facilities is arbitrary, capricious, and unreasonable, and discriminates against them contrary to law, and they seek an order from the Commissioner directing respondent to grant permission for use of its facilities as requested. Respondent denies any improper action, and asserts that, in any event, under the circumstances the issue is moot and therefore the Commissioner is without jurisdiction to consider the petition.

A hearing was conducted on April 26, 1968, at the State Department of Education, Trenton, by a hearing examiner appointed for the purpose. The report of the hearing examiner is as follows:

The petitioning organization herein has a membership of 50 to 60 persons widely distributed among the communities of Morris County. It has two members resident in Boonton, who became members during the latter part of March 1968. It was testified that the greatest concentration of members in any one community in the County is approximately seven. The co-chairman of the organization testified that its purposes are to raise moral concerns about the issue of war in Vietnam and to educate and inform the public about all facets of the Vietnamese war.

On or about March 25, 1968, the organization filed with respondent an application (P-1) for use of its high school auditorium on the evening of

May 14, 1968, to present a lecture by David Schoenbrun, former television and radio correspondent, author, and now a member of the Columbia University faculty. Officers of the organization said that they sought a location adequate to accommodate an anticipated audience of 750 or more people, readily accessible from principal highway routes, and located in the northern sector of Morris County, which, they assert, has not been reached by other programs of similar nature as completely as other areas of the County. They testified that the Boonton High School auditorium meets these criteria, and is the preferred location, which they fully intend to utilize if permission is granted. However, shortly after filing their application they learned informally that it might be denied, and, they assert, they sought other locations as alternates against such denial. Particularly, early in April, they made formal application to the Morris Hills Regional High School Board of Education for use of its auditorium, and learned on April 23 that said Board had approved the application on the previous day. Additionally, they have informal and unofficial permission to use a junior high school auditorium near Morristown, although they consider this facility too small and less readily accessible. Petitioners further testified that no public announcement of the lecture has yet been made, pending determination of the location for the program.

Respondent considered petitioners' application at length at a meeting on April 8, 1968, during which the application was discussed and representatives of the organization present were questioned. A vote of the Board membership on a motion to grant the use of the facilities resulted in a 4–4 tie, and was declared lost. The matter was reconsidered, again at length, at a meeting on April 22 and the members of the Board voted 6–3 against granting the use of the facilities. At no time, petitioners testified, has respondent stated any reason for denying their application, nor has it given petitioners any formal written notice of its action.

Petitioners testified that in the discussion which preceded the votes taken at the two Board meetings on April 8 and 22, it appeared to them that members of the Board had two concerns: (1) the possibility of disturbances or violent action that might attend the proposed lecture, and (2) the controversial nature of the program. One of petitioners' witnesses testified that Board members' questions addressed to him indicated the thinking of the Board. However, counsel for respondent stipulates that the possibility of violence was not a reason for denial of petitioners' application. A Board member testified that at the April 8 meeting he had voted in favor of granting the application, because he felt that the issue of freedom of speech was involved. However, at the second meeting, when he felt that it was clear that other facilities would be available elsewhere, he changed his position and voted against granting the application. While this Board member agrees that respondent's policy for use of its facilities does not restrict such use to residents only, he recalls that at the April 8 meeting the co-chairman had said that he "couldn't think of any members" of the organization who resided in Boonton.

It is respondent's position that it acted in the exercise of its discretion, and that absent a clear showing of abuse of such discretion, the Commissioner should not intervene. In any event, respondent argues, since all evidence shows (1) that petitioners have made a *bona fide* application for use of the Morris Hills Regional High School auditorium, (2) that such use has been granted, and (3) that no notice has been given to the Regional Board of Education that

petitioners did not fully intend to use that facility, there is no real issue before the Commissioner and the matter should be dismissed as moot.

Petitioners counter, however, that its right to be treated fairly and not arbitrarily by respondent cannot evaporate merely because they felt obligated to take other steps to protect their plans for their program. Boonton High School auditorium, they maintain, was and continues to be their first choice; steps to insure a facility elsewhere were taken only when it appeared that there was a possibility that the Boonton High School auditorium might be denied them. Even assuming, but not granting, that the Morris Hills Regional High School auditorium is in every respect equal to the Boonton auditorium with regard to their criteria for selection, they contend, the situation becomes suggestive of the now discredited "separate but equal" doctrine. Petitioners further argue that this matter is within the four corners of the case of *Seamans, et al.* v. *Board of Education of Woodbridge*, decided by the Commissioner January 4, 1968, wherein the Commissioner found that because of its failure to state a reason for denial of an application similar to that herein, respondent Board had acted arbitrarily.

* * * * * * *

The Commissioner has carefully reviewed and considered the findings of the hearing examiner as reported above.

The Commissioner does not agree that this matter is rendered moot by reason of the availability of an alternate location for petitioners' program. The statutes require the Commissioner to decide controversies and disputes arising under the school law. *N. J. S.* 18A:6–9 This is such a controversy, precipitated by an action taken by respondent pursuant to *N. J. S.* 18A:20–34. The fact that petitioners took steps to protect their plans against the eventuality of a rejection by respondent does not diminish their right to pursue this appeal from such rejection. The evidence clearly demonstrates petitioners' intention to utilize the facilities in Boonton if they prevail in this action, and the issue before the Commissioner is therefore real, and within his jurisdiction.

The Commissioner was called upon to consider a similar matter in *Seamans, et al.* v. *Board of Education of Woodbridge, supra.* While certain procedural questions were raised in that case which do not appear in the instant matter, the basic issue is the same: May a board of education deny to a responsible civic organization the use of its facilities without making clear its reasons therefor? In the *Seamans* case the Commissioner said:

> "New Jersey Statute (*R. S.* 18:5–22 [now *N. J. S.* 18A:20–34]) authorize boards of education, 'subject to reasonable regulations to be adopted by such boards,' to permit the use of school facilities, when not in use for school purposes, for, *inter alia:*
>
> "'* * * holding such social, civic, and recreational meetings and entertainments and for such other purposes as may be approved by the board of education.'
>
> "Thus, a local board of education is endowed with broad discretionary power in granting the use of its facilities. But as in all matters wherein the use of discretion is authorized, such use must be found to be reasonable. *Cf. Pelletreau* v. *Board of Education of New Milford*, decided by the Commissioner March 8, 1967, reversed State Board of Education September 6, 1967.

"The Commissioner therefore conceives it his responsibility to examine not only the reasonableness of a board's regulations adopted pursuant to *R. S.* 18:5–22, but also the proper use of the board's discretion in the application of such regulations."

In the instant matter it is as impossible for the Commissioner to examine respondent's reasons for its denial of petitioners' application as it was in *Seamans*, for no reasons are, or ever have been, effectively given. While the testimony of one Board member as to his reason for changing his position at the time of the second vote is enlightening as to him, the absence of a record of the roll call on either vote gives no warrant for a conclusion that his reason became the sole determinant of the outcome of the second vote, when granting the application was clearly defeated. The Commissioner must therefore find, as he did in *Seamans*, *supra*, that respondent has acted arbitrarily and that its action must therefore be set aside.

The determination herein, as in *Seamans*, suggests the need for a word of caution to boards of education. The Commissioner does not contemplate that in every instance of a board's action in the application of its policies and rules the board will expressly formulate a statement of its reasons for such action. To be sure, in many instances the reasons may clearly appear in the minutes of the board's deliberations or even, in some instances, in the language of a resolution. However, the Commissioner recognizes the practical problems confronting boards of education in creating a record of all its discussions and formulating a statement of its reasons for all of its decisions, as if to anticipate a need to defend itself in litigation such as that herein. The evidence of reasonable action is not always so formally generated. But in the absence of such evidence, the Commissioner cannot discharge his duty to examine the exercise of a board's discretion where, as here, it is challenged, unless at the hearing or in some other proper manner the board is willing to come forward with appropriate evidence that it acted with reason and not in an arbitrary, capricious, unreasonable, or discriminatory manner. Thus, while the burden of proof initially and in the ultimate sense rests with the petitioner in an action such as the instant matter, the Commissioner must be able to determine that some reasonable basis exists for the board's actions. Therefore, unless such basis appears to the Commissioner, the board's actions cannot be sustained. Neither in *Seamans* nor in the present matter could the Commissioner find such reasonable basis, and he therefore was impelled to the conclusion that the Board's action was unreasonable and arbitrary.

The Commissioner finds and determines that because of the absence of any indication that there is a reasonable basis for the exercise of its discretion, respondent's denial of its facilities to petitioners, as requested, will be set aside. He directs respondent to grant to petitioners the use of the Boonton High School auditorium in accord with petitioners' application therefor, and in accord with respondent's rules and regulations governing such use.

COMMISSIONER OF EDUCATION

May 3, 1968

BENJAMIN K. CLARK, II, ET AL.,

Petitioners,

v.

BOARD OF EDUCATION OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

For the Petitioners, Barbara A. Morris, Esq.

For the Respondent, Sidney Dincin, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioners in this case protest the alleged maintenance of racially segregated public schools in Englewood, and the purported refusal of respondent Board of Education to effectuate a plan which would eliminate such segregation in grades K–5. They ask the Commissioner to order respondent to take immediate, concrete, positive steps and to employ fair and impartial standards to eliminate all aspects of racial segregation and discrimination in the Englewood school system. Respondent has denied the existence of a pattern of racial segregation and asserts that it has an effective interim and long-range plan for school district organization designed to eliminate the problems which petitioners specifically raise.

The facts in this matter were presented at a hearing before the Assistant Commissioner in charge of Controversies and Disputes on May 17, 1966. Briefs of counsel were subsequently filed.

The instant matter represents the second time that an action has been brought before the Commissioner by Englewood public school pupils alleging racial segregation. The first resulted in a finding by the Commissioner that the pupil-assignment policies then in force resulted in an extreme concentration of Negro pupils in Englewood's Lincoln School, and that where reasonable means exist to prevent it, such a concentration constitutes a deprivation of equal educational opportunity under New Jersey law for pupils compelled to attend the school. The Commissioner thereupon directed the respondent Board of Education to formulate a plan to reduce the extreme concentration of Negroes in the Lincoln School, effective in September 1963. That plan, as approved by the Commissioner, established in the Engle School a central sixth grade for all Englewood pupils of that grade. It transferred from the Lincoln School to the Cleveland, Quarles, and Roosevelt Schools all pupils in grades one through five. Thus only kindergarten pupils in the Lincoln School attendance area remained in that school. No pupils from Lincoln School were assigned to Liberty School, since that school's enrollment in 1962 was already 62% Negro. See *Spruill et al.* v. *Board of Education of Englewood*, 1963 *S. L. D.* 141, affirmed State Board of Education 147. See also *Fuller et al.* v. *Volk et al.*, 230 *F. Supp.* 25 (*D. C. N. J.*, 1964).

On October 22, 1965, the enrollments in grades K–5 in the Cleveland, Liberty, Quarles, and Roosevelt Schools were as follows: (Exhibit P-1)

ENROLLMENT

School	White	Negro	Total	Percentage Negro
Cleveland	405	268	673*	39.8
Liberty	119	309	428**	72.2
Quarles	277	85	362	23.5
Roosevelt	229	161	390	41.3

* Includes 6 white and 10 Negro special class pupils.
** Includes 5 white and 11 Negro special class pupils.

The petition of appeal herein, filed with the Commissioner on March 11, 1966, is directed at the imbalance represented by the distinctly higher percentage of Negro enrollment at Liberty School than at the other three schools. Petitioners, through the testimony of the secretary of the Liberty School Parent-Teacher Association, asserted that beginning in 1962, and at other times to and including March 8, 1966, they had complained to respondent about racial segregation in Liberty School, but that although the Board conducted or sponsored several studies during that period, it had taken no affirmative action to correct this condition.

On March 14, 1966, subsequent to the filing of the petition of appeal herein, respondent adopted the following resolution, which it submitted to the Commissioner by further resolution of May 9, 1966, as a plan for the reorganization of the schools: (Exhibit R-1)

"BE IT RESOLVED BY THE BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, IN THE COUNTY OF BERGEN, NEW JERSEY, that as a first step toward the transition from a 6-3-3 form of school organization to a 4-4-4 form of school organization, the BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, IN THE COUNTY OF BERGEN, NEW JERSEY, adopts the following plan to take effect as of the opening of school in September 1966:

"1. To establish at the Engle Street School and at the Liberty School two city-wide fifth and sixth grade schools and all of the present fifth and sixth grades in the Englewood Public School System will be assigned to either the Engle Street School or to the Liberty School;
"The boundary lines for these two schools will be drawn so as to achieve even distribution of class loads, racial balance and convenient access.

"2. To assign all pupils in grades two, three and four residing in the Liberty School attendance district to the Cleveland, Quarles or Roosevelt Schools; and in connection with this assignment of grades two, three and four from the Liberty School to the Quarles, Cleveland or Roosevelt Schools, the present boundary line between the Quarles and Roosevelt Schools may be readjusted to assign children to the school nearer their homes and to equalize class loads and racial distribution.

"3. Kindergarten and Grade One classes will remain at the Liberty School as per the present boundary lines.

"4. The Superintendent is herewith instructed to proceed with all necessary arrangements, notices, and procedures consistent with the laws of the State of New Jersey to execute these directives.

"5. Provided that the plan meets with the requirements of the law and provided that the Commissioner does not disapprove the plan."

Respondent's Assistant Superintendent of Schools, called as a witness by petitioners, testified that since 1963 the Board has considered several educational plans for the school district, each of which has had as one of its goals the elimination of racial imbalance. He further testified that in order to achieve the long-range goal of a 4-4-4 school organization, plans have been prepared and money appropriated for additions to and renovation of the present High School to house grades 8 through 12 in 1967-68, and 9 through 12 thereafter. From 1968 through 1970, while planned additions to the Junior High School and to Cleveland, Quarles, and Roosevelt Elementary Schools are being made, grades 5 through 8 would be located at the Junior High School and the aforementioned elementary schools would house grades kindergarten to 4. Meanwhile, he testified, Liberty School would continue to house kindergarten and first grade until these grades can be reassigned to other elementary schools. At that time Liberty School will be discontinued for all regular classes. The target date set for the fulfillment of this "long-range plan," as it is designated by respondent, is 1970. Its completion, however, is dependent upon approval of the necessary funds by the Board of School Estimate and the appropriation thereof by the City Council.

It is clear that as long as present pupil assignment areas exist, any grades now contained in Liberty School will continue to be predominantly Negro in their enrollment. Thus, petitioners argue, the focus of their complaint is not the sole fact that predominantly Negro kindergarten and first grade classes would remain in Liberty School during the implementation of the long-range plan; rather it is the total dependence of the "long-range plan" on the provision of necessary funds. It is their view that no concrete assurance can ever be given for correction of the existing imbalance at Liberty School. Petitioners therefore seek immediate relief to correct the conditions in the Liberty School complained of herein.

In *Booker et al.* v. *Board of Education of Plainfield*, 45 *N. J.* 161 (1965) the New Jersey Supreme Court clearly set forth that there is an affirmative duty which State law and policy places on a board of education to correct or alleviate racial imbalance. However, the Court also noted that:

> "* * * the goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities. Considerations of safety, convenience, time economy and the other acknowledged virtues of the neighborhood policy must be borne in mind. Costs and other practicalities must be considered and satisfied. And trends towards withdrawal from the school community by members of the majority must be viewed and combatted, for if they are not, the results may be as frustrating as the inaction complained about by the minority. * * *" *Id.*, at page 180

Thus the prime responsibility of the Commissioner, when confronted with an attack upon a plan proposed by a board of education in purported fulfill-

ment of its obligations with regard to correction of racial imbalance, is to determine whether the local board's plan achieves, in the first instance, "the greatest dispersal consistent with sound educational values and procedures." Some convenient guidelines for this determination were set down by the Court in *Booker* as quoted *supra*. In the instant matter no detailed, definitive testimony was offered concerning "considerations of safety, convenience, time economy and the other acknowledged virtues of the neighborhood policy." However, it was the testimony of the Assistant Superintendent that such considerations were generally taken into account by respondent in its reviw of this and other plans. There was no specific testimony, however, to indicate that "trends towards withdrawal from the school community by members of the majority" will be increased by the plan submitted for the Commsisioner's approval.

The thrust of petitioner's complaint is that "costs and other practicalities" have now become the controlling factor, and that their role with respect to implementation of respondent's plan provides a condition which unreasonably interferes with the "greatest dispersal consistent with sound educational values and procedures." Without attacking the other objectives of respondent's "long-range plan" petitioners argue that the elimination of racial imbalance in the Liberty School is of such prime urgency that it must not be dependent upon and delayed by the sequential fulfillment, if at all, of the long-range plan.

While the Commissioner is desirous that all aspects of racial imbalance shall be eliminated as rapidly as possible, not only in Englewood but wherever it may exist, he does not find respondent's plan to be inconsistent with the criteria established in *Booker*, *supra*. The plan contemplates an orderly reorganization of the school system with a reasonable timetable, utilizing existing facilities and improving and enlarging them to eliminate temporary and substandard classrooms now shared by all children, both Negro and white. As long as the people of Englewood, through their Board of Education, the Board of School Estimate, and the City Council, continue, as here, to make a *bona fide* effort to find a permanent solution to the problem of racial imbalance in their schools, either through the plan as presented herein or as reasonably modified by conditions which take into acount the legitimate criteria cited in *Booker*, the Commissioner will not interfere.

While there exists a racial imbalance in kindergarten and first grade in Liberty School, enrollment data for the current school year reveal an improvement in this respect between October 1965 (Exhibit P-1) and October 1967. At the request of the Commissioner, respondent supplied to him and to counsel for petitioner an enrollment report as of October 2, 1967, which shows the following racial distribution pupils in Liberty School:

ENROLLMENT

Grade	White	Negro	Total	Percentage Negro
Kindergarten	48	66	114	57.9
One	22	40	62	64.5
Five	67	67	134	50.0
Six	77	74	151	49.0
Total	214	247	461	53.6

By comparison, the percentage of Negro enrollment reported for the same date in other schools is computed to be as follows:

Cleveland	51.7%
Quarles	42.6%
Roosevelt	38.9%

No alternative has been advanced by the parties nor conceived by the Commissioner to further resolve this condition without disrupting the progress of the overall plan or introducing disadvantageous factors inimical to the education of all. Under the circumstances, and bearing in mind respondent's *bona fide* efforts noted heretofore, the Commissioner is constrained to dismiss the petition. If no ameliorative action respecting the continuing racial imbalance in Liberty School is taken within a reasonable time, the Commissioner, of course, stands ready to entertain a request for appropriate relief.

Accordingly, the petition is dismissed.

COMMISSIONER OF EDUCATION

May 8, 1968

JEREMIAH J. O'CONNOR,

Petitioner,

v.

BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL, HUNTERDON COUNTY,

Respondent.

For the Petitioner, Mr. Jeremiah J. O'Connor, *Pro Se*

For the Respondent, Wesley L. Lance, Esq.

For Hillsborough Township, Arthur B. Smith, Esq.

For Federated Boards, Thomas P. Cook, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner is a resident of the Township of Clinton, a constituent district of the North Hunterdon Regional High School district. He alleges that respondent has refused to provide transportation to which his daughter is entitled to and from a nonpublic school and asks for an order directing the North Hunterdon Regional High School Board (hereinafter "Regional Board") to provide such transportation.

Applications to intervene *amicus curiae* made by the Hillsborough Township Board of Education (hereinafter "Hillsborough Board") and by the New Jersey Federation of District Boards of Education (hereinafter "Federation") were granted over the objections of petitioner at a conference of the parties held by the Assistant Commissioner in charge of Controversies and Disputes

at Trenton on November 14, 1967. Thereafter, the facts material to this dispute were stipulated and all parties filed briefs.

Petitioner applied to the Regional Board for transportation for his daughter, whose fifth birthday occurred on October 26, 1967, to and from the Mount St. John Academy at Gladstone, New Jersey, a nonpublic school not operated for profit which is located more than two miles and less than 20 miles from petitioner's home. The Regional Board denied petitioner's application on the ground that his child was not eligible by reason of age for admission to the local public schools and therefore is not entitled to transportation at public expense to a nonpublic school.

Petitioner resides in Clinton Township which maintains local public schools for pupils from the kindergarten to eighth grade. Admission of children to the local public schools is governed by the following policy adopted by the Clinton Township Board of Education:

> "To enter kindergarten in the Clinton Township school system a child must reach the age of 5 years on or before October 1st of the same year."

It is agreed that petitioner's daughter did not become five years old until October 26, 1967, and was, therefore, not eligible for admission to the local public schools for the 1967-68 school year.

Clinton Township pupils in grades 9 to 12 attend the North Hunterdon Regional High School of which it is a constituent district. Pursuant to *Chapter* 74, *Laws* of 1967, the Regional Board is responsible for and does provide transportation services to pupils who are residents of its constituent districts and who attend nonpublic schools which qualify under the terms of the Act. However, the Regional Board denied such transportation to petitioner's daughter on the ground that she was not entitled to it under the following policy adopted by it on August 15, 1967:

> "No child ineligible for kindergarten entrance to the public school of the district in which he or she resides will be accepted for transportation under Chapter 74, Laws of 1967 pertaining to non-profit private school transportation by the Board of Education of the North Hunterdon Regional High School District, during the school year."

The pertinent portion of *Chapter* 74, *Laws* of 1967 (*N. J. S.* 18A:39–1) under which this controversy has arisen, reads as follows:

> "* * * When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the state not more than 20 miles from the residence of the pupil regardless of whether such transportation is along established public school routes. * * * Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to this section, said regional district shall assume responsibility for the transportation of all such pupils, and the cost of such transportation for pupils below the grade level for which the regional district was organized, shall be prorated by the regional district among the constituent districts on a per pupil basis after approval of such cost by the county superintendent."

Petitioner contends that his child meets all the criteria established by the statute and is entitled to be transported at public expense to and from the non-public school she attends. In support of his claim he cites an informal opinion of the Attorney General's office which noted that:

> "* * * The fact that a child can attend a private school at an age which would preclude his attendance in the public school is not a material inquiry under the transportation section. So long as the child is kindergarten age and the private school's kindergarten is properly characterized as such, transportation must be provided."

Respondents take the position that petitioner's daughter is not a "school child" within the meaning of the statute. A school child, they urge, can only be one who is eligible to attend school in the district in which he resides and for whose education the taxpayers are obligated to pay. Respondents argue that the statutory provision of transportation to other than public schools is based on the theory that the private school is performing the same function as the public school and thus serves a public purpose. Such a rationale, they contend, does not apply to children who could not attend public school even if they wanted to and furnishing transportation in such case would constitute a gratuitous diversion of public funds to a private purpose.

Respondents find no inconsistency in their position with the informal opinion cited *supra*. They note that the subject opinion was rendered prior to the enactment of *Chapter* 249, *Laws* of 1967, which permits boards of education to refuse to accept pupils by transfer who would not have been eligible by reason of age to enter the local schools that year. Even though they express the possibility that the Attorney General's office might now, in the light of that legislation, express a different point of view, respondents aver that there is no inconsistency in the present positions. They cite that portion of the opinion which states: "So long as the child is of kindergarten age * * *," and argue that some one must make the determination when kindergarten age is reached. To leave this decision to the discretion of parents would result in the application for admission of children of widely divergent ages, respondents believe. Similarly, to permit the determination of kindergarten age to be made by the private school opens the door, respondents urge, to special treatment for children inadmissible to public school because of lack of age, whose parents can afford to send them to private schools. The result, respondents argue, would be a use of public funds for transportation of a pupil to a private school under circumstances whereby public funds could not be used to transport the same child to a public school. Therefore, respondents urge, the proper party to make the determination of kindergarten age is the public school in the district in which the pupil lives. They maintain the legislative intent to reserve the right of the determination of kindergarten age to the local board of education is clearly shown in both the transportation statute (*Chapter* 74, *Laws* of 1967) and in recent legislation governing admission by transfer (*Chapter* 249, *Laws* of 1967). Accordingly, respondents maintain, the Clinton Township Board has adopted resolutions determining kindergarten age to be attainment of five years of age by October 1 in any year. Petitioner's child did not become five years old until after that date and therefore, respondents urge, she is not of kindergarten age and accordingly is not entitled to be transported to school at public expense.

The Commissioner agrees with respondents. Although the transportation statute makes no direct reference to age, it must be read reasonably and in context.

In 1947 the United States Supreme Court affirmed the New Jersey Court of Errors and Appeals and upheld the constitutionality of the predecessor of the transportation statute now under consideration. *Everson* v. *Board of Education of Ewing Township*, 330 *U. S.* 1 (1947) The statute then read, in pertinent part, as follows:

> "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school other than a public school.
>
> "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school . . ." [*R. S.* 18:14–8]

The court held that the law was constitutionally justifiable because the provision for transportation of children to school served a legitimate public purpose and did not amount to the proscribed aid to religion as such. It held that the coincidence of benefit to private school pupils did not make the statute in any sense improper.

Immediately following the *Everson* decision the following paragraph was made a part of the New Jersey Constitution:

> "The Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school." (Art. VIII, § IV, par. 3)

As Judge Larner pointed out in *Fox* v. *Board of Education of West Milford Township*, 93 *N. J. Super.* 544, 559 (1967), the intention which underlay this constitutional provision was "to incorporate the principles of *Everson* into the fundamental law of our State so as to empower the Legislature to provide for transportation of school children to public and nonpublic schools, and to prevent a possible judicial construction to the contrary in the future."

While the constitutional delimitation of the ages at which children may be provided transportation by the Legislature may not necessarily be regarded as an absolute bar to the transportation of children of an age younger than five years, nevertheless this delimitation placed an interpretation on the law as it existed and provided a framework against which subsequent enactments must be set or measured. It is reasonable to conclude that, unless a clear legislative attempt is made to go beyond the constitution's age boundaries, the intent of the Legislature in enacting any subsequent legislation would be to remain within those boundaries. *Chapter* 74, *Laws* of 1967 makes no such attempt to transcend the constitutional framework and, therefore, must be read as intending to provide transportation to school children "within the ages of five to eighteen years inclusive."

The Commissioner notes that the legislative history of the transportation statute reveals an intention, within certain conditions and limitations, to extend benefits to private school children parallel to but no greater than those extended to public school children.

Before 1941 the transportation statute was designed for public school children:

> "Whenever in any district there are children living remote from the schoolhouse, the board of education may make rules and contracts for the transportation of such children to and from school . . ." (*R. S.* 18:14–8)

In 1941 the following amendment was proposed:

> "Children attending schools other than a public school . . . shall be entitled to *the same rights and privileges* as to transportation to and from school as are provided for children of public schools."

The statement appended to the bill said that its object was "to provide for transportation to and from school of children attending other than public schools . . . ."

The Legislature did not adopt the bill in the proposed form but instead limited the mandatory benefits afforded private school children to instances where the public school pupils first received them. The language as actually adopted was this:

> "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school other than a public school . . .
>
> "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school . . ."

Later amendments eliminated the established school route requirement for private school busing and imposed a distance limitation.

It is clear from this progression that the Legislature extended piecemeal to private school students only those benefits that public school students already enjoyed. The "triggering" provision in the 1941 amendment provided for even less of a benefit than the initially intended extension of "the *same* rights and privileges" as public school children were afforded. Furthermore, in the enactment of *Chapter* 74 of the *Laws* of 1967, the entitlement to transportation benefits was specifically excluded to private school pupils who reside in school districts where no public school pupils are transported. Given this intention and context the Commissioner cannot read the transportation act as extending to private school pupils a greater right to transportation than public school children are granted.

The petitioner's interpretation would compel just such a result. He would have his private school child transported to school under circumstances in which no transportation to public school could be afforded because public school attendance would be barred by age. The Commissioner does not believe this to have been among the results intended by the Legislature.

A school district may properly determine the cut-off age at which children may be admitted to public school. Since this date determines the entitlement of a public school pupil to transportation and since the private school pupil is entitled to no greater rights than the public school pupil, the Commissioner holds that it is reasonable and proper for a school board to determine that no transportation shall be provided any child who is ineligible by reason of age to attend public school.

Since petitioner's child did not become five years of age until after the attendance cut-off date of October 1, properly set by the Clinton Township Board of Education, she is not entitled to transportation at public expense.

The petition is, accordingly, dismissed.

COMMISSIONER OF EDUCATION

May 10, 1968

BOARD OF EDUCATION OF THE BOROUGH OF CHATHAM,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHATHAM, MORRIS COUNTY,
Respondent.

DECISION

For the Petitioner, Stickel and Frahn (Carl A. Frahn, Esq., of Counsel)

For the Respondent, McCarter & English (Arthur C. Hensler, Jr., Esq., of Counsel)

COMMISSIONER OF EDUCATION

Petitioner, at the time of this appeal, received pupils from respondent and provided a secondary school program for which it charged tuition. Petitioner alleges that respondent refuses and has failed to pay the full amount of tuition levied for the 1964-65 school year and asks the Commissioner to direct respondent to pay the moneys it claims are due and owing to petitioner. Respondent contends that the tuition rate charged by petitioner was improperly calculated and denies the existence of any arrearage in its accounts with petitioner. The matter is submitted on a stipulation of facts and briefs of counsel.

Prior to September 1962, respondent sent all of its secondary school pupils to petitioner's high school. Beginning with the 1962-63 school year, respondent began withdrawing one grade a year with the result that in 1964-65 only its twelfth grade pupils attended petitioner's high school. At the conclusion of that year the sending-receiving relationship ceased to exist. Agreements entered into between the parties contained no provision relating to tuition payments, but petitioner represents that it consistently fixed the rate in terms of the actual cost per pupil as provided by statute (*N. J. S.*

18A:38–19) and rules of the State Board of Education adopted pursuant thereto. Respondent does not contest this representation.

On January 15, 1962, one of respondent's pupils was injured in his physical education class at petitioner's high school and subsequently brought suit for damages against petitioner and its physical education teacher. Petitioner carried liability insurance to the extent of $200,000. Under the terms of its policy it was required to permit its insurance carrier to conduct all negotiations and the trial of the case. The trial resulted in a jury verdict in favor of the pupil, and a final judgment against the teacher and petitioner was entered in the amount of $335,140. The insurance carrier paid $200,000 toward satisfaction of the judgment, leaving petitioner, who was required by statute to save its teacher harmless (*N. J. S.* 18A:16–6) to pay the balance of $135,140. Petitioner paid the amount under protest. Thereafter it instituted suit against the insurance carrier, seeking reimbursement of the $135,140 on the ground that the tort action could and should have been settled within the limits of its liability policy. That suit is pending in Federal District Court.

When the time came for petitioner to strike its tuition rate for the 1964-65 school year, based on the actual per pupil cost, it included in its expenditures the $135,140 it had paid during that school year in satisfaction of the judgment. Inclusion of this amount resulted in a per pupil rate which was $62.82 greater than would have been so if the cost of the judgment had been omitted. The resulting tuition rate of $1,056 per pupil was audited and approved by the Division of Business and Finance of the State Department of Education. Respondent has declined to pay the $62.82 per pupil, resulting in a balance, according to petitioner's accounts, of $7,950.48 due for the year 1964-65.

It should be noted that 1964-65 was the last year of the sending-receiving relationship between the parties herein, and only respondent's twelfth grade pupils were attending petitioner's high school. If the sum of $135,140 were to be added to petitioner's costs for 1961-62, the year in which the accident occurred and when all of respondent's secondary school pupils were in petitioner's schools, the extra charge to and amount owed by respondent would be $25,703.48, according to petitioner's estimates.

Both parties agree that the figures offered herein are best estimates which are subject to final review and audit by the State Department of Education.

Finally, petitioner represents that neither the petitioner nor its teacher agree, or have ever agreed, that the injuries to the pupil were caused by the negligence of petitioner or its teacher. Petitioner further represents that the jury verdict did not indicate whether the petitioner was responsible only as the employer or also for separate negligence. The respondent does not have sufficient information either to stipulate or to dispute the above representations of petitioner and agrees to their being admitted as representations of the petitioner, but not as stipulated facts.

The statute pertinent to the fixing of tuition rates is *N. J. S.* 18A:38–19, which provides:

"Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the

board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board, and such tuition shall be paid by the custodian of school moneys of the sending district out of any moneys in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of the custodian of school moneys of the receiving district."

Also relevant is the following rule of the State Board of Education governing the computation of high school tuition rates pursuant to the above statute:

"1. *Method of Determining High School Tuition Rates*

a. The term 'actual cost per pupil' for determining the high school tuition rate for a given year referred to in *R. S.* 18:14–7 [now 18A:38–19] shall mean the cost per pupil in average daily enrollment, based upon total operating expenditures for that year for all high school purposes except maintenance and debt service, in lieu of which a rental charge of five per cent of the total original cost of the high school plant, including land and equipment, and subsequent additions thereto shall be made."

Petitioner contends that the right and responsibility to fix the tuition rate for attendance in its schools rests with it alone, subject to the limitation that such rate may not exceed the actual per pupil cost. Petitioner maintains that its calculation of the tuition rate for the 1964-65 school year was in complete accord with the rules and regulations of the Commissioner and the State Board of Education, that it included no sums which were not actually expended during that school year, and that the rate was audited and approved. It finds no authority anywhere which gives respondent the right to question which expenses should or should not be included in fixing the tuition rate. Whether the teacher was or was not to blame is not relevant or material, petitioner urges, for the reason that in any case petitioner had to provide for his defense and save him harmless. The expense thus incurred, petitioner contends, is an unavoidable cost of operating a school district and as such it is proper that the taxpayers of the sending district who have transferred the responsibility for the education of their high school pupils to petitioner, should bear their proportionate share of the cost.

Respondent maintains that the words "actual cost per pupil" appearing in the statute and rule are more fully defined in the rule, *supra*, to mean "total operating expenditures for that year for all high school purposes * * *." It is respondent's position that money paid to indemnify an injured pupil is not paid for a "high school purpose" nor is it an "operating expenditure." A school board which enters into an agreement to send its pupils to another district expects to pay its share of the normal recurring costs of operating the high school, respondent admits, but urges that such expectation does not contemplate being held liable for judgments arising out of the negligence of the receiving district and its employees. Respondent argues further that each local board of education is responsible for its own or its employees' negligence, and liability for payment of judgments arising therefrom is placed by statute (*N. J. S.* 18A:16–6) upon the particular board of education under whose jurisdiction the negligent act was committed. Respondent points out that it

had no control over the amount or kind of insurance protection petitioner obtained, no control over petitioner's employees or their work habits or activities, and, in fact, no control over any policy decisions made by petitioner. It urges that it was in no way responsible for the injuries which gave rise to the tort judgment recovered in this case or for other policy decisions relevant to it and, therefore, it should not be required to pay any part of the liability incurred. In any case, respondent argues, it can find no statutory authority to make such a payment which would reimburse another public agency for its negligent acts.

The Commissioner knows of no case clearly in point on the issue raised herein. Counsel, in their briefs, cite various cases dealing with tuition and sending-receiving arrangements, contracts, negligence and liability, etc., but none of them go to the specific issue of whether a judgment such as that incurred and paid by petitioner herein may be included in the total operating costs for high school purposes used to determine the actual cost per pupil for a particular school year.

In prescribing the method to be employed in calculating the cost per pupil, the State Board of Education has specified two expenditures which cannot be included in the computation: maintenance and debt service. In place of costs for maintenance, the receiving district is permitted to add a charge in lieu of rental, not to exceed five per cent of the total valuation of the school plant. Transportation of pupils is considered to be a local matter, the costs of which are to be borne by each school district. No other expenditures are eliminated by the State Board rule. It may be inferred, therefore, that such other costs as the receiving district incurs may be included in the calculation of cost per pupil for tuition purposes.

The Commissioner notes also that in the "Chart of Accounts" in which the State Board has prescribed the bookkeeping system to be followed by local districts, there is provision for the payment of judgments.

It is true, as respondent points out, that it has no say in or control of the operation of petitioner's secondary school or the costs incurred thereby. That circumstance, however, does not permit respondent to pass judgment on the expenditures made by petitioner to provide a high school education program or to choose which costs it will or will not share proportionately. Respondent has been purchasing a service from petitioner, in this case a high school education program, for its pupils. The price of that service is a proportionate share of the actual costs to petitioner. Had petitioner found it necessary, for some unanticipated reason, to make some other extraordinary expenditure for the purchase of instructional materials, additional personnel, etc., a share of such cost would have been passed along to respondent. Similarly, had petitioner received a windfall such as a gift of a sum of money or materials making certain expenditures unnecessary, respondent would have shared proportionately in the savings. In the Commissioner's judgment, petitioner and respondent were linked in this enterprise on a share-and-share-alike basis, and petitioner had a right to include in the costs to be borne proportionately the total costs of judgments such as that here in question.

No school district is immune from tort actions such as the one which underlies this dispute, and each board of education runs the risk of being involved in such litigation. It is not equitable, in the Commissioner's judg-

ment, to expect school districts which provide a full education program, to assume all of the risks, made even greater perhaps by the increased number of pupils caused by its reception of those from other districts, while the sending district is freed of all such danger. In the Commissioner's opinion both receiving and sending districts must share this hazard. The Commissioner holds that expenditures made to satisfy judgments against a receiving district such as the instant one or to indemnify its employees as required by law are proper items to be included in the total operation costs for that year in determining the actual cost per pupil for tuition purposes.

The year in which the cost for the judgment is to be assessed can only be the year in which the expenditure was made. The Commissioner finds no basis for using the year in which the accident occurred as a basis for calculating per pupil cost. The State Board rule, *supra*, provides that the per pupil cost shall be based upon the total operating expenditures *for that year*. It is clear that the expenditure, therefore, can be included in the calculation of per pupil cost only in the year in which it was paid.

The Commissioner finds and determines that the expenditure of $135,140 made by petitioner to satisfy the judgment against and/or to indemnify its employee, as required by law, may be included in the computation of the actual cost per pupil for the 1964-65 school year for the purpose of determining the tuition rate to be paid by respondent for the pupils enrolled in petitioner's schools. Computation of the tuition rate and the exact amount owed by respondent and to be paid by it to petitioner may be accomplished by agreement or may be submitted to the Division of Business and Finance of the State Department of Education for determination. The Commissioner also makes the further determination that if petitioner should recover any of the damages it has paid as a result of the suit pending, respondent will be entitled to share and to be reimbursed proportionately in such recovery.

COMMISSIONER OF EDUCATION

May 14, 1968

LORRAINE W. EWING,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, ESSEX COUNTY,

Respondent.

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Stickel and Stickel (Fred G. Stickel, III, Esq., of Counsel)

COMMISSIONER OF EDUCATION

Petitioner is a nurse who alleges that she has acquired tenure status in respondent's school district. Respondent denies that she has any such per-

manent status or right to continued employment. There being no material facts in issue, the matter is submitted for determination on briefs of counsel.

During the 1963-64 school year, petitioner was employed by respondent at various times as a substitute for any one of its three school nurses when they were absent. From October 17, 1963, to March 5, 1964, she was thus employed for a total of 11½ days. On March 25, 1964, Mrs. Tuttle, one of the regularly employed nurses, became ill and petitioner was called to take her place. Petitioner worked every school day thereafter until June 12 when Mrs. Tuttle returned for the final two days of school. During all of the 1963-64 school year, petitioner was paid on a *per diem* basis.

At its meeting on August 18, 1964, the Board of Education adopted the following two resolutions:

> "* * * the Board granted a leave of absence for the 1964-65 school year to Mrs. Tuttle with full pay through January 31, 1965, and a review of the matter to be made at the January Board meeting. It was noted that Mrs. Tuttle has over two months sick leave time accumulated, and that this leave would allow her to acquire sufficient time in the pension fund to obtain a pension, should she not be able to return to work."
>
> "* * * the Board engaged Mrs. Lorraine Ewing as a long term substitute nurse at a monthly salary of $495.00."

The two remaining school nurse positions continued to be filled by the nurses regularly employed during the previous school year.

Mrs. Tuttle died in September 1964. Petitioner served as school nurse for the entire 1964-65 school year. She was thereafter reemployed under a contract for the 1965-66 academic year at a salary of $5,400 and for 1966-67 at $5,850. Respondent failed to reemploy petitioner for the 1967-68 school year but engaged another nurse in her stead at a salary of $5,450 per year.

Petitioner contends that she has acquired tenure of employment in respondent's school district under the terms of *R. S.* 18:14–64.1a, the relevant portion of which reads:

> "The services of all school nurses * * * shall be during good behavior and efficiency * * * (c) after employment, within a period of any 4 consecutive academic years, for the equivalent of more than 3 academic years * * *."

Petitioner argues that she was continuously employed by respondent from March 25, 1964, to the end of the 1967 school year. It is her contention that her services for the period from March 25 to June 12, 1964, when tacked to the subsequent three school years for which she was employed (1964-65, 1965-66, and 1966-67) accomplish the equivalency of more than three academic years within the space of four consecutive years as laid down in the statute *supra* for the acquisition of tenure. Petitioner maintains that she ceased to be a substitute on March 25, 1964, and from thence on she was in fact filling a vacancy in the position of school nurse. Therefore, petitioner urges, her employment for tenure purposes commenced when she entered upon her duties on March 25, 1964, with the result that she acquired tenure on March 25, 1967.

There is no question that petitioner was regularly employed for three academic years commencing September 1964 and ending June 1967 and that she failed to be reemployed for the year beginning September 1967. Petitioner's claim to tenure status rests, therefore, on the inclusion of her prior employment, which she contends was as a regularly employed nurse and which respondent maintains was as a substitute nurse, in order to accomplish the more-than-three academic years necessary for its achievement. The issue to be decided is thus reduced to a question of whether any part of petitioner's employment during the 1963-64 school year can be counted toward fulfilling the requirements for the acquisition of tenure status.

It should first be noted that there has been no adjudication by any tribunal of the statute relevant herein governing the tenure of school nurses. The language of the subject statute is identical, however, to that employed in the Teachers' Tenure Act, *R. S.* 18:13–16, which has been subjected to a number of judicial and quasi-judicial interpretations. It should also be noted that the title "teacher" is commonly employed in statutory construction in a generic sense and as such is intended to include school nurses. See, for example, *R. S.* 18:13–8, 18:13–13.1, 18:13–13.2, 18:13–112.4p. Finally, as school employees who "are in positions which require them to hold appropriate certificates issued by the board of examiners," it can be argued that school nurses also come within the ambit of the Teachers' Tenure Act, *R. S.* 18:13–16. The Commissioner holds, therefore, that any judicial interpretation of the Teachers' Tenure Act is applicable to school nurses.

The issue herein is in many respects similar to that raised in *Schulz* v. *State Board of Education*, 132 *N. J. L.* 345 (*E. & A.* 1944), and *Gordon* v. *State Board of Education*, 132 *N. J. L.* 356 (*E. & A.* 1944). In *Schulz*, a teacher who had been continuously employed for three consecutive academic years attempted to tack subsequent service as a substitute to accomplish tenure status. In *Gordon*, the teacher claimed tenure on the basis of an aggregate of 640 days' employment as a substitute out of a possible 732 school days. In both cases the Court distinguished between regularly employed teachers and substitutes and held that employment as a substitute, except where such status is used as a subterfuge for purposes of concealment or evasion, does not come within the purview of the tenure statutes and may not be counted toward attainment of protected employment status.

The issue herein becomes then whether petitioner's employment in the 1963-64 school year was as a substitute nurse or one regularly employed. Respondent maintains that all of petitioner's service in that year was on a substitute basis. Petitioner contends that for the period from March 25 to the end of the year she was in a regularly employed status.

The Commissioner finds that at no time during the academic year 1963-64 was petitioner regularly employed. Certainly prior to March 25 her services were intermittent as she was engaged from time to time to fill in for an absent nurse. There was no reason to believe and nothing has been offered to show that such status changed on March 25 when she was called to perform the duties of a nurse who was ill. The fact that the nurse continued ill and petitioner's employment continued without interruption until June 12 does not alter the fact that petitioner was serving in the place of a regularly employed nurse upon whose return petitioner's employment would immediately cease. Although the Commissioner does not consider it necessary to the

determination of petitioner's substitute status, such a termination did in fact occur. Petitioner's employment ended on June 12, 1964, although the school term continued until June 19 and the ill nurse returned and resumed her duties on two days following petitioner's termination. Even thereafter, in August 1964, Mrs. Tuttle was considered to be the regularly employed nurse, as witness respondent's action to grant her a leave of absence and to employ petitioner in her stead. Nowhere is there any indication prior to Mrs. Tuttle's death that petitioner was employed in any other capacity than as a substitute who performed the duties of an absent, regularly-employed nurse and was paid on such a basis, who was not entitled to seniority, sick leave, pension fund membership or any other priviliges and benefits accorded to regularly-employed professional staff members, and whose employment was subject to interruption and cancellation at any time the full-time nurse returned. The evidence in this case clearly supports respondent's position that petitioner's status was never more than a substitute during the 1963-64 school year. That being so, petitioner's subsequent employment during three consecutive academic years failed to fulfill the probationary period necessary to continued employment in a tenure status. It is well established that such a status does not come into being until and unless the precise conditions laid down in the statute are met. *Ahrensfield* v. *State Board of Education,* 124 *N. J. L.* 231 (*Sup. Ct.* 1940), affirmed 126 *N. J. L.* 543 (*E. & A.* 1941); *Zimmerman* v. *Newark Board of Education,* 38 *N. J.* 65 (1962)

The Commissioner finds and determines that petitioner's employment for the 1963-64 academic year in respondent's schools was as a substitute school nurse. The Commissioner finds further that petitioner has not acquired and is not entitled to tenure of employment in the school district administered by respondent.

The petition is dismissed.

COMMISSIONER OF EDUCATION

May 20, 1968

IN THE MATTER OF THE SCHOOL BUDGET OF THE SCHOOL DISTRICT OF THE TOWNSHIP OF BRICK, OCEAN COUNTY

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Edwin J. Fox, Esq.

COMMISSIONER OF EDUCATION

DECISION

The Board of Education of Brick Township, hereafter "Board," alleges that the municipal governing body, hereafter "Council," failed to act to certify the amount of school appropriations, after the Board's proposals were twice rejected by the electorate, within the time afforded by statute. Council denies that it failed to act within the statutorily prescribed time.

The Board adopted the following resolution at a special meeting held March 18, 1968, and submitted it to the Commissioner of Education by letter dated March 19, 1968:

"WHEREAS, on February 28, 1968, after the second defeat of the budget by the voters of the district, the Board of Education submitted to the Clerk for the governing body of Brick Township the proposed school budget for 1968-69 as provided by R. S. 18A:22–37; and

"WHEREAS, the Board conferred with the governing body on March 5, 1968; and

"WHEREAS, the governing body has failed to exercise its right to certify to the County Board of Taxation the amount it has determined to be necessary to be appropriated for each item appearing in such budget within the time provided by law; and

"WHEREAS, it then becomes the responsibility of the Commissioner of Education in accordance with R. S. 18A:22–38 to certify the budget needed for the maintenance of a thorough and efficient system of schools in the district and to determine and certify to the Ocean County Board of Taxation the amount or amounts which he shall determine in his judgment to be necessary to be appropriate as provided by the aforesaid R. S. 18:22–38,

"THEREFORE, I move that the Secretary of the Board of Education be directed to submit the budget in the same form as submitted to the governing body of Brick Township on February 28, 1968 to the Commissioner of Education, together with all submissions and correspondence anent thereto, and to inquire of him whether or not by reason of the passage of time it became his responsibility on March 11, 1968 and thereafter to fix and determine the budget amount in accordance with R. S. 18A:22–38 and in the event he should determine it is his responsibility, that he should fix said amount."

The Assistant Commissioner of Education replied by letter dated March 28, in which he directed both parties to submit affidavits addressed to the factual issues of the matter. The affidavits reveal the following circumstances:

On January 11, 1968, a copy of the Board's proposed budget was sent to the Mayor and each member of the Township Committee. On February 13, the proposed appropriations were submitted to and rejected by the electorate. The proposals were submitted with minor reductions at a second election on February 27, 1968, and were again rejected. The next day, February 28, a letter over the signature of the Secretary of the Board was delivered to the Mayor and each member of the Township Committee, the relevant portion of which reads as follows:

"Please be advised that at the Special District Meeting of the Brick Township Board of Education, held on Tuesday, February 27, 1968, the voters at this second election rejected the items submitted.

"I, therefore, am submitting said budget to the governing body according to Title 18:7–82 * * *."

Thereafter, on March 5, the Council held a consultation meeting with the Board to discuss the budget. Council then certified its determination of the

necessary appropriations for school purposes to the Ocean County Board of Taxation by letter dated March 13.

The Board contends that Council failed to certify the school appropriations within the statutory period provided in the statutes. It maintains that the ten days provided for Council's determination began to run from February 28, when Council was notified by the Board's Secretary of the second rejection by the electorate. Council argues that the ten days in issue did not begin to toll until it received the budget and supporting data from the Board on March 5 and as a consequence its certification on March 13 was within the statutory time.

The relevant statute to this issue is *N. J. S.* 18A:22–37, which reads as follows:

> "If the voters reject any of the items submitted at the second election, the governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and within 10 days after receipt of the proposed school budget from the board, certify to the county board of taxation the amounts which said body or bodies determine to be necessary to be appropriated for each item appearing in such budget to provide a thorough and efficient system of schools in the district, the aggregate of which amounts shall be included in the taxes to be assessed, levied and collected in such municipality or municipalities for such purposes."

The Board concedes that there was no enclosure in its letter of February 28 nor was a copy of the budget delivered to Council at that time. It argues, however, that a copy of the budget had been given to each member of Council as early as January 11. Moreover, petitioner avers, at the consultation meeting on March 5, the members of Council "waived the reading of the budget having brought with them the detailed copies of the budget which had been delivered to them in January, and stated that the reading of the budget was unnecessary because they had all studied the budget theretofore submitted so that at the consultation meeting on March 5th the Township Committee had no other budget than the one previously submitted since no material changes had ever been made in it, and other than the examination of graphs and charts on population projections and inquiries concerning two-way radios in the school buses, there was no request for a different budget submission or reliance upon any budget, other than the one submitted to the Council on January 11th, by the Council at that meeting." (Affidavit of Board's Secretary)

Council does not deny receipt of copies of the Board's budget in early January but does deny that it received any further material with respect to the budget until the evening of March 5. At that meeting, Council maintains, it received not only the budget but "certain other pertinent sheets and data regarding the said Budget which was never before this date given to said Council." Council asserts further that at the March 5 meeting it announced that it was receiving the budget for the first time and considered the ten days for its determination to commence from that time.

The Commissioner will decline jurisdiction in this matter and will not interfere with the certification of Council. The fact that members of Council had copies of the budget prior to its rejection by the voters is not relevant. Indeed, it can be presumed that members of Council in their capacity as citi-

zens of the district, would have become familiar with the school budget by means of the public hearing, budget advertisement, or in other ways. Such familiarity with the proposal is not a valid substitute for the requirement on the Board to deliver the budget to the governing body after its second rejection by the electorate. The Commissioner has, in fact, pointed out the necessity for the Board to deliver not only the bare budget but such underlying information and supporting data as may be necessary or helpful to the governing body in arriving at its determination. It is clear that such data were not presented until March 5. The Commissioner holds that under the facts of this case the ten days afforded to Council by statute did not commence until March 5. The Board's application to the Commissioner to take jurisdiction and certify the appropriations for the school purposes of Brick Township for the 1968-69 school year is denied.

COMMISSIONER OF EDUCATION

May 20, 1968

RICHARD H. KELLY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

For the Petitioner, Mr. Richard H. Kelly, *Pro Se*

For the Respondent, Henry F. Gill, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a resident of Hamilton Township, brings this action to compel respondent to provide transportation for his son to and from a nonpublic school in which he is enrolled. Respondent does not contest petitioner's eligibility to such transportation but asserts that it has been unable to furnish the service requested. The facts of the matter were elicited at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on April 24, 1968.

Petitioner's son, hereinafter "the pupil," attends Doane Academy, a nonprofit private school for boys located in the City of Burlington, Burlington County, less than 20 miles from his home. The school began its operations in the fall of 1967 and has an enrollment of 66 boys in grades 6 to 12. It shares a common campus with a much older school, St. Mary's Hall, which opened in 1837, whose enrollment of approximately 200 is coeducational through the fifth grade but for girls only from grades 6 to 12. Both schools function under the auspices of the Trustees of Burlington College.

The problem herein arises from the fact that the two schools operate under different schedules. While both begin at approximately the same time in the morning, St. Mary's Hall closes at 3:30 o'clock in the afternoon and Doane Academy continues until 4:30 p.m. Thus a single trip in the morning can accommodate pupils attending either school. In the afternoon, however, a

single trip requires that St. Mary's Hall girls wait an hour until Doane Academy's day ends or that boys in Doane Academy be dismissed early. Both schools maintain that they are separate and distinct schools although they share the same site and some common facilities. As a separate school Doane Academy insists on its right to determine its own schedule and maintains that to adjust its closing time to that of St. Mary's Hall would seriously impair its program. To meet this disparity in scheduling would therefore require two transportation trips in the afternoon to service pupils at each school.

At present petitioner's son is being transported the 17.7 miles from his home to Doane Academy by bus service under contract with respondent. The same bus takes one other pupil to Doane Academy, three to St. Mary's Hall and others to Bordentown Military Institute. Total cost of the bus contract is $7,200, averaging $450 per pupil. The arrival times are 8:15 a.m. at Bordentown Military Institute and 8:45 a.m. at St. Mary's Hall and Doane Academy. Departure times were set originally at 4:30 p.m. from Doane Academy and St. Mary's Hall and 4:45 p.m. from Bordentown Military Institute, but after objections to waiting an hour beyond dismissal time were received from the parents of the children attending St. Mary's Hall, a compromise leaving time of 4 p.m. was set up. Petitioner contends that his son cannot be excused one half hour early every day in order to meet this bus schedule and he has been forced, therefore, to make his own transportation arrangements in order to get his son home from school.

Respondent concedes petitioner's entitlement to transportation for his son under the provisions of *Chapter* 74 of the *Laws* of 1967. It asserts that it has made diligent efforts to explore ways by which such transportation could be furnished by a single trip each way. For example, respondent says, it has investigated the possibility of using public carrier routes, has attempted to coordinate with neighboring school districts in a joint arrangement, and has tried to work out a shuttle system with other school bus routes but none of these methods has proved feasible. Respondent professes its willingness to provide the second trip in the afternoon, but asserts that it has been unable to secure the approval of the Mercer County Superintendent of Schools for duplicate routes from the same location.

It is apparent from the evidence that Doane Academy and St. Mary's Hall are separate school entities even though they occupy a common site. Each has its own faculty, curriculum, and schedule of classes. As part of its curriculum, Doane Academy requires every pupil to participate in athletics, and schedules this activity every afternoon from 2:50 to 4:30 o'clock. The Commissioner notes that this is not an elective activity, but is a basic element of the school's philosophy and curriculum. Under such circumstances the school cannot be required to curtail its program in order to meet a bus schedule arranged for its companion school, and suitable arrangements for transportation of pupils at the close of each school are in order.

Respondent is hereby authorized and directed to provide appropriate transportation for the balance of the 1967-68 school year for petitioner's son from Doane Academy to his home, to depart at the conclusion of its daily schedule of classes. The cost of such transportation will be approved for purposes of State Aid.

COMMISSIONER OF EDUCATION

May 21, 1968

JOSEPH J. FLESCH,

Petitioner,

v.

WALTER P. PIERSON, JR., SCHOOL DISTRICT OF BORDENTOWN TOWNSHIP, BURLINGTON COUNTY,

Respondent.

For the Petitioner, Mr. Joseph J. Flesch, *Pro Se*

For the Respondent, Mr. Walter P. Pierson, Jr., *Pro Se*

COMMISSIONER OF EDUCATION

DECISION

Petitioner challenges the qualifications of respondent to serve as a member of the Board of Education of the school district of Bordentown Township. Both parties submit the matter for determination by the Commissioner on the pleadings and documents filed therewith. From these materials the following facts appear.

Respondent became a resident of Bordentown Township on February 22, 1966. Before filing a nominating petition for a seat on the Board in January 1968, he consulted counsel with respect to whether he could meet the residence requirement for school board membership. He was advised that he would not satisfy the two-year requirement until February 22, 1968, but that if the organization meeting were unable to be held before that date, he would then be qualified and on that basis could seek election. Respondent thereafter filed a nominating petition on January 4, 1968, seeking election to a two-year unexpired term. Incumbent members of the Board were informed of the matter and the information provided by counsel. At the annual school meeting held February 13, 1968, respondent was elected to a two-year unexpired term.

On the night following the election, February 14, the Board met and by unanimous vote of the seven members present agreed to hold its reorganization meeting on Thursday, February 22, instead of Monday, February 19. According to respondent the reasons stated for this action were "in deference to a newly-elected board member because of a possible residency problem" and the fact that two members were not able to attend on February 19.

The Board did not meet to organize on the Monday following the annual school election, February 19, but convened instead on Thursday, February 22, as had been agreed. At the beginning of the meeting, petitioner raised a question with respect to respondent's qualifications and protested his being seated. Over petitioner's objections respondent was administered the oath of office and took his seat on the Board. Petitioner then filed the instant appeal.

The statute relevant to the issue herein is *N. J. S.* 18A:12–1, the pertinent portion of which reads as follows:

> "Each member of any board of education shall be a citizen and resident of the district * * * and shall have been such for at least two years immediately preceding his appointment or election * * *."

Prior to the enactment of Title 18A which replaced Title 18 on January 11, 1968, the statute, *R. S.* 18:7–11, read in part as follows:

"A member of a board shall be a citizen and resident of the territory contained in the district, and shall have been such for at least 2 years immediately preceding his becoming a member of the board."

Respondent's position is that he possessed the qualifications for board membership on the date and time that the new Board organized and that he is therefore entitled to be seated as a member. He points out that at the time he filed his nominating petition Title 18 was in effect, and on advice of counsel, under the pertinent statute therein, he was a qualified candidate. Even if it is held that Title 18A, which was not approved until January 11, 1968, altered his eligibility, respondent argues that its provisions were not made retroactive and thus could not vitiate the right to be a candidate which he possessed at the time nominating petitions were filed.

No question is raised herein of respondent's good faith or motives in seeking election to the Board of Education. Before accepting nomination he sought and obtained competent counsel and acted in accordance with the advice received. In at least two decisions the language of *R. S.* 18:7–11 requiring a candidate to have been a resident of the district "for at least 2 years immediately preceding his *becoming a member of the board*," has been construed to mean that such qualification must be met at the time of the organization meeting of the new Board. See *Carrig* v. *Schember*, Docket Number L-3804-48, an unreported case in Lyndhurst, Bergen County, Superior Court, Law Division 1948, and *Lange* v. *Warren Township Board of Education*, 1949-50 *S. L. D.* 33.

Such language does not appear, however, in *N. J. S.* 18A:12–1, which states instead that the prospective member must have been a resident of the district "for at least two years immediately preceding *his appointment or election*." It is to be assumed that the Legislature is thoroughly conversant with its own legislation and the judicial construction placed thereon. *Barringer* v. *Miele*, 6 *N. J.* 140 (1951); *Asbury Park Press, Inc.* v. *City of Asbury Park*, 19 *N. J.* 183 (1955); *Miele* v. *McGuire*, 31 *N. J.* 339 (1960) Change in language in a statute ordinarily implies purposeful alteration in substance of the law. *Essex County Retail Liquor Stores Association* v. *Municipal Board of Alcoholic Beverage Control of the City of Newark, et al.*, 77 *N. J. Super.* 70 (*App. Div.* 1962); *Nagy* v. *Ford Motor Co.*, 6 *N. J.* 341 (1951) Moreover, words of a statute are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them. *U. S.* v. *Chesbrough*, 176 *F.* 778 (*D. C. N. J.* 1910); *State* v. *Sperry & Hutchinson Co.*, 23 *N. J.* 38 (1956); *Duke Power Co.* v. *Patten*, 20 *N. J.* 42 (1955)

The election of a candidate for board of education membership occurs when the canvass of the votes is tallied and announced following the closing of the polls on the day of the election. *N. J. S.* 18A:14–59 Respondent was elected on February 13, 1968. He did not qualify for membership at that time by reason of insufficient residence. The Commissioner finds, therefore, that respondent did not possess the statutorily required qualifications for membership on a board of education and his election was invalid.

Respondent's argument that *N. J. S.* 18A:12–1 was not made retroactive and therefore could not deprive him of his right to be a candidate is not per-

suasive. No retroactive effect need be resorted to in order to carry out the directive that a board member shall be a resident of the school district for at least two years immediately preceding his election. The statute speaks in absolute terms and was in full force and effect for a month prior to the February 13, 1968, referendum.

It is true that respondent's right to be a candidate was cut off by the new law. But many potential rights are terminated and circumscribed by the enactment of laws. The Commissioner does not regard the potential right to become a member of the school board in this case as so fundamental and so vested as to be immune to a legislative change of mind, even though the respondent had filed his nominating petition prior to the approval of Title 18A. The Legislature was free to exempt from coverage under its new law any legitimate classification of those affected by it. It has not chosen to do so here.

The Commissioner finds and determines that Walter P. Pierson, Jr., lacked sufficient residence in the district to be elected a member of the Bordentown Township Board of Education at the time of the annual school election on February 13, 1968, and his election to an unexpired two-year term on that Board was invalid and is set aside. The Burlington County Superintendent of Schools is authorized and directed, pursuant to *N. J. S.* 18A:12–15, to appoint a qualified citizen to the vacant seat on the Board to serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

May 21, 1968

BOARD OF EDUCATION OF THE BOROUGH OF NATIONAL PARK, GLOUCESTER COUNTY,

Petitioner,

v.

BOROUGH OF NATIONAL PARK AND THE GLOUCESTER COUNTY BOARD OF TAXATION,

Respondents.

For the Petitioner, Alvin G. Shpeen, Esq.

For the Respondent Borough, Samuel G. DeSimone, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of respondent Borough, hereinafter "Council," certifying to the County Board of Taxation a lesser amount of appropriations for current expense purposes for the 1968-69 school year than the amount proposed by the Board in its budget which was twice rejected by the voters. The facts of the matter were educed at a hearing conducted on May 7, 1968, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The Gloucester County Board of Taxation, a nominal party respondent only, did not appear

and was not represented at the hearing. The report of the hearing examiner is as follows:

It is stipulated that the Board, after transmitting the budget to Council following its second rejection by the voters, consulted with Council. At a meeting on March 4, 1968, Council adopted a resolution (P-R-2) which reads in relevant part as follows:

"1. That the Borough Council of the Borough of National Park hereby determines that the amounts necessary to provide a thorough and efficient school system in the Borough of National Park for the school year 1968-69, shall be as follows:

(a) Local tax levy for current expenses in the amount of $82,392.00 be reduced by the sum of $12,125.00 making the appropriation for said local tax levy for current expenses the sum of $70,267.00.
* * *"

Council proposed that the following reductions be made in budget account items:

No.	Account	Board Budget	Council Recommendation	Reduction
110b	—Salaries & wages-administration	$ 3,850	$ 3,100	$ 750
130	—Other expenses-administration	3,200	2,625	575
213	—Instruction-salaries	159,100	152,100	7,000
240	—Teaching supplies	5,300	4,550	750
250	—Instruction—other expenses	200	0	200
1100	—Community services—summer program	3,450	600	2,850
	Total reduction			$12,125

Through the testimony and exhibits the following facts are found with respect to each of the proposed reductions:

Salaries and Wages—Administration. The Board proposed to increase the annual salary of its part-time Secretary from $2,100 to $2,600 on the basis of the increased amount of work required of this position. The increased salary would be comparable with those paid to Secretaries of other constituent districts of the Gateway Regional High School District, of which National Park will be the largest constituent member next year. The Board also proposes to employ summer clerical assistance for the Board Secretary primarily to relieve the administrative principal's secretary of some of the clerical duties which she now performs during the summer for the Secretary. The proposed cost of this summer clerical assistance is $500. Council recommends limiting the Secretary's salary increase to $250, on the ground that a $500 increase is in excess of a reasonable percentage for one year. It also recommends that the proposed clerical assistance be eliminated entirely, on the ground that the increase in the Secretary's work load is not excessive. The hearing examiner concludes from the evidence that the proposed increase for the Secretary is comparable to increases proposed for other Board employees and to salaries paid to Secre-

taries of districts of similar size in the area. The hearing examiner also concludes from the evidence that clerical assistance, as proposed by the Board, should be provided in order that the principal's secretary may be fully available to the principal for the summer duties of that office. It is therefore recommended that the $750 reduction in this item be restored.

Other Expenses—Administration. The Board budgeted $1,050 more in 1968-69 for this item than it did in 1967-68. (P-R-1) This represents an increase of nearly 50 percent, and reflects the desire of the Board that its members and the administrative principal participate more fully in workshops and seminars for improvement in service than heretofore. Although this account also includes school election expenses and mandatory membership dues in the New Jersey Federation of District Boards of Education, the testimony did not indicate significant increases in the cost of these items. Council proposes to cut the budget increase in half, on the ground that a projected increase of 25 pupils in next year's enrollment does not warrant the additional amount of expenditure that the Board proposes. The hearing examiner does not find the pupil enrollment relevant to the proposed increase in the budget for this item. However, it was not established that the increase is necessary for the operation of a thorough and efficient system of schools in the district, however desirable the activities to be financed thereby may be. It is therefore recommended that Council's reduction in this item be undisturbed.

Instruction—Salaries. On December 13, 1967, the Board, acting pursuant to *N. J. S. A.* 18:13–5.1 and 5.2 (now *N. J. S.* 18A:29–4.1), adopted a salary policy and schedule for teachers, including the administrative principal, to be effective for the school years 1968-69 and 1969-70. (P-R-4) The effect of this new schedule and policy is to provide an average salary increase of $800 for teachers and an increase of $2000 for the principal for 1968-69. Council recommends reducing the increases for the 20 teachers to an average of $500, and the principal's increase to $1,000, on the grounds that these lesser increases are adequate. The administrative principal testified that the proposed reductions would not fulfill the terms of the adopted salary schedule and policy, which provides for awarding a maximum of three annual increments of $300 toward adjustment of teachers to their proper place on the schedule, and which also provides for a ratio relationship of the principal's salary to that of the highest paid teacher. The relevant statutes, *supra*, require that the budget "shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year." The hearing examiner finds that the full amount budgeted by the Board is required to implement its salary schedule and policy, and recommends that the $7,000 reduced by Council be restored to the budget.

Teaching Supplies. The Board's budget proposed to increase the amount to be spent for teaching supplies from a budgeted $3,800 in 1967-68 to $5,300 for 1968-69. This increase would represent, it was testified, an average expenditure of $10.60 per pupil. It was further testified that in its consultation with Council on March 4, 1968, the Board presented information showing that as of that date, with four months of the school year remaining, $4,974 had already been spent for teaching supplies. Council recommended cutting the budgeted increase of $1,500 by half. In the light of the testimony, the hearing examiner finds the Board's proposed increase in expenditures for teaching supplies reasonable and necessary, and recommends that Council's reduction of $750 be restored.

Instruction—Other Expenses. Council's testimony was that it recommended that the $200 budgeted for this item be eliminated because of the lack of clear information concerning the use and necessity for this expenditure. Testimony and an exhibit (P-R-3) offered at the hearing explains that the proposed expenditure is for professional magazines and teaching helps, and for fees to consultants and speakers. The testimony fails to establish that this expenditure is necessary, even though desirable, for the maintenance of thorough and efficient schools in the district, and the hearing examiner therefore recommends that the reduction by Council be not disturbed.

Community Services—Summer Program. The Board's budget provided $2,850 more for this item in 1968-69 than in 1967-68, for the purpose of establishing a summer remedial and recreational program for the children of the district. The program would give remedial help in reading and mathematics, and offer physical activity and arts and crafts work, in order, it was testified, to help children with academic difficulties and to make them more able to compete with other children of the regional junior-senior high school district which they will attend. The testimony does not establish that this program, however desirable, is a necessary function of the school district, and the hearing examiner recommends that Council's reduction be undisturbed.

Although the petition herein alleges that in making the reduction of the several budget items, *supra*, Council acted in an arbitrary and capricious manner, the testimony does not support this allegation. The hearing examiner finds that Council consulted with the Board, asked questions and received information, and recommended economies which in the exercise of its judgment could be accomplished by either reducing the amount of a proposed increase in the budget or by eliminating the item when it felt the necessity therefor not clearly established. However, in such a matter as this the Commissioner is "called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled." *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94, 107 (1966)

* * * * * * *

The Commissioner has reviewed the findings reported by the hearing examiner and has carefully considered his conclusions and recommendations. The Commissioner concurs therein. Therefore, the Commissioner finds that the following amounts reduced by Council are necessary to support a thorough and efficient system of public schools in the Borough of National Park, and he directs that these amounts be restored to the budget:

Salaries and wages—administration	$ 750
Instruction—salaries	7,000
Teaching supplies	750
Total restored	$8,500

The Commissioner further directs that there be added to the certification previously made by the Council to the Gloucester County Board of Taxation the sum of $8,500, so that the total amount of the tax levy for current expense of the school district for the 1968-69 school year shall be $78,767.

COMMISSIONER OF EDUCATION

May 27, 1968

BOARD OF EDUCATION OF THE TOWNSHIP OF MADISON,

Petitioner,

v.

MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Cohen, Hoagland & Cohen (Richard A. Cohen, Esq., of Counsel)

For the Respondent, Vincent C. DeMaio, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *N. J. S.* 18A:22–37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1968-69 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes on April 19, 1968, at the State Department of Education, Trenton.

At the annual school election on February 13, 1968, the voters rejected the Board's proposals to raise $6,088,922 by local taxes for current expenses and $478,200 for capital expenditures. These items were reduced to $5,873,992 and $422,950 respectively and submitted again at a second referendum pursuant to *N. J. S.* 18A:22–36 on February 27, 1968, but again failed of approval. The budget was then sent to the Council pursuant to *N. J. S.* 18A:22–37 for its determination of the amount of local tax funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Middlesex County Board of Taxation an amount of $5,259,558 for current expenses and $348,624 for capital outlay. The pertinent amounts may be shown as follows:

	Current Expense	*Capital Outlay*	*Total*
Board's 1st Proposal	$6,088,992	$478,200	$6,567,192
Board's 2nd Proposal	5,873,992	422,950	6,296,942
Council Certification	5,259,558	348,624	5,608,182
Reduction	$ 614,434	$ 74,326	$ 688,760

The Board makes no charge that Council acted without consideration of the needs of the school system but does contend that the amount it certified is insufficient to provide a thorough and efficient system of education for the

pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Council.

As part of its determination Council suggested items of the budget in which it believed economies could be effected without harm to the educational program (Exhibit R-1 and R-2), as follows:

Current Expense Account	*Budgeted By Board*	*Suggested by Council*	*Reduction*
J-110.02 Salaries-Secy.'s Office	$ 89,875	$ 68,750	$ 21,125
J-110.05 Salaries-Legal Services	1,600	1,400	200
J-110.06 Salaries-Supt.'s Office	142,875	122,875	20,000
J-110.10 Salaries-Adm. Blds. & Grnds.	14,500	13,650	850
J-120.02 Legal Fees	8,000	5,000	3,000
J-120.04 Other Contr. Services	2,240	1,000	1,240
J-130.01 Expenses-Bd. of Educ.	4,000	2,000	2,000
J-130.02 Expenses-Bd. Secy.'s Office	8,150	5,100	3,050
J-130.06 Expenses-Supt.'s Office	6,500	4,500	2,000
J-130.13 Printing & Publishing	7,500	0	7,500
J-130.14 Misc. Exp. of Admin.	6,950	3,500	3,450
J-211 Salaries-Principals	266,225	241,225	25,000
J-214.01 Salaries-Librarians	108,600	90,600	18,000
J-214.02 Salaries-Guidance	161,275	136,275	25,000
J-214.03 Salaries-Psychological	41,200	39,200	2,000
J-215.01 Salaries-Princ.'s Office	147,443	106,260	41,183
J-215.03 Salaries-Other Inst. Staff	79,625	52,242	27,383
J-216 Salaries-Other Instruction	30,660	27,160	3,500
J-220.01 Student Textbooks	114,968	100,000	14,968
J-230.01 School Library Books	58,300	57,300	1,000
J-230.02 Periodicals & Newspapers	6,475	4,975	1,500
J-230.03 Audio-Visual Materials	37,971	22,971	15,000
J-240.01 Instructional Supplies	168,774	149,105	19,669
J-250.01 Miscellaneous Supplies	35,889	15,889	20,000
J-250.02 Travel Expenses-Inst.	6,500	0	6,500
J-250.03 Miscellaneous Expense	21,910	11,965	9,945
J-310.01 Salaries-Attendance Officers	14,600	5,500	9,100
J-310.02 Salaries-Attendance Clerks	7,800	3,900	3,900
J-320.02 Travel Expense, Attendance	1,000	500	500
J-510.01 Salaries-Trans. Supv.	14,350	12,650	1,700
J-510.02 Salaries-Drivers	100,400	80,400	20,000
J-510.04 Salaries-Maintenance Mech.	9,060	7,000	2,060
J-520.01 Bus Contracts	327,300	317,300	10,000
J-520.03 Co-curricular Activities	35,000	23,000	12,000
J-530.01 Replacement of Vehicles	29,950	24,800	5,150
J-540.01 Vehicle Insurance	6,250	5,000	1,250
J-550.01 Gasoline	14,000	10,100	3,900
J-550.02 Oil & Lubricants	2,120	600	1,520
J-550.04 Repair Parts & Supplies	4,200	3,500	700
J-550.08 Trans. Director's Expense	600	0	600
J-610.01 Salaries-Custodial	408,000	388,000	20,000
J-610.02 Salaries-Grounds	47,590	37,590	10,000

Current Expense Account		*Budgeted By Board*	*Suggested by Council*	*Reduction*
J-610.03	Other Salaries	8,860	5,000	3,860
J-630.01	Gas	42,800	40,000	2,800
J-630.02	Oil	39,300	31,300	8,000
J-640	Utilities-except Heat	113,850	100,000	13,850
J-650	Supplies for Operation	37,200	35,900	1,300
J-660	Other Operational Expense	16,790	6,790	10,000
J-710.02	Repair of Buildings	45,350	37,700	7,650
J-720	Contracted Services	79,072	64,072	15,000
J-730	Replacement of Equipment	16,775	10,000	6,775
J-740	Other Maintenance Expense	35,997	28,997	7,000
J-820	Insurance & Judgments	195,360	155,288	40,072
J-830	Rental-Land & Buildings	46,360	38,000	8,360
J1010.01	Salaries-Student Activities	49,850	32,184	17,666
J1020.01	Other Expense	63,920	31,049	32,871
J1410.01	Salaries-Adult Education	15,565	10,000	5,565
J2010.01	Salaries-Summer Schools	50,000	40,000	10,000
	Unspecified Accounts	26,222	0	26,222
	Sub-Total-Current Expense	$3,483,496	$2,869,062	$614,434
L1240.02	Administration Equipment	$64,451	$31,451	$33,000
L1240.05	Transportation Equipment	34,080	0	34,080
L1240.06	Operation of Plant Expense	31,690	24,970	6,720
L1240.07	Maintenance of Plant Expense	2,176	1,650	526
	Sub-Total—Capital Outlay	$132,397	$58,071	$74,326
	TOTAL	$3,615,893	$2,927,133	$688,760

The Board has indicated that it will not contest Council's reduction of certain items and accepts the amount suggested by Council for the following accounts:

Account		*Budgeted By Board*	*Suggested By Council*	*Reduction*
J-214.03	Salaries—Psychological	$41,200	$39,200	$2,000
J-230.01	School Library Books	58,300	57,300	1,000
J-240.01	Instructional Supplies	168,774	149,105	19,669
J-610.01	Salaries—Custodial	408,000	388,000	20,000
J-650	Supplies for Operation	37,200	35,900	1,300
		$713,474	$669,505	$43,969

The Commissioner will not consider these items, and the amounts deleted by Council will stand.

The Commissioner has carefully considered the total budget requests of the Board, the funds available to it, and the economies suggested by Council. In his study of this matter he has noted the following facts and circumstances as revealed in the testimony and documentary evidence.

Four hundred additional high school pupils are anticipated for 1968-69. The present high school is operating on double sessions and its accreditation has been deferred pending elimination of this undesirable condition. A second high school building is currently under construction. The Board hopes to occupy the new high school in September 1968 or at least sometime in the early fall. The budget was prepared with such an expectation. Council has been advised that construction is so far behind that occupancy is not possible before the middle of the year and possibly not before the 1969-70 school year. To resolve this question, and with the concurrence of counsel the Commissioner caused an inspection to be made by a qualified member of his staff who concluded: "* * * it appears realistic and possible for the contractors to complete buildings 'A,' 'B' and 'C' at least sufficiently to be occupied by September, 1968. It is also possible that building 'D' may be completed by September. Even if bad weather delays the project, pupils should still be able to use most of the facilities by the end of September." The Commissioner has assumed, therefore, that the new building will be occupied for at least a major part of the ensuing school year and that the amounts eliminated by Council in the expectation that such funds would not be required in this budget, must be reinstated at least in part.

The evidence reveals that many of Council's calculations were based on a percentage of increase over the current year's (1967-68) budget. The Board points out, however, that in a number of areas the amounts budgeted for the current year have been already or will be overexpended. For example, $124,000 was budgeted for guidance services, but $134,000 of expenditures are committed; and library costs, budgeted at $76,850, have reached, $91,995. These extras were made possible by use of unanticipated Sales Tax revenues which the Board used to employ personnel and expand services. As a result, according to the Board, if Council's reduction remains, in some instances personnel already employed and on the job will have to be dismissed.

The Board also argues the necessity for the salary increases it has provided for in its budget on the ground of competitive necessity. It says that it has negotiated salary schedules and policies not only with its professional staff but with its various groups of nonprofessional employees and has adopted new salary guides for each of them. It is bound to honor such negotiated agreements, the Board contends, or lose any hope of maintaining an adequate, competent staff.

From his study of this matter the Commissioner concludes that at least part of the reduction made by Council resulted from insufficient and incorrect information. In the Commissioner's judgment the total amount eliminated is excessive and the appropriations as certified will not permit the operation of a thorough and efficient program of education in the school district.

There appears no necessity to deal seriatim with each of the areas in which Council recommended reduced expenditures. The problem is one of total revenues available to meet the demands of a school system which has experienced phenomenal growth. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter. The Com-

missioner finds that reinstatement of the following curtailments recommended by Council are necessary to insure an adequate school program in the school district:

		Reduction By Council	*Amount to Be Reinstated*
J-110.02	Salaries—Secy.'s Office	$21,125	$8,975
J-110.06	Salaries—Supt.'s Office	20,000	15,649
J-110.10	Salaries—Adm. Bldgs. & Grnds.	850	425
J-120.02	Legal Fees	3,000	3,000
J-130.01	Expenses—Board of Education	2,000	1,000
J-130.02	Expenses—Board Secy.'s Office	3,050	1,240
J-130.06	Expenses—Supt.'s Office	2,000	2,000
J-130.13	Printing & Publishing	7,500	3,700
J-211	Salaries—Principals	25,000	10,000
J-214.01	Salaries—Librarians	18,000	18,000
J-214.02	Salaries—Guidance	25,000	15,000
J-215.01	Salaries—Princ.'s Office	14,183	15,200
J-215.03	Salaries—Other Inst. Staff	27,383	17,400
J-230.03	Audio-Visual Materials	15,000	5,000
J-250.02	Travel Expenses—Inst.	6,500	1,500
J-310.01	Salaries—Attendance Officers	9,100	2,000
J-510.01	Salaries—Trans. Supv.	1,700	1,375
J-510.02	Salaries—Drivers	20,000	5,950
J-520.01	Bus Contracts	10,000	10,000
J-520.03	Co-curricular Activities	12,000	2,000
J-550.02	Oil	1,520	920
J-550.08	Trans. Director's Expense	600	400
J-610.03	Other Salaries	3,860	3,860
J-630.01	Gas	2,800	2,800
J-630.02	Oil	8,000	6,000
J-640	Utilities—except Heat	13,850	12,850
J-710.02	Repair of Buildings	7,650	7,650
J-730	Replacement of Equipment	6,775	6,775
J-820	Insurance & Judgments	40,072	40,072
J1010.01	Salaries—Student Activities	17,666	17,666
J1020.01	Other Expenses	32,871	20,701
J1410.01	Salaries—Adult Education	5,565	5,565
J2010.01	Salaries—Summer Schools	10,000	5,000
	Unspecified Accounts	26,222	26,222
	Sub-Total—Current Expense	$447,842	$295,895
L-1240.02	Administration Equipment	$33,000	$12,000
L-1240.05	Transportation Equipment	34,080	30,000
	Sub-Total—Capital Outlay	$67,080	$42,000
	Total	$514,922	$337,895

In summary, the totals may be shown as follows:

	Current Expense	*Capital Outlay*	*Total*
Board's Budget	$5,873,992	$422,950	$6,296,942
Council's Certification	5,259,558	348,624	5,608,182
Amount of Reduction	$614,434	$74,326	$688,760
Amount Reinstated	$295,895	$42,000	$337,895
Amount not Reinstated	318,539	32,326	350,865
Council's Certification	$5,259,558	$348,624	$5,608,182
Amount Reinstated	295,895	42,000	337,895
Revised Appropriations	$5,555,453	$390,624	$5,946,077

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1968-69 made by the Council is insufficient by an amount of $337,895 for the maintenance of a thorough and efficient system of public schools in the district. He directs, therefore, that there be added to the certification of appropriations for school purposes made by Council to the Middlesex County Board of Taxation, the sum of $337,895, so that the total amount of the local tax levy for current expenses of the school district for the 1968-69 school year shall be $5,555,453 and for capital outlay $390,624.

COMMISSIONER OF EDUCATION

June 3, 1968

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD,
Petitioner,

v.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY, AND GLOUCESTER COUNTY BOARD OF TAXATION,
Respondents.

For the Petitioner, Ware, Caulfield, Zamal & Cunard (Martin F. Caulfield, Esq., of Counsel)

For the Respondents, Fred A. Gravino, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N. J. S.* 18A:22–37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1968-69 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioner in charge of the

Division of Controversies and Disputes on April 30, 1968, at the State Department of Education, Trenton. The Gloucester County Board of Taxation was named as a party respondent only, and did not appear and was not represented at the hearing.

At the annual school election on February 13, 1968, the voters rejected the Board's proposals to raise $1,532,398 for current expenses and $82,500 for capital outlay. These items were resubmitted at a second referendum pursuant to *N. J. S.* 18A:22–36 on February 27, 1968, but again failed of approval. The budget was then sent to the Committee pursuant to *N. J. S.* 18A:22–37 for its determination of the amount of funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Gloucester County Board of Taxation an amount of $1,423,398 for current expenses and $82,500 for capital outlay. The Committee also certified an amount of $57,509 on a transportation note issued and certified by the Board pursuant to *Chapter* 74, *Laws* of 1967 in the amount of $107,509. This reduction of $50,000 was admittedly an error and it is stipulated that without reference to any other determination in this matter, the Commissioner will direct that this error be corrected.

The pertinent amounts in this matter may be shown as follows:

	Board's Proposal	*Council Certification*	*Reduction*
Current Expenses	$1,532,398	$1,423,398	$109,000
Capital Outlay	82,500	82,500	0
Transportation Note	107,509	57,509	50,000

The Board contends that the amount certified by the Committee is insufficient to provide an adequate system of education for the pupils of the school district and appeals to the Commissioner to restore the deleted funds.

In making its reduction of $109,000 the Committee suggested that economies could be effected in the following items of the school budget:

Account	*Suggested Reduction*
1. Administration—Salaries	$21,900
2. Administration—Other Expenses	4,000
3. Instruction—Salaries	69,400
4. Textbooks	5,000
5. Transportation—Salaries	10,000
6. Maintenance of Grounds—Salaries	3,400
7. Transportation Note	50,000
	$163,700

The total suggested reduction of $163,700 was "rounded off" by the Committee to $109,000.

The Board does not contest the reduction of $5,000 in item #4, Textbooks, and $3,400 in item #6, Maintenance of Grounds-Salaries, and the reduction

of $8,400 therefore will stand. The other disputed curtailments will be considered individually.

Item 1—Administration—Salaries. The Committee suggests a reduction of $21,900 by the elimination of (1) the position of community relations coordinator at $10,400, (2) a new position of assistant superintendent of buildings and grounds at $6,500, and (3) increases amounting to $5,000 in administrative salaries.

The Commissioner finds these expenditures essential to the proper operation of the schools of this district. A school system of this size, approaching 6,000 pupils, has a responsibility to keep the public informed. This will have to be accomplished by some member of the administrative staff by whatever title he may be called. The number of administrative staff currently employed is no more than adequate, and reduction of one position cannot be accomplished without a deleterious effect on the school system.

Under the existing circumstances, the position of assistant supervisor of buildings and grounds is necessary to insure the proper maintenance of the school facilities. Similarly, the proposed increases in salaries to staff members are reasonable and essential if the district is to maintain an adequate administrative staff and to remain in competitive position with other school systems.

The Commissioner finds and determines that the $21,900 reduction made by the Committee must be reinstated to insure the maintenance of minimum educational standards in the Deptford Township Schools.

Item 2—Other Expenses of Administration. The Board budgeted $7,000 for this item (J-130f) comprised of $4,500 for public relations and $2,500 for office expenses. The Committee reduced the figure to $3,000, the same amount as budgeted for the current year. According to the testimony, this account has been underestimated for at least the past two years and expenditures this year will exceed the amount budgeted by approximately $2,000.

The Commissioner finds that part of the contemplated expenses are necessary to the adequate operation of the school system and cannot be maintained properly with the reduced amount. In his opinion, however, the increase from $3,000 for the current year to $7,000 for 1968-69 is not essential. He directs therefore that $1,000 of the $4,000 cut be reinstated.

Item 3—Salaries for Instruction. The Committee reduced the amount budgeted for this purpose by $69,400 and suggested (1) the elimination of an additional guidance counselor; (2) the employment of five new teachers instead of seven; (3) reduction of the amount for substitute teachers; (4) employment of a supervisor replacement at a lower salary; and (5) elimination of the position of vocational school principal.

Such reductions are not possible. (1) The enrollment in grades 7-12 is expected to reach 2,275 pupils in 1968-69. The employment of an eighth counselor will be necessary in order to preserve a ratio of pupils to guidance personnel which can be effective. (2) Five of the new teachers proposed have already been hired during the current year. The Board plans to employ additionally one teacher for a class of handicapped children and one to provide behind-the-wheel driver training. Both of these positions are essential and cannot be eliminated. (3) The Board has budgeted $36,000 for substitutes for 1968-69. It spent $44,000 in 1966-67 and $46,000 for the period September

1, 1967, to March 30, 1968, for this purpose. It is obvious that this amount cannot be reduced. (4) The Board's budget provides $12,200 for the position of supervisor of instruction. This is a twelve-months' position which is now vacant. It is clear that the salary level suggested by the Committee is insufficient and would not provide a proper differential between the teachers' salary schedule and the rate paid for supervisors. (5) The position of vocational school principal is new. The Committee recommends its elimination on the ground that it is being created in order to establish an area vocational school and as such it benefits other school districts in Gloucester County at the expense of Deptford Township. The Commissioner cannot agree. An adequate program of vocational education is essential in this school district and the program requires the direction and supervision of a principal. It should be noted also that the costs of this position are underwritten to a large extent by Federal and State funds and the cost to the district is minimal. If this position is to be eliminated as the Committee suggests, it will be necessary also to reduce the amount of revenues anticipated to support it.

The Commissioner finds that the amount of $69,400 deleted by the Committee must be reinstated in the budget.

Item 5—Salaries—Pupil Transportation. The Board budgeted $105,000 to pay the wages of its school bus drivers. The Committee recommends that such amount be reduced by $10,000. The Board contends that its present scale of $2.10 per hour is too low and that it has negotiated an increase to $2.50 per hour for next year. If this rate had been paid during the current year, the cost would have been more than $105,000, the Board asserts.

The Commissioner will direct that the $10,000 curtailment in this account be restored. The testimony discloses that the municipal truck drivers are paid at the rate of $2.50 per hour. The Commissioner also notes that the amount represents an agreement reached through negotiations which the drivers have reason to expect will be honored. The Board's estimates of the costs based on this rate appear to be reasonably conservative. The Commissioner finds, therefore, that the $10,000 reduction in this account will be overruled.

In summary, the items in issue are determined as follows:

Account		*Amount Reduced*	*Amount Reinstated*	*Amount Not Reinstated*
J-110	Administration—Salaries	$21,900	$21,900	----
J-130	Administration—Other Expense	4,000	1,000	$3,000
J-211	Instruction—Salaries	69,400	69,400	----
J-220	Textbooks	5,000	----	5,000
J-510	Transportation—Salaries	10,000	10,000	----
J-610	Grounds—Salaries	3,400	----	3,400
	Transportation Note	50,000	50,000	----
		$163,700	$152,300	$11,400
	Rounded off by the Committee	4,700	4,700	----
		$159,000	$147,600	$11,400

The Commissioner finds and determines that the amount of school appropriations certified by the Deptford Township Committee is insufficient to provide a thorough and efficient program of education in the district. The Commissioner directs therefore that the amount of $147,600 be reinstated in and added to the appropriations for school purposes for the 1968-69 school year.

COMMISSIONER OF EDUCATION

June 7, 1968

Affirmed by the State Board of Education without written opinion, February 5, 1969.

BOARD OF EDUCATION OF THE TOWN OF NEWTON,
Petitioner,

v.

TOWN COUNCIL OF THE TOWN OF NEWTON, SUSSEX COUNTY,
Respondent.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of respondent Borough, hereinafter "Council," certifying to the County Board of Taxation a lesser amount of appropriations for capital outlay purposes for the 1968-69 school year than the amount proposed by the Board in its budget which was twice rejected by the voters. Oral argument was heard by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the State Department of Education, Trenton, on June 4, 1968.

The voters of the Town of Newton twice rejected the Board's proposed appropriations for all of the school purposes for the 1968-69 school year. Thereafter, the Town Council, pursuant to *N. J. S.* 18A:22–36, made certain reductions and certified the amounts of appropriations to be levied to the Sussex County Board of Taxation. The Board accepted the reductions made by the Council in the appropriations for current expenses and the evening vocational program but contests the deletion of the entire budget for capital expenditures in the amount of $93,325. Included in such amount was an item of $54,000 for the installation of fire detection equipment in each of the three schools of the district. The Board contends that it is under a mandate of the State Board of Education to install such equipment by September, 1968, and that it will be unable to do so unless the funds intended for such purpose are reinstated in its budget.

On December 4, 1963, the State Board of Education adopted a resolution to require the installation of fire detection equipment in all New Jersey public school buildings with the exception of certain one-story structures having particular exit features. None of the Newton public schools qualifies for such exemption and the installation of the required detection system by September, 1968, is required.

The Court in *East Brunswick Board of Education* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), established a guide for the Commissioner in adjudicating contested school budget reductions as follows:

> "* * * The Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. * * *" (at page 107)

In this case Council has fixed an amount of appropriations which is insufficient for the Board to comply with a mandatory requirement. The sum of $54,000 estimated by the Board as necessary for completion of the required installation which was eliminated by the Council must therefore be reinstated in the school appropriations for capital expenditure purposes. The Commissioner therefore directs that the Council increase the amount certified for the school purposes of the district by $54,000 or provide an alternative means by which the Board of Education can satisfy the mandate of the State Board of Education with respect to the installation of approved fire detection systems in its schools.

COMMISSIONER OF EDUCATION

June 13, 1968

BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK,
Petitioner,

v.

BOARD OF COMMISSIONERS OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY, AND BERGEN COUNTY BOARD OF TAXATION,
Respondents.

For the Petitioner, Kiefer, Bollermann & Durkin (Martin T. Durkin, Esq., of Counsel)

For the Respondent Commissioners, Sydney V. Stoldt, Jr., Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of the Board of Commissioners of Ridgefield Park, hereinafter "Commissioners," certifying to the County Board of Taxation a lesser amount of appropriations for current expense purposes for the 1968-69 school year than the amount proposed by the Board in its budget which was twice defeated by the voters. The facts of the matter were educed at a hearing conducted on May 17, 1968,

at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The Bergen County Board of Taxation, a nominal party respondent only, did not appear and was not represented at the hearing. The report of the hearing examiner is as follows:

Following two defeats by the voters of the Board's proposal to raise $1,752,739.92 by local taxes for current expense purposes for 1968-69, the Board forwarded its budget to the Commission and met with the Commissioners on February 29, 1968. Thereafter, on March 5 the Commissioners fixed the amount to be raised for current expenses to $1,616,939.92, a reduction of $135,800. The Board met in caucus four times thereafter, reviewing its budget for possible areas in which economies could be effected. On March 8 it requested, and on March 11 received, from the Commissioners a statement of the particular items which they believed could be reduced or eliminated, with their underlying reasons therefor. The Board reviewed the Commissioners' statement, and determined in some instances that it could accept the proposed reductions in full, in other instances in part, and in still others not at all for a total of $31,900 in "accepted" reductions. Additionally, the Board found other areas of its current expense budget in which it could, if necessary, effect economies not proposed by the Commissioners, and in two instances increased the amount of reduction proposed by the Commissioners, for an additional net reduction of $34,090. However, the Board contends that these "additional reductions" were proposed before it had received the itemized list from the Commissioners, and does not consider them relevant to the appeal herein. The Board therefore seeks the reinstatement of $103,900 of the $135,800 reduced by the Commissioners, as follows: (P-R-5b, Exhibits C and D)

Account No.	*Item*	*Board Budget*	*Commission Reduction*	*Reduction Accepted*	*Reduction Appealed*
J110a	Board Secy.—Salary Increase	$1,500	$500		$500
J110a	Extra Clerical Service	1,000	1,000		1,000
J130m	Printing & Publishing	1,550	1,100	$600	500
J130n	Misc. Expense—Admin.	3,300	1,000	1,000	
J211	Salaries—Principals	72,000	4,500		4,500
J212	Salary—Supervisor	13,300	500		500
J213	Salaries—Teachers	1,129,150	32,000	9,600	22,400
J214b	Salaries—Guidance	67,000	13,500		13,500
J214c	Salaries—Psychological	27,750	12,000		12,000
J215c	Salaries—Clerical, Guidance & Psychology	14,045	2,000		2,000
J230a	School Library Books	20,000	4,000	4,000	
J230c	Audio-Visual Materials	9,100	1,000		1,000
J240	Teaching Supplies	60,000	5,400	2,700	2,700
J520a	Transp. Contracts	46,275	10,000		10,000
J520c	Transp.—Field Trips	10,000	2,500	2,500	
J610a	Salaries—Custodial Services	161,650	15,000	5,000	10,000
J640a	Water	5,000	3,000		3,000
J640b	Electricity	35,000	8,500		8,500
J640d	Telephone	14,000	2,000	2,000	

Account No.	*Item*	*Board Budget*	*Commission Reduction*	*Reduction Accepted*	*Reduction Appealed*
J720b	Contracted Services—Repair of Buildings	3,000	1,000	.....	1,000
J730a	Replacement—Instructional Equip.	22,166	6,300	.....	6,300
J740a	Other Expenses—Up-Keep of Grounds	2,500	1,000	.....	1,000
J870	Tuition	61,330	8,000	4,500	3,500
	Totals		$135,800	$31,900	$103,900

Testimony and exhibits were offered by the Board, and all relevant documents were stipulated by counsel. The Commissioners offered no direct testimony, but rely upon their statement of proposed reductions (Exhibit C of the petition of appeal) and the testimony of the Board's witness in support of their position. With respect to each of the reductions appealed by the Board, therefore, the hearing examiner makes the following findings, conclusions, and recommendations:

J110a—Board Secretary—Salary Increase. The Commissioners reduced the proposed salary increase for the Secretary of the Board of Education from $1,500 to $1,000, on the ground that the higher increase exceeded that proposed for the Superintendent of Schools. The Board testified that the proposed increase is in recognition of the length and quality of the Secretary's services, the quality of his fiscal performance which has brought financial returns to the district, and the desire of the Board to pay a salary comparable to those in similar positions in other districts in the County, taking into consideration the size of the district, and the training and length of service of the several secretaries. The Board further contends that there is no logical basis for relating the proposed increase to that planned for the Superintendent. On the facts presented, the hearing examiner recommends that the $500 reduction in this item be restored.

J110a—Extra Clerical Service. The Board budgeted $1,000 for "extra" clerical service for 1968-69, in order to provide for extra help during peak workload periods, for substitute help for absentees, and to accommodate an anticipated additional workload during the coming school year. The Commissioners contend that since an additional clerk was employed during the 1967-68 school year, whose salary is provided for in the 1968-69 budget, this additional $1,000 should be deleted. The hearing examiner finds that $1,000 is not excessive and is warranted for the purposes described in the Board's testimony. It is recommended that this amount be restored.

J130m—Printing and Publishing. The Board appeals $500 cut from this account, which it had planned to spend for the printing and publishing of an administrative handbook. The Commissioners' statement indicates their understanding that this was to be a republication of a handbook which had also been published in 1967-68. (Exhibit C) The Board's testimony shows that there is no administrative handbook in existence, that although such an item was budgeted for 1967-68 it was not published, and that there is a need for such a publication. Although the Commissioners' reason for eliminating this

item proceeds from either misinformation or misunderstanding, the testimony does not establish that an administrative handbook is necessary to provide a thorough and efficient system of public schools for the children of the district. It is therefore recommended that this reduction be sustained.

J211—Salaries—Principals. The Board's budget provided $9,500 for salary increases for the district's high school principal and vice-principal and three elementary school principals. The Commissioners cut $4,500 from that amount, and recommended that the remaining $5,000 in increases be given according to merit and seniority in the position. The Board's testimony shows that no salary schedule and policy for principals had been adopted prior to the fixing of the budget, but that extended study and discussions with the administrative group had been in progress since last fall, leading to the adoption of a schedule of principals' and directors' salaries for 1968-69 subsequent to the filing of the appeal herein. (P-4) This schedule is based upon a study of administrative salaries in the geographical area, takes into consideration the nature and requirements of the position, the employee's maturity in the position, and job performance, and is related to the top salary of teachers at the masters degree level. It was shown that at present the elementary principals' salaries are among the lowest in Bergen County, and the high school principal's salary is below the mid-point for that position in the County. From the budget data provided (P-R-5b, pages 17 and 19), the hearing examiner notes that the Board's proposed increases for principals amount to slightly over 15%, which is not inconsistent with an average 13% increase for teachers. The hearing examiner finds that the testimony supports the reasonableness of the Board's budgeted increase in this item, and recommends that the amount of $4,500 reduced by the Commissioners be restored.

J212—Salary—Supervisor. The Board's budget proposes a salary increase of $1,400 for the supervisor of health, physical education and athletics. This represents an increase of 11% over the supervisor's present salary. For the reasons found in *J211, supra,* the hearing examiner recommends the restoration of the cut of $500 recommended by the Commissioners in this item.

J213—Salaries—Teachers. The Commissioners recommend reducing this item by a total of $32,000, all of which is related to planned addition of new personnel, for these reasons: (1) The new positions of psychologist and guidance counselor are also provided for in accounts J214b and J214c. Therefore, says the Commissioners, two of the "10 new positions" at $80,000 (see P-R-5b, page 19) should be eliminated, and they propose reducing the budget therefor at the rate of $8,000 per position, for a total of $16,000. (2) Further, the Commissioners believe that by better balancing of class sizes the need for two of the proposed six new high school positions could be postponed for a year, and a further economy of $16,000 could be effected.

It is clear that the salaries of a counselor and a psychologist cannot be included in this account. The hearing examiner therefore recommends that the $16,000 reduction recommended by the Commissioners be sustained. This now leaves $64,000 for "new positions." The information provided by the Board to the Commissioners (P-R-5b, page II) indicated a need for two more elementary teachers and six more high school teachers. To this the Board, at the hearing, added one more, a speech therapist. The Commissioners contend

that it would be possible to postpone employment of two of the proposed high school teachers. However, the hearing examiner finds that these two positions are necessary (1) to accommodate increased enrollment in modern foreign languages and English, (2) to equalize teaching period loads among teachers, (3) to provide for the full implementation of the curriculum in English, and (4) to maintain class sizes at their present levels. On the other hand, there was insufficient testimony with respect to the proposed speech therapist to warrant a finding that such a position is needed at this time for a thorough and efficient system of public schools in the district. It is therefore recommended that the $16,000 deleted by the Commissioners for two new high school teaching positions be restored.

J214b—Salaries—Guidance Personnel. The reduction of $13,500 proposed by the Commissioners in this item is grounded on the contention that the position of director of pupil personnel services is not necessary to be established at this time. The Board, on the other hand, contends that this is not a new position, but in fact constitutes a transfer of a present employee from the position of curriculum coordinator to which he was assigned in preparation for the opening of the district's new high school in September 1968. The Board believes that the need for a director of pupil personnel services is now greater than its need for a curriculum coordinator. The Board further states that it feels a greater need for this position than for an additional counselor, whose position was discussed in consideration of *J213, supra.* The job description for the position of director of pupil personnel services offered in evidence (P-3) describes services which are necessary to be performed in a modern high school, including, but not limited to, the supervision and coordination of the work of four counselors in the guidance program. The hearing examiner finds that this expenditure supports a necessary function of the school district, and recommends that $13,500 be restored to the budget.

J214c—Salaries—Psychological Personnel. The Board's budget includes an amount of $12,000 to employ a second school psychologist. During each of the school years 1966-67 and 1967-68, it was testified, the school psychologist resigned before the conclusion of the school year, with the result that a backlog of cases requiring the services of a school psychologist has been built up. The Board proposes to employ two full-time psychologists, in part to eliminate this backlog, and in part to provide additional time and services. There is no basis to anticipate that the unfortunate circumstances which occurred in 1966-67 and 1967-68 will be repeated. Moreover, the hearing examiner finds that the evidence does not establish that the services of two full-time school psychologists will be needed for the anticipated 1968-69 enrollment. It is therefore recommended that the Commissioners' elimination of $12,000 for a second school psychologist be undisturbed.

J215c—Salaries—Clerical, Guidance and Psychology. In connection with its proposal to add a second school psychologist, the Board provided $4,500 in its budget to employ full-time clerical help for its psychological services. For such services during the 1967-68 school year, $1,100 had been budgeted. The Commissioners reduced this item by $2,000, on the ground that since it had eliminated the second position of school psychologist, full-time clerical help would not be required. Since the hearing examiner has recommended

that the reduction in *J214c* be sustained, it is accordingly recommended that the reduction of $2,000 in this item be likewise sustained.

J230c—Audio-Visual Materials. The Commissioners recommend reducing the appropriation for this item from $9,100 to $8,100, on the grounds that it represents an excessively large increase over actual expenditures of $4,434 in 1966-67. The amount budgeted for 1967-68 was $7,410, and this was over-expended by $650 as of March 31, 1968. (P-R-5a) The Board's testimony shows that the proposed appropriation provides for an expenditure of $3.40 per pupil in projected enrollment, and that it is based upon needs submitted by the teachers of the district. The hearing examiner concludes that while a considerable increase was needed in 1967-68 because of the additional number of teaching stations provided by the new high school, it was not demonstrated that an even higher expenditure will be necessary to maintain a thorough and efficient system of schools in 1968-69. He therefore recommends that the $1,000 reduction proposed by the Commissioners be undisturbed.

J240—Teaching Supplies. The Commissioners propose reducing the amount appropriated in this item by $5,400. The Board appeals half of this reduction, or $2,700. The Commissioners contend that the Board's increase will represent an expenditure of $22 per pupil in 1968-69, in contrast to $15 per pupil budgeted for 1967-68. Although the current year's budget will be overexpended by $17,500 by the end of the school year, it was conceded that much of this overexpenditure was necessary to stock new high school facilities, such as shops and laboratories. The amount sought to be restored by the Board would provide $21 per pupil in the 1968-69 enrollment. The hearing examiner agrees that this is a reasonable figure, and recommends that $2,700 of the $5,400 cut by the Commissioners be restored.

J520a—Transportation Contracts, and *J870—Tuition.* These items will be considered together because the resolution of the controversy concerning them is dependent on the same set of facts. The Board had budgeted $22,000 for contracted transportation and $18,000 for tuition for "unknown" pupils requiring special education placement in other school districts in 1968-69. At the time the budget was prepared, it was projected that fourteen additional pupils would need such services, in addition to any others that might be found among the backlog of 74 cases still being evaluated. The Commissioners believe that the amounts budgeted for "unknown" pupils are excessive, and recommend reducing the amount provided for transportation by $10,000, and the amount for tuition by $8,000. The Board appeals the full $10,000 transportation cut, and $3,500 of the tuition cut. The testimony demonstrates the probability that there will be at least fourteen additional pupils to be provided for, and the allowances for transportation and tuition are consistent with the average amounts currently being paid by the district for other pupils being transported to other districts for special education services. It is therefore recommended that $10,000 be restored to *J520a—Transportation Contracts* and $3,500 to *J870—Tuition.*

J610a—Salaries—Custodial Services. The Board budgeted $10,000 for two additional positions in its custodial staff, in order to provide ten custodians in the high school, working in three shifts. Additionally it budgeted $5,000 to employ a custodian for one-half year to train as a replacement for the custodial

supervisor, who will retire. The Commissioners recommend eliminating the half-year position at $5,000, one of the two new full-year positions at $5,000, and $5,000 of the $20,000 provided in the budget for overtime pay for school activities. The Board appeals $10,000 of the recommended $15,000 cut, indicating its acceptance of the recommended $5,000 cut in overtime pay, but asserts that the additional square footage in the new school requires both of the proposed full-year positions as well as the half-year position. In the light of the testimony that two additional high school custodians were employed when the new school was opened, the hearing examiner finds that the need for two more full positions has not been established, and that the establishment of one full-year position for 1968-69, as recommended by the Commissioners, will suffice to maintain the workload of the custodians at a reasonable level. He further finds that the employment of a supervisor trainee for a half year is a justifiable expenditure. It is therefore recommended that $5,000 of the $10,000 appealed by the Board be restored to the budget.

J640a—Water. The Board's budget increases the amount appropriated for water from $2,000 in 1967-68 to $5,000 in 1968-69. The Commissioners believed and recommended that there should be no increase. The testimony disclosed that as of March 8, 1968, water bills paid had already amounted to $2,672. At the conclusion of the Board's testimony on this item, the respondent indicated that it had no objection to the reinstatement of $3,000 cut from this account. The hearing examiner so recommends.

J640b—Electricity. The Commissioners recommend cutting $8,500 from the $35,000 appropriated for this item. Testimony showed that for the period from September 13, 1967, when the new high school opened, to February 15, 1968, the average monthly cost of electricity exceeded $2,900. The Board's budget estimate was based on an average of $3,000 per month for the academic year, in addition to the cost of electricity during the summer, which amounted to $2,000 last summer, before the high school was available. The hearing examiner finds that $35,000 is a reasonable estimate of need for electricity for 1968-69, and recommends that $8,500 cut by the Commissioners be restored.

J720b—Contracted Services—Repairs. The Board had a budget item of $3,000 for roof repairs, which the Commissioners recommend reducing to $2,000 because there were no firm anticipations of the need for this item. The Board's testimony shows that it spent $2,412 in 1965-66 for such repairs, $1,400 in 1966-67, and $2,100 to date in 1967-68. There was no testimony establishing a known need in 1968-69. The hearing examiner therefore finds that an appropriation of $3,000 has not been shown to be required, and accordingly recommends that the Commissioners' recommendation be affirmed.

J730a—Replacement of Instructional Equipment. The Commissioners recommend postponing the purchase of a video tape recorder for $2,300, and initiating a reading laboratory with eight instead of fifteen units at a saving of $4,000. The Board seeks the video tape recorder to make fuller and more efficient use of its closed circuit television installation. The hearing examiner finds that the testimony does not establish that such an item of equipment, however desirable, is essential to the operation of a thorough and efficient system of schools in the district. Testimony on the need for a 15-station reading laboratory was likewise inadequate to establish the necessity for such equipment. The hearing examiner therefore recommends that the elimination

of $2,300 for a video tape recorder and the reduction of $4,000 in the appropriation for reading laboratory equipment be undisturbed.

J740a—Other Expenses—Upkeep of Grounds. The Board appropriated $2,500 for upkeep of grounds, principally those associated with the new high school facility, including the improvement of some ten acres not improved in the original landscaping of the new facility. The Commissioners recommend reducing this appropriation to $1,500. The testimony does not establish that an expenditure of this sort is essential to the maintenance of a thorough and efficient system of public schools, and recommends that the reduction of $1,000 made by the Commissioners be affirmed.

The following table recapitulates the recommendations of the hearing examiner as to the $103,900 reduction in items appealed by the Board:

Account No.	*Item*	*Appealed By Board*	*Restoration Recommended*	*Restoration Not Recommended*
J110a	Board Secy.—Salary Increase	$ 500	$ 500	—
J110a	Extra Clerical Service	1,000	1,000	—
J130m	Printing & Publishing	500	—	$ 500
J211	Salaries-Principals	4,500	4,500	—
J212	Salary-Supervisor	500	500	—
J213	Salaries-Teachers	22,400	16,000	6,400
J214b	Salaries-Guidance	13,500	13,500	—
J214c	Salaries-Psychological	12,000	—	12,000
J215c	Salaries-Clerical, Guidance & Psychology	2,000	—	2,000
J230c	Audio-Visual Materials	1,000	—	1,000
J240	Teaching Supplies	2,700	2,700	—
J520a	Transp. Contracts	10,000	10,000	—
J610a	Salaries-Custodial Services	10,000	5,000	5,000
J640a	Water	3,000	3,000	—
J640b	Electricity	8,500	8,500	—
J720b	Contracted Services—Repair of Buildings	1,000	—	1,000
J730a	Replacement–Instructional Equipment	6,300	—	6,300
J740a	Other Expenses—Upkeep of Grounds	1,000	—	1,000
J870	Tuition	3,500	3,500	—
		$103,900	$68,700	$35,200

* * * * * * *

The Commissioner has reviewed the findings of the hearing examiner reported above and has carefully considered the conclusions and recommendations. In concurring therein, the Commissioner finds and determines that an

amount of $68,700 must be added to the amount previously certified by the Commissioners to be raised for the current expenses of the school district in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district. He therefore directs the Commissioners of the Village of Ridgefield Park to add to the previous certification to the Bergen County Board of Taxation of $1,616,939.22 for the current expenses of the school district the amount of $68,700, so that the total amount of the local tax levy for current expenses for 1968-69 shall be $1,685,639.22.

COMMISSIONER OF EDUCATION

June 13, 1968

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON,
Petitioner,

v.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

For the Petitioner, Henry F. Gill, Esq.

For the Respondent, Donald M. Ducko, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N. J. S.* 18A:22–37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1968-69 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes on June 11, 1968, at the State Department of Education, Trenton.

At the annual school election on February 13, 1968, the voters rejected the Board's proposals to raise $7,287,060 for current expenses, $30,818 for capital outlay, and $500 for evening school for boreign born. These items were resubmitted at a second referendum pursuant to *N. J. S.* 18A:22–36 on February 27, 1968, in the amounts of $7,197,060 for current expense, $20,818 for capital outlay and $500 for evening school for foreign born, but again failed of approval. The budget was then sent to the Committee pursuant to *N. J. S.* 18A:22–37 for its determination of the amount of funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Mercer County Board of Taxation an amount of $7,029,060 for current expenses, $20,818 for capital outlay, and $500 for evening school for foreign born.

The pertinent amounts in this matter may be shown as follows:

	Bd's 1st Proposal	*Bd's 2nd Proposal*	*Council Certification*	*Reduction*
Current Expenses	$7,287,060	$7,197,060	$7,029,060	$168,000
Capital Outlay	30,818	20,818	20,818	—
Evening-School for Foreign Born	500	500	500	—

When requested by the Board to state the reasons underlying the determination to curtail the appropriations by $168,000, the Committee suggested that the economies could be effected in two areas, the employment of additional teachers and pupil transportation. The suggested economies were subsequently detailed as a saving of $68,000 in the teachers' salary account and $100,000 in contracted services for pupil transportation. The Board contends that the amount certified by the Committee is insufficient to provide an adequate system of education for the pupils of the school district and appeals to the Commissioner to restore the deleted funds.

One member of the Board spoke in support of the Committee's action. He stated that the cut represented less than 2% of the total budget and is therefore only a token reduction. He cited the appropriation balances since 1963 and items of revenue which he contends will be available but have not been anticipated. More efficient assignment of teachers is possible, in his judgment, and would eliminate the over-budgeting in terms of enrollment which, he claims, has existed for some years. In his opinion, the reduction made by the Committee can be absorbed in several areas other than those suggested by the Committee.

The Committee recommends that no additional teaching positions be established for next year. In its budget the Board planned new positions as follows:

3 elementary teachers
10 junior high school teachers
1 senior high school teacher
5 elementary resource teachers
1 reading teacher
1 speech teacher
1 elementary librarian
1 learning disabilities teacher
1 adult school director (now part-time)

From his study of the testimony and evidence the Commissioner concludes that the above additional staff members are not only desirable but necessary to maintain a sound educational program. The enrollment is expected to increase by 385 pupils next year. The data show that there are already many classes where the number of pupils exceeds the optimum for effective teaching and learning. Additional teachers are essential if such condition is not to worsen. The Superintendent testified that some 150 pupils not now being serviced are in need of supplementary instruction in reading. It further appears that there are only two librarians for the twenty-two elementary schools, and no resource specialists (art, music, health and physical education, home

economics, industrial arts) available for any of the elementary grades. The data further reveal that the staff-pupil ratio in this district is the lowest in the county. In the light of these conditions, the Commissioner concludes that to enforce a moratorium on the employment of additional teachers is not justified at this time and would impair the educational program to an impermissible degree. The $68,000 deleted by the Committee must therefore be reinstated.

In the matter of contracted services for pupil transportation, the budget reveals an increase of $193,000 from $355,000 in 1967-68 to $548,000 in 1968-69. The Committee suggested that the amount for this purpose be reduced by $100,000 to $448,000.

The Board maintains when it reduced the amount proposed at the second referendum by $100,000 it contemplated that $50,000 of such saving would come from the pupil transportation account. Another $100,000 cut added to the $50,000 already deleted would not permit the operation of mandatory transportation services, according to the Board.

The $193,000 increase over the present budget represents $170,000 for transportation of pupils to nonpublic schools and $23,000 for normal increases in costs. The Board concedes, however, that recent amendatory legislation will effect a saving of approximately $38,000 in the cost of nonpublic school transportation.

The Commissioner notes that the total cost of transportation for the current school year is $352,000. Approximately $60,000 of this amount is nonmandated, leaving $292,000 to furnish required transportation. Nonpublic school services are estimated at $132,000. Adding these two amounts and including an amount of $24,000 (roughly 5%) for normal increases in costs produces a total of $448,000, or $100,000 less than the Board's original budget and the exact amount of the Committee's reduction.

It appears that the Board had already decided to cut its transportation budget by $50,000 when it resubmitted its budget in a reduced amount. A further reduction of $100,000 will leave only $398,000, which is $50,000 less than the $448,000 which appears to be necessary. The Commissioner finds, therefore, that $50,000 of the $100,000 deleted by the Committee must be reinstated in this account.

In summary, the Commissioner finds that the $68,000 reduction suggested by the Committee in the teachers' salary account and one half or $50,000 of the $100,000 deleted in the pupil transportation account must be reinstated in order to insure the maintenance of a thorough and efficient school system in the district. The Commissioner directs, therefore, that $118,000 be added to the appropriations for school purposes of the district previously certified by the Committee to the Mercer County Board of Taxation.

COMMISSIONER OF EDUCATION

June 26, 1968

CARMINE GIANNINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

For the Petitioner, Romei, Bernstein & Fiorello (Adolph A. Romei, Esq., of Counsel; John Fiorello, Esq., on the Brief)

For the Respondent, Robert P. Swartz, Esq. (George Sabbath, Esq., on the Brief)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a supervisor of custodians employed by respondent, asserts that he has been improperly and unlawfully dismissed in violation of his tenure rights. Respondent denies that petitioner has any tenure rights, and contends that the abolition of his position and his consequent dismissal were lawful acts within its power.

Testimony and documentary evidence were produced at a hearing conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on May 2, 1968, at the County Administration Building, Paterson. Briefs of counsel have been submitted.

Petitioner was first employed by respondent on May 10, 1962, in the capacity of "Assistant to the Supervisor of Buildings, Repairs, Equipment and Supplies." (P-3) The resolution employing him specified his term of employment from May 1, 1962, to January 31, 1963. He continued to be employed after the original term, although there is no evidence to show that respondent took formal action to reappoint him, either with or without term, after the original appointment. On September 13, 1962, the title of the supervisor whom petitioner served as assistant was changed to "Supervisor of Building Repairs and Custodial Services." (P-5) The job description adopted on February 13, 1963, (P-7) for this position reads as follows:

> "Under direction, has charge of the operation and maintenance of mechanical equipment, and repairs; and supervises all maintenance and custodial employees; does related work as required; makes inspections of buildings and other types of construction work to assure compliance of workmanship. Is responsible for the physical condition of the interior and exterior of school buildings, playgrounds and walks."

Petitioner served as assistant to such supervisor until June 2, 1966, when the incumbent supervisor resigned. (P-9) Thereafter, for six months, petitioner served as acting supervisor and received extra compensation for his additional duties. In a series of resolutions on January 5, 1967, (P-10) petitioner was transferred, with his consent and understanding that his rights were protected (Tr. 7, 8; but see Tr. 44, 45, 70, 71), to an existing vacancy in one of two

positions as Supervisor of Custodians, no term of appointment being mentioned; a person not previously employed by respondent was made Supervisor of Building Repairs and Custodial Services for a one-year term; and a person originally employed in October 1962 as a carpenter (P-6) was appointed to petitioner's prior position of Assistant Supervisor of Building Repairs and Custodial Services, likewise for a one-year term. Although the position of Supervisor of Custodians carried a lower salary in respondent's salary scale, petitioner's salary was adjusted so that he suffered no reduction because of his new assignment. (Tr. 11)

On November 2, 1967, respondent adopted the following resolution: (P-11)

> "WHEREAS, the members of the Board of Education have been engaged in a continued study relative to effecting economies in various areas of the Board's operation without impairing the efficient administration of the school system, and
>
> "WHEREAS, there are presently employed two Assistant Supervisors of Building Repairs and Custodial Services, and
>
> "WHEREAS, after careful consideration, it is the judgment of a majority of the members of the Board of Education that two such administrative and supervisory positions are not required and that an efficient administration of this department can be successfully maintained by one Assistant Supervisor of Building Repairs and Custodial Services, and as a result of such determination, now therefore be it
>
> "RESOLVED, that one of the presently existing positions known as Assistant Supervisor of Building Repairs and Custodial Services, be abolished effective December 31, 1967, and be it further
>
> "RESOLVED, that the last or latest appointee to said position be advised forthwith that his services will no longer be required following December 31, 1967 due to the abolition of the position heretofore held by him."

On November 10, a letter was addressed to petitioner by the Secretary of the Board (P-1), enclosing a copy of the resolution, *supra*, and notifying him that by the terms thereof his position was abolished and his services would be terminated effective December 31, 1967. The petition herein followed.

The testimony also establishes that the incumbent in the other position of Supervisor of Custodians has held that position for some 24 years; that subsequent to repondent's resolution of November 2, 1967, *supra*, twelve additional custodians have been appointed to provide around-the-clock custodial service in certain schools subject to vandalism; and that a former chief custodian in one of the schools has been appointed to be "in charge of the security of the buildings" so staffed for 24-hour custodial service, and to supervise the janitors employed in those buildings. (Tr. 72, 73) Petitioner also testified that the change in his position in January 1967 occurred after a change in the politics of the City administration, that he was active in the deposed party, and that the person appointed Supervisor in the position in which he had been Acting Supervisor was his political counterpart in the victorious party.

It is petitioner's contention: (1) that he acquired tenure in his employment; (2) that the abolition of his position was improperly motivated; and (3) that, in any event, under applicable statutes he is entitled to be restored to his former position as Assistant Supervisor. Respondent, on the other hand, denies that petitioner had acquired tenure as Assistant Supervisor, and asserts that, in any event, any rights in that position were waived by his acceptance of another position not protected by tenure, and consequently his release upon the abolition of that position was right and proper. Respondent further contends that petitioner's appeal should be dismissed on the grounds of laches, in that (1) he failed to take any action to test the legality of his position in 1963 when his original appointment expired; and (2) he took no action upon his acceptance of his new position in January 1967.

The Commissioner will not dismiss this petition on the ground of laches. It is true, and the Commissioner has previously held, that school district employees must make timely and effective protest when their employment rights are affected. (See, for example, *Harenberg* v. *Board of Education of Newark*, 1960-61 *S. L. D.* 144, affirmed Superior Court, Appellate Division, July 7, 1961, and cases cited therein.) However, such is not the case here. Petitioner had nothing to protest in 1963, since he was continued in his employment in accordance with the practice and custom of the Board of Education. (Tr. 58, 59) In January 1967 he accepted a transfer to another position with no reason to believe that any rights which he may have had were in any way impaired. It was not until respondent's resolution on November 2, 1967, and his subsequent notice thereof that any basis for an appeal occurred. The subsequent filing of the petition of appeal herein on January 8, 1968, is found to be timely.

The issues thus presented by the testimony may therefore be stated as follows:

I. Does petitioner enjoy tenure in any capacity? If so, in what capacity?

II. What was the effect, if any, upon petitioner's status by reason of his transfer in January 1967?

III. Was the abolition of petitioner's position *bona fide?*

IV. What rights, if any, did petitioner retain as a result of the abolition of his position?

I

The tenure rights of school employees in a janitorial or custodial position have been considered in numerous decisions of the Commissioner, the State Board of Education, and the courts. These decisions have given judicial meaning to what is sometimes called the Janitors' Tenure Law, originally enacted as *Chapter* 44, *Laws* of 1911, § 2. The invariable interpretation of this *Chapter* and its subsequent revisions and amendments (*R. S.* 18:5-67 as amended) has been that when a janitorial employee is appointed for a definite term, his employment rights do not extend beyond that term, but when the appointment is for an indefinite term, the protection afforded by the law continues indefinitely. *DeBolt* v. *Board of Education of Mt. Laurel Township*, 1932 *Supplement to School Law Decisions of* 1928, page 930, at 931 See also *Calverley* v. *Board of Education of Landis Township*, 1938 *S. L. D.* 706,

affirmed State Board of Education 709; *Lynch* v. *Board of Education of Irvington*, 1938 *S. L. D.* 703, affirmed State Board of Education 705; *Ratajczak* v. *Board of Education of Perth Amboy*, 1938 *S. L. D.* 709, affirmed State Board of Education 711, affirmed 114 *N. J. L.* 577 (*Sup. Ct.* 1935), 116 *N. J. L.* 162 (*E. & A.* 1936); *Whitehead* v. *Board of Education of Morristown*, 1949-50 *S. L. D.* 65; *Mignone* v. *Board of Education of West Orange*, 1965 *S. L. D.* 104; *Olley* v. *Board of Education of Southern Regional High School*, decided by the Commissioner February 7, 1968; and see *N. J. S.* 18A:17–3.

There is no question in the Commissioner's mind that petitioner's position, as a supervisor of janitorial work, comes within the meaning and intent of the tenure provisions for "janitors, janitor-engineers, custodians or janitorial employees" (*R. S.* 18:5–66.1) as expresesd in *R. S.* 18:5–67. In *Barnes et al.* v. *Board of Education of Jersey City*, 1961-62 *S. L. D.* 122, reversed in part State Board of Education 1963 *S. L. D.* 240, affirmed 85 *N. J. Super.* 42 (*App. Div.* 1964), cert. denied 43 *N. J.* 450 (1964), the Superior Court said:

> "* * * Morevoer, since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, 'the widest range should be given to the applicability of the law.' *Sullivan* v. *McOsker*, 84 *N. J. L.* 380, 385 (*E. & A.* 1913)."

Applying this principle to the question of whether an assistant janitorial supervisor, among others in *Barnes*, acquired tenure, the Court said further:

> "Our consideration of the statutes in the light of the principle of liberal construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees."

Nor is petitioner's tenure in the janitorial status in any way impaired because he worked in an administrative position. In *Brunner* v. *Board of Education of Camden*, 1959-60 *S. L. D.* 155, petitioner challenged the abolition of his position as Chief Janitor as a violation of his tenure rights. Holding that petitioner enjoyed tenure protection as a janitor, the Commissioner said:

> "In the opinion of the Commissioner, petitioner is protected in his position as chief janitor under the janitors' tenure statutes. * * * In the Commissioner's judgment, the position of chief janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the general scope of the tenure statute."

See also *Barnes* v. *Board of Education of Jersey City, supra*, 1963 *S. L. D.* at p. 248.

II

It follows, therefore, that when, in January 1967, petitioner accepted a transfer to the position of Supervisor of Custodians, he waived none of the protection of tenure that he had previously enjoyed as Assistant Supervisor of Building Repairs and Custodial Services. Respondent's "Policies and Job Descriptions, 1962" (P-13) at page 151 describes the position of Supervisor of Custodians as follows:

> "*Definition:* Under direction, responsible for supervising the custodial personnel engaged in cleaning and heating buildings of the school system; does related work as required.

> "*Examples of Work:* Inspects, analyzes, and determines the cleaning, heating, and maintenance work to be done; gives suitable instructions and assignments to personnel; establishes, maintains, and develops effective work plans; supervises the work involved in the cleaning and maintenance of school buildings, grounds, heating and ventilating systems; requisitions supplies and equipment, supervises the storing of equipment and supplies; takes necessary steps to eliminate fire and other hazards; prepares reports and correspondence, supervises the establishment of records and files."

This job description is strikingly parallel to the description of the duties assigned to the tenure-protected position of "Chief Janitor" in *Brunner, supra.*

III

The statutes (*R. S.* 18:5–66.1, now *N. J. S.* 18A:17–4) authorize boards of education to reduce the number of janitorial employees, subject to certain restrictions and conditions. In the instant matter, respondent's resolution of November 2, 1967 (P-11), purportedly abolishing petitioner's position, followed "a continued study relative to effecting economies in various areas of the Board's operation," and found that it was currently employing "two Assistant Supervisors of Building Repairs and Custodial Services." It further found that "two such administrative and supervisory positions are not required and that an efficient administration of this department can be successfully maintained by one Assistant Supervisor of Building Repairs and Custodial Services * * *." Although the testimony cearly establishes that there were not "two such positions," and that in any event petitioner held the position of Supervisor of Custodians, nonetheless it was he who received the notice of the Board's resolution and termination of employment. While respondent ascribes this inconsistency to a purely clerical error, the Commissioner does not find that it can be so readily disposed of, in view of the language of the resolution reciting "a continued study" and reaching its conclusion "after careful consideration." From all the circumstances, it is a reasonable inference that the intent of the resolution was to abolish the employee, rather than his position, and the Commissioner so finds.

Moreover, while the purported objective of abolishing the position named in respondent's resolution was to effect an economy, and while petitioner offered testimony, even though inconclusive, that no economy had been effected, respondent offered no proofs in refutation of petitioner's allegations. Nor did it effectively counter petitioner's testimony that respondent's entire scheme was to remove him for his political activity in behalf of losing candidates for municipal office. *Cf. Quinlan* v. *Board of Education of North Bergen*, 73 *N. J. Super.* 44, 54, 55 (*App. Div.* 1962).

The courts of New Jersey have upheld *bona fide* efforts to reorganize governmental administration for economy and efficiency, but they have also held that the *bona fides* of such efforts must be sustained, and that they may not be used as a guise for political recrimination. In *Newark* v. *Civil Service Commission*, 112 *N. J. L.* 571 (*Sup. Ct.* 1934), affirmed 114 *N. J. L.* 185 (*E. & A.* 1934), the Court, in reviewing the action of the Civil Service Commission restoring a legal assistant whose position was abolished purportedly for reasons of economy, found that

"The weight of the evidence is that the municipal action was not taken in the interest of economy, but that it was really to accomplish Ward's removal.

"Tenure of employment statutes are subject to the right of a governing body to discontinue old methods, create new offices and otherwise make changes in the public interest, provided such changes are not mere pretexts for removal from office." *Id.*, 112 *N. J. L.* at 574. See also *Quinlan* v. *Board of Education of North Bergen, supra*, at 54.

IV

But even if it were found that respondent did in fact abolish the position of Supervisor of Custodians and that such abolition was in good faith, petitioner's rights as a tenured custodial employee are fully protected by *R. S.* 18:5–66.1, the relevant part of which reads as follows:

"The board of education of any school district may reduce the number of janitors, janitor-engineers, custodians or janitorial employees, in any such district, subject to the following restrictions and conditions. * * * when any such janitor, janitor-engineer, custodian or janitorial employee under tenure is dismissed, the janitor, janitor-engineer, custodian or janitorial employee, having the least number of years of service to his credit shall be dismissed in preference to those having longer terms of service * * *."

The testimony establishes that petitioner's successor in the position of Assistant Supervisor of Building Repairs and Custodial Services had been in the employ of respondent for less time than petitioner. In the light of the Commissioner's determination that the transfer of petitioner to the position of Supervisor of Custodians constitutes no waiver of the protection he had previously acquired, it must be held that petitioner's dismissal constitutes a violation of his seniority protection under *R. S.* 18:5–66.1.

In summary, the Commissioner finds and determines that petitioner acquired tenure in respondent's district under the provisions of the statutes protecting the tenure of janitorial and custodial employees, and that he was dismissed from his employment by a resolution purportedly abolishing his position, in violation of his tenure and seniority rights under such statutes. The Commissioner therefore directs that petitioner be reinstated in respondent's employment in accordance with the findings herein, with all rights to back compensation to which he may be entitled.

COMMISSIONER OF EDUCATION

July 11, 1968

PETER P. LUCCA,

Petitioner,

v.

LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, CAMDEN COUNTY,

Respondent.

For the Petitioner, Hartman & Schlesinger (Jan M. Schlesinger, Esq., of Counsel)

For the Respondent, Joseph A. Maressa, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a resident in one of the constituent districts of the regional high school district administered by respondent, alleges that respondent permitted a letter addressed to "Dear Parents," promoting and favoring adoption of a school bond issue, to be distributed by children in the schools in violation of statute. Respondent denies any unlawful action.

Respondent moved to dismiss the petition on the grounds that the matter has been unduly protracted and that petitioner's request is meaningless because there is no affirmative relief which the Commissioner can grant. After a hearing on March 28, 1968, before the Assistant Commissioner in charge of Controversies and Disputes, the Commissioner denied respondent's motion, finding that he has a duty to see to it that the terms and policies of the school laws are faithfully effectuated and to order appropriate action on a showing by petitioner that respondent had conducted its affairs improperly. Petitioner was given leave, therefore, to proceed with his appeal. Thereafter, counsel for respondent and petitioner, by letters to the Commissioner, dated May 27 and June 3, 1968, respectively, agreed that a formal hearing in this matter would be unnecessary and that the matter be adjudicated by the Commissioner on the basis of the record without further proceedings. Counsel further agreed that the sole issue is whether the distribution of the subject letter by the pupils of respondent's schools prior to the special election on May 16, 1967, violated *N. J. S.* 18A:42–4, which reads as follows:

> "No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section."

The letter in question reads as follows:

"Dear Parents:

"We're concerned about your child who will enter junior high school in this district next September or in the years ahead. Our concern is over a space crisis, resulting in double sessions at Overbrook now and a certainty Edgewood will have them in two years.

"The reason is simple—the number of pupils entering the system is growing constantly but classrooms aren't. The district hasn't had a building program since 1959 when Edgewood was opened and Overbrook enlarged. "This situation can only worsen unless something is done quickly. The only solution can be more classrooms. This is our goal.

"On April 11, voters of the district took the first step toward more classrooms. They approved acquisition of 48.764 acres on Turnersville Road, Pine Hill, as a senior high school site.

"The next step will be taken Tuesday, May 16. Voters of the district, you among them, will have a chance to approve a $5.381 million bond issue to construct two new schools, a 53-room comprehensive senior high school in Pine Hill and new 35-room junior school on the same tract where Edgewood now stands in Tansboro.

"Such approval will give the district four schools, two senior high schools and two junior schools (including Overbrook which would be converted into a junior school). This will eliminate double sessions. Each child will be guaranteed a full day's education.

"The school board has been advised the district has been approved to conduct an area vocational program. With this comes a federal grant of $300,000 to help pay construction costs of the new schools. The State is expected to match this federal grant with another $300,000, making a total of $600,000, over 10% of the cost.

"If voters approve the bond issue, concern over classroom crisis will vanish. You as a parent can help decide the issue, but only if you vote in your town on Tuesday, May 16, between 5 and 9 p.m. Simply put, the question is: 'Do you want your child to have the best possible education or don't you?'

"This message is from your Board of Education:"

The letter concludes with the names of members of the Board of Education and the constituent district represented by each.

Petitioner contends that the letter promoted or favored the proposal to be voted on and that its distribution by the pupils of respondent's schools was violative of *N. J. S.* 18A:42–4, *supra*. Respondent denies the contention and asserts that the letter was distributed to supplement information previously disseminated by mail in order to make certain that the voters of some areas of the district having inadequate mailing addresses would be properly informed about the proposal to be voted upon in the approaching election.

The Commissioner finds no reason to question the purity of respondent's motives or the honesty of its intention to serve an essential public purpose by the preparation and distribution of the letter at issue herein. The Commissioner cannot escape the conclusion, however, that the tenor of the letter does

promote and favor the approval of the proposal before the voters, and its distribution by the pupils of respondent's schools is, therefore, inconsistent with the law. Respondent would have been better advised to have confined its dissemination of information to those media whose use is legally proper. The use of school pupils for the purpose was an error of judgment which cannot be supported, in the Commissioner's opinion.

The Commissioner wishes to emphasize, however, that his decision in this case is based solely on the fact that the letter was distributed by the pupils of respondent's schools and does not constitute a criticism of respondent's efforts to inform the voters concerning the proposal to be voted upon and to seek approval. The Commissioner has held previously in a similar case that while a board of education cannot legally utilize pupils of its schools to distribute to voters materials which promote or favor the adoption of election proposals, it can and should avail itself of reasonable promotional media to explain and interpret such proposals to the people. See *Halligan* v. *Board of Education of the Borough of Rutherford*, 1959 *S. L. D.* 198. A board of education not only has the right, but it also has the duty to disclose fully and fairly all relevant facts to the voters in its endeavor to inform and to secure approval of its proposals. *Cf. Citizens to Protect Public Funds and Dudley Kimball* v. *Board of Education of the Township of Parsippany-Troy Hills*, 13 *N. J.* 172 (1953).

The Commissioner finds and determines, therefore, that although respondent's motives may have been purposeful and well-intended, its utilization of school pupils to distribute the letter was contrary to the provisions of *N. J. S.* 18A:42–4. The Commissioner notes with approval, however, that respondent Board of Education has adopted a policy implementing the requirements of *N. J. S.* 18A:42–4, *supra*, which should provide proper guidance for its school staff in the future.

COMMISSIONER OF EDUCATION

July 15, 1968

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK,
Petitioner,

v

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

For the Petitioner, Potts and Gaynor (Robert E. Gaynor, Esq., of Counsel)

For the Respondent, Seiffert and Frisch (Andre William Gruber, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N. J. S.* 18A:22–37, certifying

to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1968-69 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes on May 29, 1968, at the State Department of Education, Trenton.

At the annual school election on February 13, 1968, the voters rejected the the Board's proposals to raise $2,835,985 by local taxes for current expenses and $134,910.58 for capital expenditures. These items were reduced to $2,829,308 and $95,710.58 respectively and submitted again at a second referendum pursuant to *N. J. S.* 18A:22–36 but again failed of approval. The budget was then sent to the Committee pursuant to *N. J. S.* 18A:22–37 for its determination of the amount of local tax funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Middlesex County Board of Taxation an amount which reduced the appropriations for current expenses by $150,767 and for capital outlay by $37,010, for a total reduction of $187,777.

The Committee suggested line items of the budget in which it believed economies could be effected without harm to the educational program. The Board reviewed the Committee's suggestions and determined in some instances that it could accept the proposed reductions in full, in other instances in part, and in some not at all. The total amount of accepted and uncontested reductions is $71,441. The Board contends that curtailment beyond such amount will not provide sufficient funds to maintain a thorough and efficient system of education for the pupils of the school district. It appeals to the Commissioner to restore the deleted amounts contested.

The following table shows the amounts budgeted by the Board for various items, the economies recommended by the Committee, the reductions deemed by the Board to be feasible, and those it contests and asks to be restored:

Acct. No.	*Item*	*Board Budget*	*Committee Reduction*	*Reduction Accepted*	*Reduction Appealed*
J110b	Salaries-Bd. Secy.'s Office	$ 49,044	$ 4,000	$ —	$ 4,000
J110f	Salaries-Supt.'s Office	48,091	7,500	—	7,500
J130b	Other Exp.-Bd. Secy.'s Office	5,000	1,000	—	1,000
J130f	Other Exp.-Supt.	2,500	1,000	1,000	—
J130m	Other Exp.-Publishing	3,000	1,000	1,000	—
	Salaries:				
J213	Teachers	1,963,411	25,000	15,000	10,000
J213a	Sup. Teachers	15,000	5,000	—	5,000
J214a	Librarians	55,935	5,000	—	5,000
J214b	Guidance	63,819	2,000	2,000	—
J214c	Psychological	36,669	1,000	1,000	—
J215a	Principal's Office	66,845	5,000	5,000	—
J215c	Clerical, Inst. Staff	33,572	3,000	3,000	—
J216	Teacher Aides	11,500	11,500	—	11,500

Acct. No.	*Item*	*Board Budget*	*Committee Reduction*	*Reduction Accepted*	*Reduction Appealed*
J230c	Audio-Visual Materials	13,411	3,000	3,000	—
J230e	Other Exp.-Library	5,000	1,000	1,000	—
J240	Teaching Supplies	64,730	8,000	8,000	—
J250a	Instruction-Misc. Supplies	10,110	930	930	—
J250b	Instruction-Travel Exp.	4,000	1,500	—	1,500
J250c	Instruction-Misc. Exp.	8,000	2,000	2,000	—
J310a	Salaries-Att. Officer	500	400	400	—
J510a	Salaries-Trans. Supvr.	9,321	821	391	430
J520a	Transportation Contr.	182,238	20,000	15,000	5,000
J520c	Field Trips	9,000	1,000	1,000	—
J550a	Other Expenses-Transp.	7,300	1,000	1,000	—
J610a	Salaries-Custodians	135,511	3,500	3,500	—
J640d	Telephone & Telegraph	11,000	1,000	—	1,000
J710b	Salaries-Bldg. Repair	31,993	1,000	1,000	—
J820b	Insurance-Employees	65,106	25,106	—	25,106
J830a	Rent-Instruction	22,700	700	700	—
J1010	Salaries-Student Activities	19,010	4,010	—	4,010
L1230c	Remodeling	30,580	15,290	—	* 15,290
L1240b	Equip.-Administration	1,760	1,000	1,000	—
L1240c	Equip.-Instruction	60,000	20,000	—	20,000
L1240f	Equip.-Plant Operation	3,520	720	720	—
	"Fifth step adjustment"	3,800	3,800	3,800	—
	Totals	$3,049,176	$187,777	$71,441	$116,336

* The Board appeals for an additional $5,420, a restoration of $20,710, to a total of $36,000 for this item based on new estimates of cost.

The Commissioner will consider each of the challenged reductions seriatim as follows:

J110b—Salaries—Board Secretary's Office. The amount budgeted for the current year in this account was $47,500. It appears that only $41,650 of this amount will be spent for salaries of incumbent personnel. For next year the Board budgeted $49,044, an increase of 20% over this year's expenditures. This amount is required to provide the salary increases and adjustments under new salary policies adopted by the Board. The major increase is $2,500 in the salary of the Board's Secretary from $15,500 to $18,000. The Committee has taken issue with the amount of the increases and recommends a reduction of $4,000 in the account.

In the circumstances of this matter the Commissioner must take the position that a 20% increase in one year in this account cannot be supported and suggests that 10% would be more reasonable. Such an increase of 10% over the 1967-68 salaries would produce an amount of $45,815 or $3,229 less than the sum budgeted by the Board. The Commissioner will, therefore, modify Council's reduction of $4,000 to $3,229 resulting in the reinstatement of the difference of $771.

J110f—Salaries—Superintendent's Office. The Board budgeted $48,091 for this account, an increase of $6,791 over the current year's appropriation. The major increase is in the salary of the Superintendent of Schools from $20,750 to $24,600. The Board protests the reduction of $7,500 recommended by the Committee.

The Board budgeted $41,300 in this account for the year 1967-68, but will expend $43,760. Its proposed increase to $48,091 for 1968-69 represents no more than a 10% increase over the current year's expenditures. The Commissioner notes further that the salary established for the Superintendent is in terms of a general salary policy established for administrative personnel which is tied in with the salary policy adopted for the instructional staff. Under such circumstances the Commissioner finds that the Committee's reduction cannot be allowed and he directs that the $7,500 deleted be restored.

J130b—Other Expenses—Board Secretary's Office. The amount budgeted for this account is $5,000, an increase of $890 over the $4,110 appropriated for the current year. The Board asks that the Committee's cut of $1,000 be reinstated.

The testimony failed to disclose the necessity for a 25% increase in this account. The Committee's reduction, however, would result in a lesser amount than that provided for the 1967-68 school year. The Commissioner finds that a small increase over current expenditures is required and will restore $250 in this account. The Committee's reduction of $1,000 is amended to $750.

J213—Salaries—Teachers. The Board budgeted $1,963,411 for teachers' salaries, an increase of $256,689 over the 1967-68 appropriations. A $25,000 reduction is recommended by the Committee.

It appears that the Board can absorb the reduction in this account. It seeks, however, to have $10,000 restored to be used for supplementary instruction purposes (J213a) for which, it maintains, insufficient funds have been budgeted. The Commissioner must take the position, however, that the Board is bound by the budget which it prepared and cannot, at this late date, seek to increase funds for certain items by seeking to have acceptable reductions in other accounts overridden for such purpose. The Board having failed to demonstrate the necessity for reinstatement of $25,000 in this account, the reduction made by the Committee will not be disturbed.

J213a—Salaries—Bedside Teachers. This year's budget provided $4,000 for this purpose. The Board made a substantial increase in its budget for next year to $15,000 and the Committee has recommended a saving of $5,000. The Board not only seeks to have the $5,000 restored but requests the Commissioner to add an additional $10,000, for a total of $25,000 for supplementary instruction purposes.

The Commissioner finds that the total amount of $15,000 budgeted by the Board is necessary in order to comply with mandated programs of instruction for children with special needs and the $5,000 deleted by the Committee must be restored. He finds further that such an amount represents a substantial increase for this purpose over previous years and that there is no basis for enlarging the amount beyond that determined to be necessary by the Board in its budget statement.

J214a—Salaries—School Librarians. The Committee suggests a saving of $5,000 in the $55,935 amount budgeted for librarians' salaries. The Board contends that this sum represents the amount of money necessary to employ its library staff for an eleventh month during the summer. Such a practice is desirable, in the Board's view, in order to have the libraries ready to open at the beginning of school in the fall.

While there can be little dispute that the employment of the library staff during the summer months may be desirable, it can hardly be held to be an essential element in the adequate operation of the school system. The Commissioner finds no basis on which he can order reinstatement of $5,000 in this account.

J216—Teacher Aides. The Board plans to employ teacher aides to release teachers from certain noninstructional duties. Such a plan has been under discussion and study for some time and formed part of the agreements reached between the Board and the staff in their salary and working conditions negotiations. On January 15, 1968, prior to submission of the budget to the electorate the Board adopted the following resolution:

> "That the salary policies agreement reached between the Education Association and the Board of Education for the 1968-69 school year including the attached salary schedules—teacher aides, basic hospitalization and medical insurance including a supplementary rider for all employees and their dependents, be adopted to become effective July 1st, 1968."

It is clear that the funds necessary to the implementation of salary policies adopted by a board of education must be provided and are not subject to curtailment. *N. J. S.* 18A:29-4.1 See also *Board of Education of Cliffside Park* v. *Mayor and Council of Cliffside Park.* The Commissioner determines, therefore, that the reduction of $11,500 must be reinstated in the appropriations.

J250b—Travel Expense—Instruction. For the past two years the Board has budgeted $3,500 to cover the cost of reimbursing professional staff members who are required to travel from school to school, and for travel expenses to workshops, conventions, meetings and recruitment trips. It increased the amount for next year to $4,000. The Committee suggests a reduction of $1,500.

The Commissioner finds that such a cut will reduce the funds for this purpose below the level of expenditures for recent years. He determines that $1,000 is to be reinstated in this account but finds no essential need for increasing it by $500 beyond the existing level.

J510a—Salaries—Pupil Transportation. The funds budgeted in this account cover the salaries of a part-time transportation supervisor and a full-time clerk-typist. Their proposed combined compensation, including increments, amounts to $8,930. The Board budgeted $9,321, an excess of $391. The Committee recommended $8,500, a reduction of $821. The Board asks for reinstatement of the $430 (corrected from $391) necessary to implement the proposed salaries.

This is a matter of salary policy and as such the amount necessary for implementation must be restored. The Commissioner determines that the

reduction in this account is to be limited to $391 and the remaining $430 will be reinstated.

J520a—Contracted Services—Pupil Transportation. The Board estimated $182,238 will be required in 1968-69 for pupil transportation bus contracts. Included in this sum is an amount in excess of $30,000 for transportation of nonpublic school pupils. As a result of amendatory legislation the Board concedes that, based on this year's experience, a saving of $15,000 can be estimated. The Committee reduced the account by $20,000 and the Board requests that $5,000 be restored.

The Commissioner will deny this request. From the evidence it appears that there is sufficient leeway in this account to absorb the additional reduction and no necessity for its restoration has been established.

J640d—Telephone and Telegraph. The Board contends that it has already expended more than the $11,000 it budgeted for next year for telephone service for the first nine months of the current year and therefore the Committee's reduction of $1,000 is unrealistic. The Committee contends that more adequate controls on telephone usage would enable operation within the lesser amount.

The Commissioner agrees with the Committee. The budget for this account has increased $4,000 in two years. The evidence fails to support the necessity for such increase and the $1,000 cut will not be disturbed.

J820b—Insurance—Employees. The Committee recommended the elimination of $25,106, representing the cost of health insurance for employees, from the amount of $65,106 budgeted by the Board. At the hearing of this matter, it was conceded that, pursuant to the holding of the Court in the *Cliffside Park* case, *supra*, an amount sufficient to provide such insurance coverage for the professional staff must be reinstated. The issue then becomes a question of whether an amount of $4,865, which represents the cost for coverage of nonprofessional personnel, must be reinstated.

The Commissioner sees no reason to deny the nonprofessional staff such an important benefit as health insurance coverage for the sole reason that such a denial is not proscribed by law. The proper operation of the school system depends not only upon a healthy and secure instructional staff but upon ancillary personnel whose health and security are similarly protected. Even though the statute which requires inclusion of the funds necessary to implement salary policies is limited to the professional staff, the Commissioner will hold that where a board of education has seen fit to extend such a benefit as insurance to other employees also, such amount is required for the proper operation of the schools. The Commissioner determines, therefore, that the sum of $25,106 for health insurance coverage is to be restored to the appropriations.

J1010—Salaries—Student Body Activities. The reduction of $4,010 in this account would require either that the salaries paid for supervision be reduced or that a sufficient number of activities be eliminated to accomplish the savings. The first of these alternatives must be rejected for the reasons set forth in J-216 *supra*. Examination of the list of activities fails to disclose any activity whose elimination would not impair the school program. The reduction in this item is not acceptable and the $4,010 must be restored.

L1230c—Remodeling. The Board planned to install fire detection equipment in the schools as required by the State Board of Education and budgeted $30,580 for such purpose. The Committee cut the amount in half to $15,290.

The State Board of Education adopted a regulation in 1963 requiring the installation of fire detection equipment in public schools by September 1968. South Brunswick's schools are not yet so equipped and no exemption or exception to the rule has been granted to them. The funds necessary to implement this mandated remodeling must be provided in the budget, therefore, and the Commissioner directs reinstatement of the $15,290 deleted by the Committee. Although the Board now believes that such sum may prove insufficient to accomplish the complete project, the Commissioner will decline to enlarge the amount originally budgeted.

L1240c—Equipment for Instruction. The Board's budget of $60,000 was curtailed by the Committee by $20,000 leaving $40,000 to be expended for instructional equipment.

The Board planned to use $40,000 for equipment at the new Crossroads School which opened in September 1967. It appears that the bond issue under which this school was authorized failed to provide sufficient funds to equip the school properly. The Board, therefore, submitted a referendum to the voters in the fall of 1967 requesting additional money to equip the school but the proposal was rejected. An amount of $40,000 was included then in the school budget in the hope of completing the Crossroads School.

To determine the exigency of this item, the Commissioner directed an inspection of the Crossroads School by a member of his staff. His report confirms the testimony offered by the Board that equipment essential to adequate instruction has not been provided in a number of classrooms and particularly those intended for teaching science, home economics or industrial arts. In order that these facilities which are now being used, may provide more adequately for teaching and learning, the Commissioner will direct reinstatement of the $20,000 by which this account was curtailed.

The following table summarizes the Commissioner's findings and determinations herein:

Account No.	*Reductions Accepted*	*Reductions Appealed*	*Reductions Reinstated*	*Reductions To Remain*
J110b	—	$ 4,000	$ 771	$ 3,229
J110f	—	7,500	7,500	—
J130b	$ 1,000	250	750	—
J130f	1,000	—	—	—
J130m	1,000	—	—	—
J213	15,000	10,000	—	10,000
J213a	—	5,000	5,000	—
J214a	—	5,000	—	5,000
J214b	2,000	—	—	—
J214c	1,000	—	—	—

Account No.	*Reductions Accepted*	*Reductions Appealed*	*Reductions Reinstated*	*Reductions To Remain*
J215a	5,000	—	—	—
J215c	3,000	—	—	—
J216	—	11,500	11,500	—
J230c	3,000	—	—	—
J230e	1,000	—	—	—
J240	8,000	—	—	—
J250a	930	—	—	—
J250b	—	1,500	1,000	500
J250c	2,000	—	—	—
J310a	400	—	—	—
J510a	391	430	430	—
J520a	15,000	5,000	—	5,000
J520c	1,000	—	—	—
J550a	1,000	—	—	—
J610a	3,500	—	—	—
J640d	—	1,000	—	1,000
J710b	1,000	—	—	—
J820b	—	25,106	25,106	—
J830a	700	—	—	—
J1010	—	4,010	4,010	—
L1230c	—	15,290	15,290	—
L1240b	1,000	—	—	—
L1240c	—	20,000	20,000	—
L1240f	720	—	—	—
5th Step	3,800	—	—	—
	$71,441	$116,336	$90,857	$25,479

The Commissioner finds and determines that the reduction in the certification of school appropriations made by the Committee will not permit the maintenance of a thorough and efficient system of public schools in the district of South Brunswick. The Commissioner directs therefore that an amount of $90,857 be added to the earlier certification made to the Middlesex County Board of Taxation and raised for the school purposes of the district for the year 1968-69.

COMMISSIONER OF EDUCATION

July 19, 1968

BOARD OF EDUCATION OF THE STERLING HIGH SCHOOL DISTRICT,
Petitioner,

v.

MAYORS AND COUNCILS OF THE BOROUGHS OF SOMERDALE, STRATFORD, AND MAGNOLIA, CAMDEN COUNTY,
Respondents.

For the Petitioner, Hyland, Davis & Reberkenny (William F. Hyland, Esq., and Richard C. Schramm, Esq., of Counsel)

For the Borough of Somerdale, Palese and Palese (Donald Palese, Esq., of Counsel)

For the Borough of Stratford, Thomas S. Higgins, Esq.

For the Borough of Magnolia, Joseph A. Maressa, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, the Board of Education of the Sterling Regional High School District, hereinafter "Board," appeals from an action of the Mayors and Councils of its constituent districts, the Boroughs of Somerdale, Stratford, and Magnolia, hereinafter "Councils," certifying to the County Board of Taxation a lesser amount of appropriations for the 1968-69 school year than the amount proposed by the Board in its budget which was twice defeated by the voters. The facts of the matter were presented at a hearing conducted on June 18, 1968, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The three Boroughs joined in an answer to the petition herein, but the Borough of Magnolia did not enter an appearance at the hearing.

At the annual school district election on February 6, 1968, the voters of the constituent districts rejected the Board's proposals to raise by local taxation the amounts of $767,478.48 for current expenses and $14,950.65 for capital outlay. The same proposals were resubmitted at a second referendum on February 20, and were again defeated. Thereafter the Board met with the several Mayors and Councils to consult about the budget, pursuant to *N. J. S.* 18A:13–19. Subsequently, on February 28 in Stratford, and on March 4 in Somerdale and Magnolia, the Mayors and Councils adopted similar resolutions certifying to the Camden County Board of Taxation the amount of $721,478.48 for current expenses, a reduction of $46,000, and $4,950.65 for capital outlay, a reduction of $10,000, as the amounts to be raised by local taxation for the regional school district for the 1968-69 school year.

Although in its petition to the Commissioner the Board seeks the restoration of the reductions in both current expense and capital outlay, at the hearing it presented no testimony on the capital outlay reduction, and withdraws its appeal on this item. Further, it is stipulated that the only issues before the

Commissioner concern the necessity for the restoration of the reductions made by the Councils, and that the Councils were furnished all information needed for their determination.

In a schedule annexed to their answer to the petition herein, the respondents itemize the recommended reductions to be made in the current expense appropriation, which is presented as follows, with supplementary explanatory information and minor corrections developed at the hearing:

Acct. No.	*Item*	*Board's Proposal*	*Councils' Proposal*	*Item Reduction*
110f-2	Supt.'s Secy.'s Salary	$4,800	$4,600	$200
110i-1	Bd. Secy.-Bus. Admin. Sal.	12,180	11,980	200
110i-2, 3	Secy.'s & Clerk's Salaries	9,800	9,400	400
213	Teachers-Salaries	558,965	550,965	8,000
213.1	Substitute Teachers	10,000	9,000	1,000
214a-2	Librarian-Salary	600	0	600
214b-4	Guidance-Salaries	42,690	32,690	10,000
214b-5	Guidance-Salaries (summer)	1,000	0	1,000
215a-1, 2, 3, 4	Clerks-Principal's Office	16,500	15,700	800
215a-5	Clerk-Substitute & Part-time	1,000	0	1,000
215c-1, 2	Clerks-Other	7,600	7,200	400
215c-3	Clerk-Guidance	3,000	0	3,000
230a-1	Library & Ref. Books	6,480	5,200	1,280
250c-1	Equipment-Rental	1,000	0	1,000
410a-3	Nurse-Salary	8,200	7,700	500
520c-2	Field Trips	3,110	2,000	1,110
610a	Custodial Salaries	59,875	56,900	2,975
610b	Care of Grounds-Salaries	9,600	8,800	800
1010	Athletics-Salaries	15,575	14,825	750
1020c	Athletics-Uniforms	13,790.35	9,000	4,790.35
	TOTAL ITEM REDUCTIONS			$39,805.35
	Appropriation from Surplus			6,194.65
	TOTAL BUDGET REDUCTION			$46,000.00

The hearing examiner makes the following findings, conclusions, and recommendations with respect to each of Councils' proposed reductions:

110f-2; 110i-2, 3; 215a-1, 2, 3, 4; 215c-1, 2—Clerical and Secretarial Salaries. For the purpose of this report, these items are grouped together, since they are concerned with salary increases proposed for nine clerical and secretarial personnel in the Superintendent's, Principal's, Secretary-Business Manager's and other offices in the system. In accordance with a salary schedule for such personnel adopted November 22, 1967, the Board proposed to

grant each an increment of $200 and an adjustment increment of $200 to bring them to their proper step on the schedule. The Councils contend that an increment of $200 each is sufficient and comports with increments being granted to municipal employees in the constituent districts. The Board contends that its salary schedule is designed to make its salaries competitive with those paid in private employment, in order that it can attract and retain competent clerical help. Examination of salary data furnished to the Commissioner in connection with this hearing reveals that the proposed $400 increases constitute, on an average, approximately 10 percent on present salaries. Increases of this order are not in excess of the percentages proposed for other employees, both professional and nonprofessional. The maintenance of a stable, trained secretarial and clerical staff is essential to the efficient operation of a school system. The hearing examiner recommends that the $1,800 reduction proposed by the Councils for these items be restored.

110i-1—Salary—Board Secretary-Business Administrator. The Board proposes to increase the salary of its Secretary-Business Administrator by $500 to $12,180. The Councils recommended reducing the increase to $300, as being a sufficient increase. The testimony reveals that the incumbent has been employed in school board work in this district or elsewhere for some 30 years, and that her present salary is lower that that of any other school business administrator in Camden County. The hearing examiner finds that the Board's proposed $500 increase is reasonable, and recommends that the $200 cut by the Councils be restored.

213—Salaries—Teachers. The Councils propose that $8,000, representing a salary appropriation for the addition of one more teacher, be eliminated from the budget. The testimony reveals that an enrollment increase of 125 pupils is anticipated for 1968-69. The present staff:pupil ratio is 1:17.5, and the addition of one more teacher, it is argued by petitioner, is needed to maintain a suitable ratio and keep class sizes reasonably close to their present level. The hearing examiner finds no evidence of excessive staff complement, and concludes that the addition of but one more teacher for the anticipated enrollment increase is conservative, and necessary for the maintenance of a thorough and efficient school. It is therefore recommended that Councils' reduction of $8,000 in this item be restored.

213.1—Salaries—Substitute Teachers. The Board's budget increased the appropriation for salaries of substitute teachers from $9,000 in 1967-68 to $10,000 for 1968-69. Councils contend that the current budget appropriation of $9,000 is sufficient, based on available information. The testimony, however, shows that in 1965-66 $14,000 was spent for substitutes, $12,900 was paid in 1966-67, and in the current year to date $9,700 has been expended. It was explained that the $9,000 budgeted for 1967-68 reflected the anticipation that certain special needs in the preceding two years would not immediately recur. The increase of $1,000, the examiner finds, represents a reasonable anticipation in the light of the past three years' experience. It is therefore recommended that the reduction of $1,000 be restored.

214a-2—Librarian—Salaries. An amount of $600 was appropriated by the Board to provide library services in the school on two evenings a week. It was testified that no other suitable library facilities are available in the district after school hours. Councils offer no testimony *contra* that presented

by petitioner, and submit the matter for the Commissioner's determination. In consideration of the testimony, and the great importance of available library facilities in modern education, the hearing examiner recommends that this item be restored.

214b-4—Guidance—Salaries. Council recommends that one of four guidance counselors be eliminated, at a saving of $10,000. The testimony shows that with present counseling staff the counselor:pupil ratio for 1968-69 would be 1:330, and that if only three counselors were employed the ratio would rise to 1:441, to the detriment of the guidance program. The burden of Councils' testimony is that since it is felt that the guidance staff is not operating at desirable effectiveness and efficiency, elimination of one counselor would put the remaining three on their mettle. The logic of this reasoning escapes the hearing examiner; if employees are not functioning effectively, there are appropriate administrative means other than mere reduction of staff to deal with the situation. The hearing examiner finds that the recommended reduction of the guidance staff would be detrimental to the operation of a thorough and efficient high school, and recommends the restoration of the proposed $10,000 reduction.

214b-5—Guidance—Salaries (summer). The Board proposes to employ one of its guidance counselors for one month during summer vacation in order to provide guidance services during the period when the full-year guidance director is on vacation. Councils feel that such full-time service is not needed for thorough and efficient operation of the school, and suggest that other administrative personnel available in the school during the summer could supply some of the guidance services. The hearing examiner finds that however desirable it may be to have the guidance office operative throughout the summer, it is not essential, in that summer guidance services can be controlled by scheduling more effectively than during the academic year, when all pupils are present and the services of counselors are needed on a continuous basis. It is therefore recommended that the proposed $1,000 reduction be undisturbed.

215a-5—Salaries—Substitutes and Part-time Clerk. An appropriation of $1,000 was budgeted by the Board for the employment of substitutes for clerical employees, and to provide part-time summer clerical help. While the need for such summer help was not clearly demonstrated, the fact is that more than the $1,000 budgeted for substitute clerical help in 1967-68 has already been expended. On this basis alone, the budgeted amount of $1,000 is reasonable and necessary, and should be restored. The hearing examiner so recommends.

215c-3—Clerk—Guidance Office. The Board budgeted $3,000 to employ an additional clerk as of September 1968, to work in the guidance office. The principal need for this clerk, it was testified, is to assist the present clerk in the preparation of pupil transcripts, the volume of which is steadily increasing. The Councils feel that this expenditure is not needed. The hearing examiner finds that the need for this clerk is established by the testimony, and recommends the restoration of the $3,000 proposed by the Board for this item.

230a-1—Library and Reference Books. For 1967-68 the Board budgeted $5,200 for library and reference books. It proposed to increase that amount

to $6,480 for 1968-69. The Councils recommend that this increase, amounting to $1,280, be eliminated. The Board's proposal would provide for a per-student expenditure of approximately five dollars for the 1968-69 enrollment. The hearing examiner finds this proposal necessary for the maintenance of an effective library facility for this school, and recommends that the $1,280 reduction recommended by the Councils be restored.

250c-1—Equipment Rental. An item of $1,000 for the rental of a photocopying machine was included in the Board's budget. It was testified that this machine would be made available to pupils in the library for making photocopies on a fee basis. The Councils contend that such equipment is not necessary for the operation of a thorough and efficient school. The hearing examiner agrees, and recommends that this reduction be sustained.

410a-3—Nurse—Salary. The Board budgeted $500 to adjust the school nurse's salary to place her on the scale provided for teachers holding the bachelor's degree. It was testified that the nurse does not have the degree, but that other teachers without the bachelor's degree are paid on that scale. Absent any evidence of a separate salary category for school nurses (*cf. Johnson* v. *Board of Education of West Windsor*, decided by the Commissioner December 13, 1967), and in recognition that a school nurse is a teacher (*cf. McCarthy* v. *Board of Education of Orange*, 1955-56 *S. L. D.* 124), the hearing examiner finds no reason to conclude that, with respect to salary, the school nurse should receive less than other teachers without a degree. It is therefore recommended that the $500 cut from this account be restored.

520c-2—Field Trips. The Board increased its budget for this account from $1,550 in 1967-68 to $3,110 for 1968-69. The Councils believe that the increase in this amount is unnecessary, and recommends a budget amount of $2,000, for a reduction of $1,110. While the Commissioner has previously held that field trips are a desirable aspect of the curriculum (*Willett* v. *Board of Education of Colts Neck*, 1966 *S. L. D.* 202), it was not shown that doubling the budgeted amount for such trips for 1968-69 is necessary for the maintenance of a thorough and efficient high school program. It is therefore recommended that the reduction of $1,110 proposed by the Councils be sustained.

610a—Custodial Salaries. The Board budgeted salary increases and adjustments of $400 each for twelve persons employed in its custodial staff, in accordance with a salary scale adopted in December 1967. The Councils recommended that these increases be limited to $200 each, for a total saving of $2,400, plus the correction of an alleged "error" in the Board's figures of $575, for a grand total reduction of $2,975 in the custodial salaries account. The Councils contend that increases of $200 would be commensurate with those granted to municipal employees in comparable work. The Board testified that competent custodians cannot be employed or retained unless its salary scale is maintained, and the hearing examiner so finds. The Board also testified that the $575 appropriated in this account is not, in fact, an "error," but represents that portion of a $5,500 item budgeted for substitutes and over time applicable to the 610a account. The hearing examiner recommends that $2,975 be restored to this account.

610b—Salaries—Care of Grounds. The Board's budget provides $4,800 for the employment of an additional man for the care of grounds. The Councils believe that such an employee can be secured for $4,000, and

therefore recommend an $800 reduction. The testimony establishes that the job requirements call for a semi-skilled employee capable of doing maintenance work, and that the proposed $4,800 is required to employ a person with the past experience and skills called for. The hearing examiner so finds and recommends the restoration of $800 cut by the Councils.

1010—Athletics—Salaries. The Board proposed in its budget to spend $15,575.00 for supplementary salary payments to professional personnel involved in its athletics program, an increase of $1,575 over the amount budgeted for this item in 1967-68. Some of the increase provides for salary increases to certain individuals, and the remainder is to provide coaching and direction for additional athletic activities. The Councils recommend that $750 of the increase be eliminated, on the grounds that the teachers involved have received adequate increases in their contractual salaries. The hearing examiner finds that the testimony does not establish the need for the full amount of the budgeted increase, and recommends that the $750 reduction proposed by the Councils be undisturbed.

1020c—Athletics—Uniforms. The budget for purchase of uniforms for athletics was increased from $9,000 for 1967-68 to $13,790.35 for 1968-69, an increase which the Councils feel is unjustified and unnecessary. The testimony of the Board was that the increase was needed to buy uniform equipment to provide greater safety for pupil participants; however there was such a lack of specificity in the testimony as to the precise needs to be met that the hearing examiner finds that the increase of $4,790.35 in this item is not necessary for the operation of a thorough and efficient school. It is therefore recommended that the reduction in this amount proposed by the Councils be sustained.

Appropriation from Surplus. The Councils recommend that in order to reduce the local tax levy, a sum of $6,194.65 be appropriated from available surplus in the current expense account. It was testified that at the meeting of the Board and Councils on February 26, 1968, the surplus amounted to nearly $28,000. At the time of the hearing the surplus was $24,000, with outstanding purchase orders in excess of this amount. However, the Board testified that a surplus was expected, of an amount that could not be accurately predicted at this time. There was no testimony that the amount of surplus proposed by the Councils to be appropriated would not be available, or that such an appropriation would make it impossible for the Board to operate effectively during the 1968-69 school year. The hearing examiner therefore recommends that Councils' proposal to appropriate $6,194.65 from surplus be sustained.

In recapitulation, the hearing examiner finds that appropriations amounting to $31,155, which appropriations the Councils recommended should be eliminated from the budget, are reasonable and necessary for the operation of Sterling Regional High School in 1968-69, and recommends that this amount be restored to the budget. He further finds that appropriations amounting to $8,650.35 are not necessary for such operation, and recommends that this amount, together with $6,194.65 to be appropriated from surplus, be not restored to the budget.

* * * * * * *

The Commissioner has reviewed the findings of the hearing examiner reported *supra*, and has carefully considered the recommendations made upon these findings. In concurring therein, the Commissioner finds and determines that an amount of $31,155 must be added to the amount previously certified by the Mayors and Councils to be raised for the current expenses of the Sterling Regional High School District in order to provide sufficient funds to maintain a thorough and efficient high school in the district. He therefore directs the Mayors and Councils of the Boroughs of Somerdale, Stratford, and Magnolia, constituent districts of the Sterling Regional High School District, to add to the previous certification to the Camden County Board of Taxation of $721,478.48 for the current expenses of said school district the amount of $31,155, so that the total amount of the local tax levy for current expenses shall be $752,633.48.

COMMISSIONER OF EDUCATION

July 19, 1968

Dismissed by State Board of Education, October 9, 1968.

IN THE MATTER OF THE TENURE HEARING OF DOROTHY MOLLER, SCHOOL DISTRICT OF WEST ORANGE, ESSEX COUNTY

For the Complainant Board of Education, Samuel A. Christiano, Esq.

For the Respondent, Cole & Geaney (John F. Geaney, Jr., Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Charges against respondent, a teacher under tenure in the employ of the West Orange Board of Education, were certified by the Board to the Commissioner, pursuant to *N. J. S.* 18A:6–11. The respondent, in an amended answer to the charges, makes the following statement:

> " * * * Mrs. Moller, while not conceding guilt does not desire a hearing of the matter * * * [and] is satisfied to accept the two weeks suspension of pay which has already been imposed upon her by the West Orange Board of Education."

The Commissioner, having considered the charges as filed and certified, and being informed that respondent was restored to her employment following a period of two weeks' suspension without pay, accepts respondent's statement of her position in this matter and determines that such suspension constitutes a suitable and sufficient penalty in this matter. (*In re Fulcomer*, 93 *N. J. Super.* 404 (*App. Div.* 1967), decided by the Commissioner on remand August 9, 1967)

COMMISSIONER OF EDUCATION

July 26, 1968

DIANNE NASHEL,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY, AND JOHN J. WHITE, SUPERINTENDENT OF SCHOOLS,

Respondents.

For the Petitioner, Platoff, Platoff & Heftler (Howard M. Nashel, Esq., of Counsel)

For the respondents, Alexander A. Abramson, Esq., and Isidore Parnes, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner in this case asserts that her employment as a teacher in respondents' schools was terminated unlawfully and in violation of the terms of her employment contract. Respondents answer that her employment was terminated in accordance with a rule of the Board of Education terminating employment at the end of the third month of pregnancy.

A hearing in this matter was held on June 19, 1968, at the office of the County Superintendent of Schools, Jersey City, before a hearing examiner designated by the Commissioner. The report of the hearing examiner is as follows:

Petitioner was first employed by respondent Board for the 1966-67 school year. She was reemployed under contract with the Board for the period from July 1, 1967, to June 30, 1968. On or about September 8, 1967, shortly after the reopening of schools, petitioner, in conversation with her principal, revealed to him that she was pregnant, and would complete the third month of her pregnancy at the end of September. The principal communicated this information to the Superintendent, who met with the teacher in conference on or about September 11. The Superintendent testified that he informed the teacher of the Board's rule concerning pregnancy, and that she would not be permitted to teach after September 29. He directed her to submit her resignation and a letter from her physician. The teacher indicated at that time that she felt that the Board's policy was unfair and unfounded. Under date of September 14, the teacher's physician wrote, at her request, a letter "To Whom It May Concern," certifying that she would complete the third month of pregnancy on October 1, 1967; that her expected date of confinement was March 31, 1968; and that she "is in excellent health and may continue to work." This letter was duly delivered to the Superintendent. However, the teacher did not submit a letter of resignation. She was employed in instructional activities through the month of September, although not assigned to a class, and her employment was terminated as of the end of that month. During the course of the month, her attorney addressed a letter to the Superintendent (P-1), protesting the proposed termination as illegal, and

received a reply (P-2) stating the Superintendent's duty to enforce Board policies, and asserting the respondent Board's authority to establish such a policy as the one in question "in the best interest of the children in their schools."

It is stipulated that respondent Board's minutes disclose no formal action of the Board with respect to petitioner's termination. It is further stipulated that the termination of petitioner's employment was effected pursuant to a rule (3380) printed in the "Staff Handbook" which reads in part as follows (R-1):

"*LEAVES OF ABSENCE*

"Leaves of absence shall be granted only to teachers under tenure and for the following reasons:

Personal Illness
Maternity
Sabbatical Leave for Study
Sabbatical Leave for Rest & Recuperation

* * * * * * *

"2. *Maternity*

"Any member of the teaching staff who is a married woman, as soon as she is three months pregnant, shall file with the Superintendent an application for a maternity leave together with a doctor's certificate stating the date of the expected birth. The Board of Education shall then grant a maternity leave for two calendar years plus such time as is necessary for the teacher to return February 1st, or September 1st."

The contract of employment between petitioner and respondent Board contains, *inter alia*, the following provisions:

"The said party of the second part hereby accepts the employment aforesaid and agrees to faithfully do and perform duties under the employment aforesaid, and to observe and enforce the rules prescribed for the government of the school by the Board of Education.

"It is hereby agreed by the parties hereto that this contract may not be terminated by either party excepting for physical disability or other just cause preventing the employee from performance of service hereunder and the contract shall run for the full term named above."

It is petitioner's contention that respondent Board had no rule which provides for the termination of employment, for maternity reasons of a teacher not under tenure. She emphasizes that the rule of the Board under which she was purportedly terminated provides only for *leaves of absence* of *tenure teachers*. Thus, she contends, she had no knowledge of a rule governing the conditions of her contract, since no rule in fact existed. Further, she urges, she was not physically disabled from continuing to perform her duties as a teacher on and after October 1, 1967, as indicated by the statement of her physician, *supra*, as well as by her own testimony as to her physical well-being. Her own and a neighbor's testimony, she asserts, was

offered to show that her pregnancy was not visible until approximately the beginning of the eighth month.

In any event, petitioner contends, respondent Board made no determination at any time that she was physically unfit for work, or that any just cause existed for her termination, nor did it at any time take any formal action to dismiss her by a majority vote of its full membership as required by statute existent at the time the petition was filed, *R. S.* 18:6–20. The entire process of the purported termination, petitioner avers, was conducted by and under the direction of the Superintendent of Schools.

Respondents, on the other hand, argue that by the terms of her employment contract petitioner is bound to conform to the rules of the Board, and that the rule, *supra*, governing leaves of absence for maternity reasons is applicable to non-tenure teachers in that, since such teachers are not eligible for leave of absence, they must resign or be terminated at the end of the third month of pregnancy. There can be no greater rights for the non-tenure than for the tenure teacher, respondents argue; therefore the rule must be interpreted in its inclusive and general effect. Respondents contend further that the condition of petitioner's health, however fine it may have been, is not relevant, since the rule is intended to cover all teachers who are pregnant, of whom some might not enjoy such good health. (Tr. 69)

As to petitioner's emphasis on the absence of any formal determination or action by the Board with respect to her termination, respondents argue that the power to dismiss teachers given by *R. S.* 18:6–20 applies only to dismissal of tenure teachers, and cite *Downs* v. *Board of Education of Hoboken*, 12 *N. J. Misc.* 345 (*Sup. Ct.* 1934), affirmed as *Flechtner* v. *Board of Education of Hoboken*, 113 *N. J. L.* 401 (*E. & A.* 1934):

> "These powers are limited as to the employment and discharge of teachers only to the extent provided by the Teachers' Tenure Law * * *."

R. S. 18:6–20 reads in relevant part as follows:

> "No principal or teacher shall be appointed, transferred, or dismissed * * * except by a majority vote of the whole number of members of the board."

The hearing examiner finds no basis either in the court's decision in *Downs* or in the statute itself for the narrow interpretation which respondents urge. The only limitation on the broad powers contained in the statute, *supra*, is with respect to, and to the extent provided in the Teachers' Tenure Law.

In conclusion, the hearing examiner finds that

1. Petitioner's employment was terminated by direction of the Superintendent of Schools at the conclusion of the third month of her pregnancy on September 30, 1967.

2. The termination was accomplished purportedly under a rule of the Board of Education providing that teachers under tenure must apply for a leave of absence to begin at the end of the third month of pregnancy.

3. No action was taken by respondent Board to make any determination with respect to termination of the employment contract with petitioner or to dismiss her in accordance with any of the terms of such contract.

* * * * * * *

The Commissioner has reviewed and considered the findings of the hearing examiner as reported above.

There is no doubt in the Commissioner's mind that within the power given to boards of education to make rules and regulations "for the employment, regulation of conduct and discharge of its employees" (*N. J. S.* 18A:11–1), ample authority exists for such boards to make rules concerning the employment of teachers who are pregnant. Such rules are in the interest of both the pupils and the employee. See, for example, *Mateer* v. *Board of Education of Fair Lawn*, 1950-51 *S. L. D.* 63, affirmed State Board of Education 1951-52 *S. L. D.* 62. Such rules might provide for a leave of absence, as respondent Board's rule provided for its tenure employees. Or the Board might provide by rule (*N. J. S.* 18A:27–4) or contract (*N. J. S.* 18A:27–5, 6) for the termination of employment of a non-tenure teacher. In the instant matter, however, whether through design or oversight, respondent has made no provision for either leave of absence or for the termination of employment, prior to the end of the term of the employment contract, of teachers not protected by tenure. It cannot be held that respondent's rule, *supra*, respecting leaves of absence for tenure teachers can be so general and inclusive as to *imply* the termination of a contract. The mutual and separate rights of boards of education and their teachers are too precisely defined by the statutes to permit of such broad interpretation. Thus it cannot be said, and the Commissioner so finds, that petitioner breached her contract by failing to "observe and enforce" any rule prescribed by the Board for the government of the school with respect to maternity, since no rule existed which was applicable to her.

Moreover, with respect to any provision contained in the employment contract which would provide a basis for its termination, respondent specifically eschews any claim of "physical disability" on petitioner's part, and made no finding of "other just cause preventing the employee from performance of service." The findings of the hearing examiner demonstrate that all of the procedures leading to the termination of petitioner's employment were carried on by the Superintendent. Whether, prior to September 30, 1967, the Board was even aware of the developing situation, including the exchange of letters between petitioner's attorney and the Superintendent, is not shown by the testimony. It is not necessary to belabor the fact that both employment and dismissal of teachers are functions of the board of education. Had respondent Board, in this case, been apprised of petitioner's condition, and had it taken action reserved by law only to a board of education, the results might well have been different. But it is clear to the Commissioner, and he so finds, that this termination was a unilateral action by the Superintendent, beyond the scope of his authority. The Commissioner therefore holds that the procedures by which petitioner was terminated violated her rights under her contract and under the statutes.

The statutes (*N. J. S.* 18A:6–30.1, formerly *R. S.* 18:13–11) provide that

> "When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract * * *."

In the instant matter, the "full term of the contract" was to the end of the 1967-68 school year. Petitioner seeks compensation either for such "full term" or for such a period of time as her condition of pregnancy would not have prevented her from performing her services under her contract of employment.

Nothing in the testimony indicates any desire or intention of petitioner to resume teaching under her contract after her period of confinement at the end of March 1968. On the other hand, the unrefuted testimony of petitioner and her witness was that her pregnancy was not visible until approximately February 1, 1968, at the end of the seventh month of her term of pregnancy. While the Commissioner believes that it is within the discretion of a local board of education to determine by its own rule the time and conditions under which leave of absence or termination of employment for maternity reasons shall begin, in the particular circumstances of this case he finds it reasonable to conclude that, absent any effective rule or procedure that could have terminated her contract, petitioner's eligibility for employment under her contract continued to the end of January 1968. He therefore directs that petitioner be compensated in accordance with the terms of her contract, to and including January 31, 1968.

COMMISSIONER OF EDUCATION

August 12, 1968

JOY AND EDWARD CALHOUN,

Petitioners,

v.

LONG BRANCH BOARD OF EDUCATION, MONMOUTH COUNTY,

Respondent.

For the Petitioners, *Pro Se*

For the Respondent, Giordano, Giordano, and Halleran (John R. Halleran, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

In this action petitioners allege that class trips are planned in respondent's schools in which participation during school hours is not optional and is at the pupils' own expense. Respondent enters a general denial of the allegations and has moved for dismissal of the petition. A memorandum of law was submitted in support of the motion.

A hearing on the motion was held on June 21, 1968, at the State Department of Education, Trenton, by a hearing examiner designated for that purpose. The report of the hearing examiner is as follows:

The petition of appeal herein relates specifically to a trip taken by pupils of four sections of the eighth grade of respondent's Junior High School to a theater in Asbury Park on February 13, 1968. Each pupil expressing the intention to attend, paid the sum of $2.00 to cover costs of transportation and admission to view the film, "Gone With the Wind." Petitioners' son, a member of one of the class sections, was absent from school on the day of the trip and therefore did not participate. The $2.00 paid in advance by him was subsequently refunded in full.

The motion for dismissal is urged on the following grounds:

1. The issues raised by petitioners are moot.
2. Petitioners have no standing to maintain the appeal.
3. Petitioners have failed to state a claim upon which relief may be afforded.

Respondent argues that the entire incident complained of by petitioners is now past and that the issues raised by petitioners are moot. It is respondent's contention that since petitioners' son was unable to participate in the trip because of absence from school due to illness, and since the money he had previously paid to cover the costs of the trip was fully returned to him, there is no longer any controversy to be adjudicated. Petitioners, on the other hand, argue that the matter is not moot and that they must look to future problems with their child in similar circumstances if present procedures with respect to class trips continue to be utilized in respondent's schools. It is also argued by petitioners that their child should not be required to attend school under conditions in which he cannot or will not participate with the majority of classmates. A dispute was created, petitioners assert, before the actual date of the trip when the proposal to attend the showing of the film, *supra*, was first made. It was then, they claim, that pressure was first put upon their son to participate in the trip and that such pressure continued. Respondent argues that petitioners' claim of such pressure was not alleged in the pleadings and that it cannot therefore now be made an issue.

Respondent argues further that petitioners have no standing to maintain the instant appeal since they have suffered no harm or injury as a result of the trip. Respondent points out that the courts have held previously that it must be demonstrated that a real controversy exists and that injury or harm has been done for relief to be obtained. See *Cochran* v. *Planning Board of Summit*, 87 *N. J. Super.* 526, 534 (*Law Div.* 1965); *Newark Twentieth Century Taxicab Association* v. *Lerner*, 11 *N. J. Super.* 363, 366 (*Chan. Div.* 1951). Petitioners again argue the possibility of future harm arising from the operation of respondent's policy, citing a specific trip already being planned in which their son will be given the chance to participate. The hearing examiner concludes that, since petitioners' son did not participate in the trip and since the fee previously paid by him was later refunded, petitioners suffered no harm or injury.

* * * * * * *

The Commissioner, having considered the findings and conclusions of the hearing examiner as reported above, determines that he cannot look beyond

the pleadings for issues that are not set forth therein. Also the Commissioner finds and determines that since petitioners' child was absent from school on the date of the trip and since he was refunded all monies previously paid by him for the trip, petitioners have suffered no harm and have therefore no standing in the appeal herein. The Commissioner therefore holds that there is no controversy presently cognizable before him pursuant to *N. J. S.* 18A:6–9 and no justifiable issue which he can decide. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION

August 12, 1968

IN THE MATTER OF THE TENURE HEARING OF ALFRED E. JAKUCS, SCHOOL DISTRICT OF THE CITY OF LINDEN, UNION COUNTY

For the Complainant, Magner, Abraham, Orlando & Kahn (Richard B. Magner, Esq., of Counsel; Irving C. Evers, Esq., of Counsel and on the Brief)

For the Respondent, Joseph N. Dempsey, Esq.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

Charges pursuant to the Tenure Employees Hearing Act have been certified to the Commissioner by the complainant Board of Education (hereinafter "Board") against respondent, a teacher under tenure in the school district of Linden. The teacher has moved for dismissal of the charges.

A hearing on the motion for dismissal was held on June 3, 1968, at the State Department of Education, Trenton, by a hearing examiner designated for that purpose. The report of the hearing examiner is as follows:

The motion for dismissal of the charges certified by the Board to the Commissioner by resolution dated March 26, 1968, is urged on the following grounds:

I. The Board, having knowledge of the charges against the teacher, failed to take action thereon within 45 days, as required by statute.

II. The charges allege inefficiency, and the teacher was not given 90 days' written notice thereof, as required by statute.

I.

Attached to and made part of the notice of motion herein are two directives from the President of the Board, one (Schedule A), dated December 4, 1967, suspending the teacher from certain of his duties and assigning them to another employee "pending further action of the Board, and while this matter is under investigation;" the other (Schedule B), dated January 10, 1968, defining the teacher's duties and relocating his office, "for the purpose of promoting efficiency and harmony in the department and the school system." It is argued that it must be presumed that at the time of the issuance

of these directives, both more than 45 days prior to March 26, 1968, the Board had knowledge of the substance of the allegations against the teacher and took no action to determine whether to certify charges to the Commissioner. See *N. J. S.* 18A:6–11 and 13.

No allegation is made that formal charges, *in writing*, were filed with the Board by anyone other than, or prior to, the written charges signed by the President of the Board, dated March 26, 1967 (obviously, from the content of the charges, in error for 1968), which were considered at a meeting on that date. The hearing examiner therefore finds that the Board made its determination and certification of the charges herein within 45 days of the filing of written charges as required by *N. J. S.* 18A:6–11.

II.

The teacher further contends that, in any event, the charges against him are charges of inefficiency, and that he did not receive, as required by *N. J.S.* 18A:6–12, at least 90 days prior to the certification of charges to the Commissioner, "written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish * * * [him] an opportunity to correct and overcome the same."

The charges filed with the Board are sixteen in number, and the Board determined and certified that all but the second charge, which was "dismissed," would be sufficient, if true in fact, to warrant dismissal or reduction in salary.

The hearing examiner finds no need to consider the arguments of counsel as to each of the charges separately. The contentions that the charges are those of inefficiency fall into four categories, as follows:

1. The charges indicate no rule, policy, or assignment of duty by the Board which places upon the teacher responsibility for the acts which he is accused of performing improperly or failing to perform. At most, therefore, it is contended that his alleged conduct would be an allegation of inefficiency. (Charges #1, 3, 4, 6, 11, 12, 13)
2. The charges relate to acts which are the ultimate responsibility of the Board, or in any event could not be made the teacher's responsibility. (Charges #5, 10, 11)
3. The charges by their clear language allege inefficient conduct. (Charges #7, 8, 9, 14, 16)
4. The charge is based upon a trifling incident. (Charge #15)

The Board, on the other hand, contends that the charges assert not inefficiency but incompetent performance and administration of the duties of the teacher's position as Director of the Department of Health, Safety and Physical Education and Athletics. It should not be necessary, the Board argues, for it to spell out in every detail the manner and form of carrying out the duties and responsibilities of the position. The several charges, therefore, it is argued, assert incompetent performance of duties which properly pertain to the position which the teacher occupies.

While not conceding that the charges, as originally preferred by the President of the Board of Education, constitute charges of inefficiency, the original

complainant has filed, and the Board of Education has certified, subsequent to the hearing on June 3, 1968, amended charges. As amended, the charges set forth with respect to each of the alleged derelictions, that the teacher either knew, or should have known, the duties and responsibilities imposed by his position, and that notwithstanding such knowledge, he acted or failed to act in such a manner as to have improperly discharged such duties and responsibilities.

The hearing examiner notes that the specific acts set forth in the charges arise from situations which are either nonrecurrent or intermittent to the degree that they would be unlikely to recur within a 90-day period. Thus, a notice of inefficiency directed solely to the acts specified would not afford opportunity either for the teacher to correct and overcome inefficiency or for the Board to evaluate his performance in those precise situations within a 90-day period. On the other hand—and this position is reinforced by the statement of the amended charges—the essential allegation is that respondent knows, or should know, what his duties and responsibilities are, and has not performed and fulfilled them. The specific charges, therefore, even if they are not of such a nature as to permit measurement of change within a period of 90 days, nonetheless demonstrate a kind of performance which, if true, constitutes inefficiency rather than incompetence, which, by contrast, signifies lack of knowledge or ability to do the job assigned. The hearing examiner believes that a notice of inefficiency can be framed in such a fashion as to indicate clearly the employer's dissatisfaction with his performance and the kind of correction demanded. It is therefore recommended that respondent teacher's motion be granted, and the charges dismissed, but without prejudice to the Board's subsequent right to proceed consistent with the provisions of *N. J. S.* 18A:6–12, *supra*.

* * * * * * *

The Commissioner, having considered the report of the findings, conclusions, and recommendation of the hearing examiner, finds and determines (1) that the Board of Education made its determination and certification of the charges herein within 45 days of the receipt of written charges; (2) that the charges, including the amended charges, allege inefficiency in the performance of the duties of the respondent teacher's position; and (3) that the teacher was not given 90 days' written notice of such inefficiency as provided by *N. J. S.* 18A:6–12. He therefore directs that the charges be dismissed, but without prejudice to the right of the Board of Education to proceed subsequently in conformance with the principles enunciated in this decision and pursuant to the provisions of *N. J. S.* 18A:6–12.

ACTING COMMISSIONER OF EDUCATION

August 12, 1968

PATRICIA RICE, ET AL.,

Petitioners,

AND

KATHLEEN BROWN, ET AL.,

Petitioners-Intervenors,

V.

BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, IN THE COUNTY OF ESSEX,

Respondent.

For the Petitioners, Barbara A. Morris, Esq.

For the Respondent, Charles R. L. Hemmersley, Esq.

For the Intervenors, Frohling and Gaulkin (John B. M. Frohling, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

On November 8, 1967, the Commissioner of Education rendered a decision on the appeal in this case in which he found that (1) a condition of racial imbalance exists in certain schools under respondent's jurisdiction; (2) respondent had a clear affirmative duty under New Jersey law to eliminate or alleviate such conditions to the extent that it is reasonable, practicable and educationally sound to do so, in order to fulfill its obligation to provide equal educational opportunity to all children; (3) while the proposal submitted by respondent would go far to ameliorate the undesirable situation it would still permit racial imbalance in the lower grades and particularly in the Glenfield and Nishuane schools; and (4) the plan proposed was therefore insufficient and could not be accepted or approved. The Montclair Board of Education was directed to formulate a plan which would effectively achieve the goal of racial dispersal as it has been defined by New Jersey tribunals. The Commissioner retained jurisdiction pending submission of the required plan.

By letter dated April 10, 1968, respondent submitted its new plan to the Commissioner. Petitioners requested time to study the proposals and on May 22 advised the Commissioner by letter that they objected thereto. Petitioners were thereupon notified that the Commissioner considered a hearing on the merits of the plan both unnecessary and undesirable because of the urgency to move the matter to a conclusion. Petitioners were directed to file their objections in detail and in writing, and they did so on June 18, 1968. Respondents followed with an answer to petitioners' objections on June 24. Although all documents referred to herein were served also upon counsel for the intervenors, no reply or statement in their behalf has been received.

Respondent having complied with the order in this case to submit a plan to correct the conceded racial imbalance in its school assignment organization

and policies, petitioners having stated their opinions and objections with respect to the plan, and intervenors having remained silent, the Commissioner finds no need for further hearing or submissions and will proceed to a determination of the sufficiency of respondent's proposals.

Respondent's plan has been submitted to the Commissioner and simultaneously to the community in the following form:

"I. THE BOARD OF EDUCATION'S PREFERRED PLAN

A. TWO MIDDLE SCHOOLS (Grades 5–8)

1. Convert Mt. Hebron and Hillside schools into racially balanced 'Middle Schools' for students in grades 5 through 8.
2. Bring each of these buildings up to modern educational standards.
3. Enroll approximately one-half of all pupils in grades 5 through 8 in each building.
4. Continue to enroll Kindergarten through grade 4 pupils in each building.

B. PRIMARY SCHOOLS (Kindergarten through Grade 4)

1. Edgemont, Southwest and Watchung schools will remain primary schools for Kindergarten through grade 4.
2. Bradford, Grove Street, Nishuane and Northeast schools will operate as primary schools for Kindergarten through grade 4.
3. Mt. Hebron and Hillside schools will retain a primary school unit for Kindergarten through grade 4.
4. Except as provided below as to Glenfield pupils, the above K–4 schools will retain approximately the same attendance areas as at present.
5. Rand School, now occupied by a 5–6 grade program and a 'neighborhood' kindergarten, will have its kindergarten children divided between Watchung and Edgemont Schools according to district boundaries now in effect for grades 1 through 4. The 10 rooms in the Rand building will then be used for pupil services office space, along with special education classes for high school age students.

C. NISHUANE

This building, in addition to continuing as a primary school (K–4) for pupils from the present Nishuane district, will house a center for individual help in learning problems.

1. This center will be created for the use of pupils throughout the community whose achievement falls significantly short of their ability.
2. More specifically, the Nishuane building will contain:
   a. A fully equipped and staffed reading laboratory for diagnosis and correction of reading difficulties.

b. Computer assisted instruction in mathematics and English, and possibly science. Learning programs in these subject areas will be tailored to the individual pupil's needs—programs on which he can work as rapidly as he is able.

3. Pupils, grades one through 12, will be assigned to the center for brief periods—from 2 or 3 days, to as long as 2 or 3 weeks. Return to their regular school program will occur through consultation with the staff of specialists as well as pupil self-evaluation of progress.
4. Racial balance in the Nishuane building will be improved by townwide use of the learning center.
5. The Nishuane primary grade classes will operate with an average class size of 20. The services of the center for learning problems will be immediately available to pupils enrolled in those primary grades.
6. Open enrollment will be made available to Nishuane (K–4) pupils in other schools where racial balance and class size permits.

D. GLENFIELD

1. Glenfield area children in grades 2 through 4 will be assigned to Bradford, Mt. Hebron or Northeast schools. The racial balance in those schools will approximate 70% white, 30% Negro.
2. The Glenfield building will be used as an early childhood education center for approximately 700 children.
   a. The center will provide a ½ day pre-school program for four year olds, a full day Kindergarten program, and first grade.
   b. All Kindergarten and first grade pupils in the Glenfield School district will attend this early childhood center. All four year olds in the Glenfield district will be given an opportunity to enroll in the pre-school program.
   c. Parents of children from throughout Montclair may request admission to this center for their children. Space and budgetary considerations will necessitate screening these requests with the objectives of limiting attendance to those who can profit most from a pre-school program and producing racial balance. Admission will be contingent upon remaining with the program through grade 1.
   d. Admission to and exit from the center will be flexible. Admission and exit may occur at various times during the year based on an appraisal of readiness, maturity, and achievement. The total time spent at the center prior to grade 2 could vary from 2 to 4 years.
   e. The center at Glenfield, together with some elementary special education classes, will utilize effectively the space in this building.

E. TENTATIVE CALENDAR IF THE BOARD'S PREFERRED PLAN IS APPROVED BY THE COMMISSIONER OF EDUCATION AND IF FUNDS ARE PROVIDED

1. Taking into consideration time required for planning and construction, it is expected that the Plan could be implemented by September 1970.
2. Some aspects of the pre-school center at Glenfield and the learning center at Nishuane may be implemented during the period between September 1968 and September 1970.

"II. THE ALTERNATE PLAN

This plan will be put into effect should the Board of School Estimate and Municipal Government fail to provide the funds necessary to implement the Board of Education's Preferred Plan.

A. GLENFIELD

1. This building would be the location for an additional racially balanced 5th and 6th grade program. Glenfield, Nishuane and Rand schools would then accommodate all 5th and 6th graders.
2. Fifth and 6th graders from Bradford, Glenfield, Grove, Mt. Hebron and Northeast would be assigned to Glenfield.
3. The Glenfield Kindergarten would remain there, but present Glenfield grades one through 4 would be assigned to Bradford, Mt. Hebron and Northeast.

B. NISHUANE

All Hillside 5th and 6th graders would be assigned to the present 5th and 6th grade program at Nishuane. The pupil increase would be accommodated through renovation of basement space.

C. HILLSIDE

Because present overcrowding would not be completely resolved through removal of grades 5 and 6 to Nishuane, additional space outside the Hillside building would be needed.

D. TENTATIVE CALENDAR FOR THE ALTERNATE PLAN IF APPROVED BY THE COMMISSIONER OF EDUCATION

Should funds necessary to the implementation of the Board of Education's Preferred Plan not be provided, the Alternate Plan, if approved by the Commissioner, will be implemented by September 1969."

Petitioners concede that both the Preferred and the Alternate Plans improve on the Board's earlier proposal by eliminating segregation in grades 5–12 rather than in 6–12. They do not find either plan completely acceptable, however. Their specific objections and respondent's rebuttals may be stated briefly as follows:

1. Petitioners make general objection that the plans will disturb the racial concentrations in grades K–4 only slightly and those grades will remain segregated under respondent's proposals.

Respondent says that this contention is incorrect. They assert that (a) Bradford, Mt. Hebron, and Northeast schools, formerly 100% white, will become 70% white and 30% Negro by the transfer of grades 2–4 from Glenfield; (b) Glenfield School, formerly 96% Negro will not only house 143 children from the immediate area but pupils from all sections of the town to a number approximating 700 in a setting designed specifically for early childhood education; (c) Nishuane will house, in addition to its 333 pupils, 94% of whom are Negro, approximately 250 children in need of individualized learning programs from all areas of the district; and (d) the 222 pupils in grades K–4 at Rand School (83% Negro) will attend the Edgemont School (97% white) and the Watchung School (94% white).

2. Petitioners say that respondent has failed to detail the capital construction or additions needed to implement the proposals and such lack of specificity precludes any proper evaluation.

Respondent admits that it has not spelled out the exact facilities to be constructed for the reason that the expense involved in order to provide such details prior to plan approval cannot be justified. It points out, however, that details for the two contemplated middle schools were set forth in a prior plan and it avers that it fully intends to provide sufficient building capacity for all of its proposals, once they are accepted.

3. With respect to Nishuane School, petitioners aver that the transfer of grades 5 and 6 to the proposed middle schools will leave grades K–4 intact, serving only to intensify the undesirable racial concentration in this building. They reject the assumption that establishment of a learning center for community-wide use at Nishuane will have sufficient general acceptance to result in a reduction of the racial imbalance there. Nor do petitioners believe that the opportunity open to pupils in the Nishuane area to attend other schools on a free-choice basis will have any realistic merit in reducing racial concentrations when available space in other schools is almost nonexistent.

While respondent admits that the racial concentration in grades K–4 in Nishuane may not be changed, it denies that it will be intensified or that it has failed to consider the racial situation in that school. It asserts that the racial composition of the school as a whole will be altered favorably by its use as a center for pupils in grades 1–12 from all parts of the district and rejects petitioners' belief that such attendance will not occur. Respondent says further that opportunities for Nishuane children to transfer to other schools will not be virtually nonexistent as petitioners contend but that a substantial number of such choices will be afforded to those who elect to attend elsewhere.

4. With respect to Glenfield School, petitioners say that retention of grades K–1 from that attendance area will make those classes almost totally Negro. Petitioners view the proposed use of Glenfield as an "early childhood education center" which will attract city-wide registration as unrealistic, and believe that the number of white pupils who will elect to attend such a center will be minimal. They suggest instead that Glenfield be used as a city-wide middle or intermediate school. Such use, petitioners claim, would overcome the problem of voluntary city-wide attendance at an early childhood education center which petitioners consider to be unrealistic and unachievable.

The Board rejects petitioners' conclusions with respect to Glenfield School. It says that it contemplates establishment of a unique facility with such ad-

vantages for pre-school age and early childhood education that children from all sections will be attracted to enroll and the racial imbalance petitioners predict will thereby be eliminated. The Board maintains also that it has considered use of Glenfield as a middle school for grades 5–8 in place of Mt. Hebron or Hillside but has rejected the idea as unsuitable and undesirable because of location, lack of space for expansion, and the absence of play space and other facilities for upper-grade pupils. In respondent's judgment use of Glenfield as a middle school would not offer the kinds of clear educational advantages necessary to support the raising of capital outlays for such purpose.

5. Petitioners maintain that since the proposal provides (section E) "if the plan is approved" and "if the funds are provided," it is impossible to evaluate the Preferred Plan when this condition clearly affects whether in fact any positive plan is presented.

Respondent makes no specific rebuttal to this objection.

6. Petitioners say further that "the time factor, unexplained—as to need, —is objected to in its present form."

Respondent's rebuttal is silent with respect to this objection.

7. With respect to the Alternate Plan, petitioners take the position that retention of the racial concentration of grades K–4 in the Nishuane School and the renovation of inferior space in its basement for classrooms make this proposal unacceptable.

Respondent makes no specific answer to this charge. In summation, however, it avers that in formulating its proposals it considered fully and conscientiously the principles laid down by the New Jersey Supreme Court in *Booker* v. *Plainfield Board of Education*, 45 *N. J.* 161 (1965) and that the plan submitted herein represents its best, good faith efforts to achieve the greatest racial dispersal consistent with sound educational values as directed by the Court.

Respondent's earlier plan which prompted the appeal herein, was not approved primarily because it failed to alleviate the concentration of Negro pupils in grades K–5 in the Glenfield and Nishuane schools. Both the Preferred Plan and the Alternate Plan go further to mitigate this undesirable condition but without eliminating it entirely. Under the Preferred Plan the Glenfield School would no longer house grades 2–5 from that area and those children would be transported to other schools. Grades K and 1 would remain predominantly Negro. In Nishuane the fifth grade would be eliminated and assigned elsewhere but the racial concentration in grades K–4 would remain unaffected. The Alternate Plan would eliminate racial concentration in grades 1–5 in Glenfield with the kindergarten unchanged. It would also integrate the fifth grade at Nishuane with grades K–4 remaining undisturbed.

If the goal to be achieved is the complete elimination of racial imbalance, it is apparent that neither of respondent's plans offers that degree of perfection. Both plans offer more complete correction at Glenfield than at Nishuane. Only grades K and 1 under the Preferred Plan and kindergarten alone under the Alternate Plan would be predominantly Negro at Glenfield instead of grades K–5 at present. At Nishuane grades K–4 instead of K–5 would remain imbalanced under either plan. It is apparent, therefore, that neither plan will completely guarantee the elimination of the problem which is the issue in this

appeal. On the other hand, this matter has been the subject of exhaustive study by a number of groups who have diligently sought a proper solution over a number of years. No better or more adequate proposals than the ones offered herein have emerged. The Commissioner is convinced that the two plans advanced by the Board represent its best, good faith efforts to meet the problem. In such case the fact that the proposals do not constitute a perfect remedy does not preclude their approval, in the Commissioner's judgment.

Moreover the Commissioner believes that petitioners' appraisal of the net effect of respondent's proposals is unnecessarily limited and pessimistic. For instance, despite petitioners' objections, particularly with respect to the alleviation of racial imbalance in the lower grades at Nishuane School, it is entirely credible that the establishment of a special learning center could make this school so attractive as to accomplish the hoped-for desegregation. Such a center, properly conceived and operated, could not only provide significant educational advantages to all areas of the district but, if its potential were to be realized, would alleviate the continued racial concentration which petitioners fear. Similarly the creation of an early childhood learning center in the Glenfield School can open up educational possibilities and advantages not now available to pupils anywhere in the town which would have, at the same time, a corrective effect upon the racial imbalance problem in that school. The educational program which the Board plans to inaugurate at the Glenfield and Nishuane schools, if properly and adequately implemented, can result in their becoming such outstanding and vital centers for learning that they will attract pupils from all segments of the community and be a focus of attention beyond its borders. With such a development the continued racial concentration predicted by petitioners would tend to disappear.

Whether the possibilities for educational improvement, elimination of racial concentrations, or other desirable goals inherent in respondent's proposals are realized or not depends, of course, upon the conceptions which underly their creation, the support with which they are provided, and the degree to which they are implemented. Lack of community support in the form of failure to provide funds, apathy, negative attitudes or other cause may prevent accomplishment of the expected and hoped-for goals set by the Board. Nonetheless, the Commissioner has reached the conclusion that the plans submitted by the Board are well conceived and do provide a means for the elimination of undesirable racial concentrations in the public schools of the district. The Preferred Plan in particular opens up possibilities for improvement of the education system in a number of significant areas which would offer unusual educational advantages not now available to pupils of the district. Such a plan, which offers sound promise not only to correct undesirable racial concentrations but to open up new and important educational opportunities, should not be condemned on speculation but must be afforded a fair opportunity to prove itself and to realize the potential benefits for all children of the community for which it was conceived.

With respect to the relative merits of the two proposals there can be no question that the Preferred Plan is the one of choice. While there is little to choose between the two as far as the degree of alleviation of racial imbalance is concerned, the Preferred Plan is educationally far superior in all respects. Its proper implementation is dependent, of course, upon the community's willingness to provide the funds necessary to achieve the exceptional educa-

tional possibilities inherent in its conception, and it is to be hoped that the electorate will choose to offer the children these advantages. However that may be, the Commissioner must recognize that the Alternate Plan is an acceptable if much less educationally desirable substitute to achieve the racial dispersal sought herein should funds not be made available to the Board. While it, like the Preferred Plan, cannot be held to guarantee a perfect remedy, it represents the most feasible plan offered up to this time to most nearly accomplish the goals sought if capital expenditures to accomplish the more educationally desirable Preferred Plan are not forthcoming.

In summary the Commissioner finds and determines that the Montclair Board of Education has made a conscientious and diligent good faith effort to formulate proposals for the elimination of racial imbalance in its schools, and that the two proposals submitted herein known as the Preferred Plan and the Alternate Plan represent reasonable plans aimed at achieving the greatest racial dispersal consistent with sound educational values and procedures. The Commissioner, therefore, approves the proposals and authorizes their implementation as rapidly as is practicable.

The petition is dismissed.

COMMISSIONER OF EDUCATION

August 19, 1968

DECISION OF STATE BOARD OF EDUCATION

The State Board of Education agrees with the decision of the Commsisioner and hereby affirms it. We think, however, he should have retained jurisdiction and hereby remand the matter to him and direct him to retain jurisdiction.

February 6, 1969.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH,
Petitioner,

v.

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, AND SOMERSET COUNTY BOARD OF TAXATION,
Respondents.

For the Petitioner, Klein & Lusardi (LeRoy P. Lusardi, Esq., of Counsel)

For the Respondents, Allgair, King & Kelleher (George W. Allgair, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N. J. S.* 18A:22–37, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1968-69 school year than the amount proposed by the Board

in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioner in charge of the Division of Controversies and Disputes on July 23 and 24, 1968, at the State Department of Education, Trenton.

At the annual school election on February 13, 1968, the voters rejected the Board's proposals to raise $2,228,092 by local taxes for current expenses and $53,051 for capital expenditures. These items were reduced to $2,146,092 and $26,661 respectively and submitted at a second referendum pursuant to *N. J. S.* 18A:22–36 but again failed of approval. The budget was then sent to the Committee pursuant to *N. J. S.* 18A:22–37 for its determination of the amount of local tax funds required to maintain a thorough and efficient district school system.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Somerset County Board of Taxation an amount which reduced the appropriations for current expenses by $187,675 and for capital outlay by $14,596, for a total reduction of $202,271. The amounts may be shown by the following table:

	Referendum #1	*Referendum #2*	*Committee's Determination*	*Amount Reduced By Committee*
Current Expense	$2,228,092	$2,146,092	$1,958,417	$187,675
Capital Outlay	53,051	26,661	12,065	14,596
Total	$2,281,143	$2,172,753	$1,970,482	$202,271

The Committee suggested line items of the budget in which it believed economies could be effected without harm to the educational program. The Board reviewed the Committee's suggestions and determined that it could accept the proposed reductions in two items, but would contest the others. Later, during the hearing of this matter, the Board accepted one other reduction and the Committee also agreed to restoration of its cut in one account. The total amount of accepted and uncontested reductions is $21,000. The Board contends that curtailment beyond such amount will not provide sufficient funds to maintain a thorough and efficient system of education for the pupils of the school district. It appeals to the Commissioner to restore the deleted amounts contested.

The following table shows the amounts budgeted by the Board for various items, the economies recommended by the Committee, the reductions deemed by the Board to be feasible, and those it contests and asks to be restored:

Acct. No.	*Item*	*Board Budget*	*Committee Suggestion*	*Amount of Reduction*
110b	Salaries-Bd. Secy.'s Off.	$ 26,320	$ 20,020	$ 6,300
110f	Salaries-Supt.'s Off.	33,320	31,320	2,000
120c	Architect Fees	1,000	0	1,000
130b	Bd. Secy.'s Off. Exp.	2.030	1,530	500
	Salaries:			
213	Teachers	1,229,792	1,199,792	30,000
213b	Suppl. Instr.	25,100	19,100	6,000
410a	School Nurses	41,950	35,650	6,300

Acct. No.	*Item*	*Board Budget*	*Committee Suggestion*	*Amount of Reduction*
520a-1	Trans.-In District	184,397	176,397	8,000*
520a-2	Trans.-Out of District	121,184	113,184	8,000*
520a-4	Trans.-Field Trips	3,000	2,200	800
610a	Salaries-Janitors	100,175	95,175	5,000*
720a	Upkeep of Grounds	11,000	6,000	5,000
730b	Equip. Repl.-Non-instr.	2,500	2,000	500
	Total-Current Expense	$1,781,768	$1,702,368	$79,400
1240b	Equip.-Admin.	$ 1,350	$ 1,000	$ 350
1240c	Equip.-Instr.	10,962	9,462	1,500
1240d	Equip.-Health Services	525	95	430
1240f	Equip. Operation of Plant	11,414	1,098	10,316
1240g	Equip.-Maintenance	2,000	0	2,000**
	Total-Capital Outlay	$ 26,251	$ 11,655	$14,596

* reductions accepted by the Board
** restoration agreed to by Committee

The Committee also recommends that the amount of $91,725 from free appropriation balances fixed by the Board in its budget be increased by $108,275 to a total of $200,000 from surplus. The total of the Committee's reductions is, therefore, as follows:

Recommended reductions in Current Expense Account	$ 79,400
Recommended reductions in Capital Outlay	14,596
Increase in appropriation from balances	108,275
Total reductions in local appropriations	$202,271

The Commissioner will consider each of the challenged reductions seriatim as follows:

110b—Salaries—Board Secretary's Office.

Relevant figures for this account are:

Actual expenditures 1966-67	$17,154
Budgeted 1967-68	18,800
Actual expenditures 1967-68	19,722
Budgeted 1968-69	26,320
Recommended by Committee	20,020

During the past year the Secretary of the Board of Education has also been appointed School Business Administrator and has assumed new and additional duties. The Board seeks to raise his salary from $10,000 to $12,000. Also proposed are salary increases of $600 and $420 for two secretarial employees and the addition of a new clerical position at $4,400. The Committee recommends deletion of the new position and a reduction of salary increases to less than 10 per cent.

The Commissioner finds that the Committee's reduction must be restored. The proposed salary of the School Business Administrator, while amounting to a 20 per cent increase, is not excessive in terms of the size of the school system and the duties he will be called upon to perform. Nor are the salaries

proposed for the incumbent secretaries out of line with similar employees in other school districts. Finally, the need for a third clerical worker is apparent in view of the volume of business activities for which this office is responsible. The Commissioner finds that the amount of money budgeted by the Board for the office of the Secretary cannot be curtailed in terms of present-day demands on the business office of the school system without adversely affecting the efficient operation of the schools. The sum of $6,300 will therefore be reinstated in the appropriations.

110f—Salaries, Superintendent's Office.

Actual expenditures 1966-67	$27,374
Budgeted 1967-68	29,500
Actual expenditures 1967-68	29,421
Budgeted 1968-69	33,320
Recommended by Committee	31,320

The increase of approximately $4,000 over the last year's expenditures provides for increases in salary for the Superintendent, two secretaries and $2,000 for part-time summer help as needed. The Committee recommends that the salary increases be reduced by $2,000.

The Commissioner cannot agree that failure to provide the contemplated raises in the stipend of these employees will have no deleterious effect on the operation of the schools of the district. The number of administrative staff is no more than minimum, and the proposed salaries are consistent with and not in excess of current practice in other school systems of this size. The Commissioner finds that the amount of $2,000 recommended by the Committee to be cut from this account must be restored to insure proper administration of the school system.

120c—Architect Fees.

Actual expense 1966-67	$ 0
Budgeted 1967-68	0
Actual expenditures 1967-68	0
Budgeted 1968-69	1,000
Recommended by Committee	0

The Board maintains that it should begin without delay to plan for a new elementary school or additions to existing buildings. It notes that during the coming year it will have to reopen the four-room Flagtown School and the two-room Liberty School, both obsolescent buildings. Although a new high school is under construction and will be occupied in September 1969, the Board estimates that additional elementary school facilities will be required by the opening of the 1970-71 school year.

The Committee maintains that population growth in the township has declined over the past two years, that the new high school will not be filled to capacity for some time, and that there is no need to plan new elementary school facilities at this time. Such planning can be deferred, it is argued, for at least another year.

The Commissioner agrees. Completion of the new high school will afford additional classroom space for a time and its occupation will permit the Board to make a clear assessment of its building needs. The Commissioner cannot find that the Committee's elimination of this item will impair the operation of the school system. The $1,000 reduction in this account will remain.

130b—Board Secretary's Office Expense.

Actual expenditures 1966-67	$1,938
Budgeted 1967-68	1,200
Actual expenditures 1967-68	1,900
Budgeted 1968-69	2,030
Recommended by Committee	1,530

The Committee suggest that this item be curtailed by $500 on the reasoning that the expenses will be reduced that much by the elimination of the additional employee recommended under Item 110b, *supra*. The Commissioner has determined that the extra clerk cannot be eliminated but, even so, this argument is not relevant to the issue. Whether the Board Secretary's staff is increased or not the operating expenses of his office such as postage, stationery, etc., will remain unchanged. The testimony reveals that $1,900 was needed for this purpose during the past year. On that basis an increase to $2,030 appears warranted and the Commissioner so finds. The reduction of $500 in this account is overridden and the amount restored.

213—Salaries—Teachers.

Actual expenditures 1966-67	$ 797,245
Budgeted 1967-68	951,325
Actual expenditures 1967-68	956,122
Budgeted 1968-69	1,229,792
Recommended by Committee	1,199,792

Of the $1,229,792 budgeted by the Board, $1,129,172 is required to provide the salaries of the present teaching staff according to the adopted salary schedule. The remainder, $100,620, is planned to be used for the following purposes:

6 additional teachers because of enrollment increase	$ 40,000
1 high school department head	9,400
1 learning disabilities specialist	8,700
1 teacher for emotionally disturbed class	8,700
1 music teacher—elementary	7,300
1 physical education teacher—elementary	7,300
8 summer school teachers	4,400
2 summer school music teachers	800
Salary increases for advanced degrees	2,000
Teacher turnover	3,000
Surplus	9,020
	$100,620

The Committee recommends the elimination of four teachers at approximately $7,500 for a total reduction of $30,000. It maintains that there are three or four teachers in excess of need and that the Board has admitted overestimating in terms of population growth. The Committee does not contest implementation of the salary schedule for incumbent staff but avers that a saving of $30,000 can be made in the total account.

The Commissioner is sympathetic toward and concurs in the desirability of the Board's objectives, such as to keep class size at an optimum level, to employ staff in advance of the opening of the new high school, to replace

departing teachers with more experienced (and therefore more expensive) personnel and would hope to see these goals achieved. Nevertheless, in the light of voter rejection of the Board's policies as reflected in the referendums and in consideration of the basic and minimum needs of the school system, he must agree with the Committee that this account can be reduced by $30,000 without impairing the educational program to a harmful degree. Employment of a high school department head a year in advance can be defended as desirable but not as essential. Similarly it is not at all clear that the estimated number of additional pupils cannot be accommodated without filling all six of the new positions planned. Nor is it at all sure that more experienced teachers can or will be found to replace any who may leave. There is also an uncommitted surplus of $9,000. Desirable as all of these and the other expenditures planned may be, they fall short of a clear showing that elimination of $30,000 will not permit the operation of a thorough and efficient program of education in the district. The Committee's reduction will, therefore, not be disturbed.

213b—Salaries—Individual Supplementary Instruction.

Actual expenditures 1966-67	$12,830
Budgeted 1967-68	13,650
Actual expenditures 1967-68	13,650
Budgeted 1968-69	25,100
Recommended by Committee	19,100

The Board seeks to provide individual supplementary instruction as required by statute for children who have been identified as needing such special help because of physical, mental or emotional handicaps. It has provided such instruction for 27 such pupils this past year but has identified at least 44 who need such special help. The program has been supported by Federal funds which are now exhausted.

This account covers the cost of two speech therapists, one teacher of the blind, and a teacher to give individual supplementary instruction. The increase in the budget is caused, the Board says, by the withdrawal of Federal funds and to provide appropriate salary increases. The Committee recommends elimination of the supplemental instruction teacher.

The testimony revealed an unfortunate lack of communication between the parties with respect to this item. It appears that the function of a supplemental instruction teacher was never sufficiently clarified for the Committee's full understanding. It is doubtful, in the Commissioner's judgment, whether the Committee would have made this reduction had they had more complete information. There is little question of the necessity for this position. Boards of education are required by statute to provide for the educational needs of children with special learning problems, and the amount budgeted by the Board for this purpose is no more than minimum. An adequate program cannot be maintained with a lesser amount and the deleted sum of $6,000 will, therefore, be restored.

410a—Salaries—School Nurses.

Actual expenditures 1966-67	$23,600
Budgeted 1967-68	32,000
Actual expenditures 1967-68	31,600
Budgeted 1968-69	41,950
Recommended by Committee	35,650

Four school nurses are currently employed. One is assigned full time to the Hillsborough School and the other three divide their time among the other four schools. The Board would like to assign a nurse full time to each of the five large schools and seeks to add a fifth position for that purpose. The Committee suggests elimination of the new position at a cost of $6,300.

The number of nursing staff required to conduct an acceptable school health program will vary, of course, with the type of program, number of schools, location, and other factors. Generally speaking, however, one nurse to every 750 pupils is considered to be an adequate ratio. Applying that figure to the current situation indicates that the school district's four nurses should be able to maintain a satisfactory program in the district. The Commissioner finds, therefore, no basis on which the amount of $6,300 deleted by the Committee must be restored.

520a–1—Pupil Transportation Services—Within the District.

Actual expenditures 1966-67	$144,516
Budgeted 1967-68	170,181
Actual expenditures 1967-68	148,400
Budgeted 1968-69	184,397
Recommended by Committee	176,397

The Board stipulates its acceptance of the suggested reduction of $8,000 in this account.

520a–2—Pupil Transportation Services—Outside the District.

Actual expenditures 1966-67	$ 43,527
Budgeted 1967-68	74,000
Actual expenditures 1967-68	96,000
Budgeted 1968-69	121,184
Recommended by Committee	113,184

The Board stipulates its acceptance of the suggested reduction of $8,000 in this account.

520a–4—Pupil Transportation Services—Field Trips.

Actual expenditures 1966-67	$2,636
Budgeted 1967-68	2,000
Actual expenditures 1967-68	3,635
Budgeted 1968-69	3,000
Recommended by Committee	2,200

The Committee recommends a $200 increase over the amount budgeted for 1967-68. While the Commissioner has held that field trips are a desirable aspect of the curriculum (*Willett* v. *Colts Neck Board of Education*, 1966 *S. L. D.* 202, affirmed State Board of Education April 3, 1968) it has not been established by the Board herein that failure to expand the number and kind of such trips will impair the educational program to such a degree as to require the Commissioner's intervention. The Committee's recommendation that this item be reduced by $800 will remain undisturbed.

610a—Salaries—Custodial Services.

Actual expenditures 1966-67	$ 69,709
Budgeted 1967-68	107,000
Actual expenditures 1967-68	80,956
Budgeted 1968-69	100,175
Recommended by Committee	95,175

The Board stipulates its acceptance of the suggested reduction of $5,000 for this purpose.

720a—Upkeep of Grounds.

Actual expenditures 1966-67	$ 5,819
Budgeted 1967-68	4,000
Actual expenditures 1967-68	1,629
Budgeted 1968-69	11,000
Recommended by Committee	6,000

The Board included $3,000 in this account to take care of snow removal from the five school plants. It also planned to replace the driveway at the Triangle School, estimated to cost $7,000, which members of the Committee concede is in poor condition. The Committee recommends a reduction of $5,000 stating that it will have the municipal road department perform the necessary snow removal. Apparently the plan to replace the school driveway was unknown to the Committee at the time it acted to set the appropriations.

The Commissioner will modify the Committee's reduction of $5,000 in this account to $3,000, which was the estimated cost of snow removal which the Committee has agreed to assume.

730b—Replacement of Non-instructional Equipment.

Actual expenditures 1966-67	$2,391
Budgeted 1967-68	1,650
Actual expenditures 1967-68	1,422
Budgeted 1968-69	2,500
Recommended by Committee	2,000

According to the testimony, the funds in this account are used mainly for replacement of janitors' equipment which breaks down. The Committee avers that the amount budgeted represents an over-estimation of need and recommends a cut of $500.

The Commissioner finds nothing in the records or the Board's presentation to warrant setting the Committee's suggestion aside. The amount recommended would appear sufficient in the light of expenditures for the past year. The Committee's determination will remain undisturbed.

1240b—Equipment for Administration.

Actual expenditures 1966-67	$ 742
Budgeted 1967-68	2,623
Actual expenditures 1967-68	831
Budgeted 1968-69	1,350
Recommended by Committee	1,000

In recommending a saving of $350 in this account the Committee suggested that instead of two electric duplicators requested for two schools, the Board purchase manually operated machines.

The Commissioner will decline to become involved in the relative merits of manually and electrically operated duplicators. The amount of money concerned is inconsequential and can be absorbed in the total budget if the Board so desires. The Committee's reduction will stand.

1240c—Equipment for Insruction.

Actual expenditures 1966-67	$ 4,457
Budgeted 1967-68	7,400
Actual expenditures 1967-68	5,367
Budgeted 1968-69	10,962
Recommended by Committee	9,462

The amount budgeted for next year in this account constitutes an 80 per cent increase over the last year's expenditures. It is needed, the Board maintains, for the purchase of two new pianos and the kind and number of pieces of audio-visual equipment which will enable the district to meet recommended standards for such instructional aids. The Committee suggests that one piano and various other items be deleted for a reduction of $1,500.

The Commissioner notes that even with the Committee's curtailment the Board will have a 75 per cent increase in funds over the amount it spent for instructional equipment during the past year when $2,000 less than the amount budgeted was actually used. While the Commissioner recognizes and supports the need for and desirability of adequate instructional aids, endorses the standards the Board seeks to achieve, and would approve the amounts requested were he setting the budget in the first instance, he cannot find that the Committee's reduction will so impair the educational program that it must be set aside. With $4,000 additional over this year's costs the Board should be able to supply a significant amount of new equipment toward the realization of the standards it has adopted.

The Commissioner finds no basis for modifying the Committee's recommendation of $1,500 less in this account.

1240d—Equipment for Health Services.

Actual expenditures 1966-67	$554
Budgeted 1967-68	0
Actual expenditures 1967-68	0
Budgeted 1968-69	525
Recommended by Committee	95

The Board's budget of $525 includes one stretcher chair at $95, one audiometer at $325, and one desk for an additional nurse at $105. The Committee recommends elimination of the audiometer and desk, for the reason that it has also suggested that the additional nurse not be hired. See Item 410a, *supra*. The school district currently owns three audiometers and seeks a fourth in order that this equipment may not have to be taken from one building to another with possible damage to proper calibration.

The Commissioner finds no ground for interfering with the Committee's recommendation. He has already sanctioned the elimination of a fifth nurse and he cannot find that three audiometers are insufficient to meet the needs of an enrollment of 2,800 pupils. The reduction of $430 in this account will remain undisturbed.

1240f—Operation of Plant.

Actual expenditures 1966-67	$ 1,647
Budgeted 1967-68	4,200
Actual expenditures 1967-68	4,060
Budgeted 1968-69	11,414
Recommended by Committee	1,098

The Committee suggests elimination of the following expenditures:

Asphalt paving for bus parking at new high school	$ 3,900
Fence around track at new high school	1,200
Architect's fees for above alterations	235
One Sewer and drain cleaner	281
One Ford tractor and mower	4,700
	$10,316

On June 25, 1968, the Board submitted and the voters approved three proposals for the issuance of bonds in a total amount of $225,000 for equipment and additional construction at the new high school. The Committee testified that it understood that the first three items above were included in that referendum and if they were not they should have been. In its opinion such capital outlays should not be put in the annual tax levy but should be made a part of the construction cost supported by bonded indebtedness. The Committee further disputes the need for these particular items at this time and suggests their postponement until the need is demonstrated.

The Commissioner must agree that the first three items should have been included in the June referendum and that their immediate necessity has not been proved by the Board. Under the circumstances he will not intervene in the Committee's determination.

With respect to the last two items, the Committee suggests that (1) employment of a sewer cleaning service has been more economical than purchase of the requested equipment; and (2) that the Committee has purchased a tractor-mower to provide heavy mowing services for the municipal recreation commission and will also be able to perform the same function for the schools. Under these circumstances the Commissioner finds no reason to intervene to restore funds recommended to be deleted from this account.

1240g—Maintenance of Plant.

Actual expenditures 1966-67	$ 0
Budgeted 1967-68	35,000
Actual expenditures 1967-68	34,730
Budgeted 1968-69	2,000
Recommended by Committee	0

The Committee testified that at the time it fixed the appropriation it understood that the Liberty School would not be in use in 1968-69 and that, therefore, the $2,000 budgeted for installation of fire detection equipment in that building would not be required. It concedes that use of the school will necessitate its being equipped with a fire detection system in accordance with the mandate of the State Board of Education.

The reduction of $2,000 in this account must be restored and the Commissioner so finds and directs.

Appropriations from Balances.

Finally the Committee recommends that the tax levy be further reduced by increasing the appropriations from free balances. In its budget, the Board appropriated $91,725 from an estimated balance on June 30, 1968, of $144,047. The Committee contends that the actual balance is much larger and that an additional $108,275 to a total of $200,000 can be used to reduce the amounts to be raised by local taxation. The report of the Secretary of the Board submitted subsequent to the hearing discloses the following:

	Current Expense	*Capital Outlay*
Balance, June 30, 1968	$317,422.26	$27,683.00
Balances appropriated for 1968-69 as per budget statement (2-15-68)	-91,725.00	
	-11,975.40	-10,367.25
Free Appropriation Balance, June 30, 1968	$213,721.86	$17,315.75

The Commissioner recognizes no necessity for the Board to carry an uncommitted balance in excess of $200,000. Appropriation of an additional $108,275 to reduce the amounts to be raised locally appears sound and reasonable. The Board will still have more than $100,000 of uncommitted funds which should be sufficient for contingencies. The Commissioner finds no reason to interfere with the Committee's recommendation to apply a total of $200,000 from surplus to support the coming year's expenditures.

The reductions to be reinstated and those to remain as recommended by the Committee may be summarized as follows:

Account No.	*Item*	*Committee Reduction*	*Amount Restored*	*Amount Not Restored*
110b	Salaries-Bd. Secy.'s Off.	$ 6,300	$ 6,300	$ —
110f	Salaries-Supt.'s Off.	2,000	2,000	—
120c	Architect Fees	1,000	—	—
130b	Bd. Secy.'s Off. Exp.	500	500	—
	SALARIES:			
213	Teachers	30,000	—	30,000
213b	Suppl. Instr.	6,000	6,000	—
410a	School Nurses	6,300	—	6,300
520a-1	Trans.-In District	8,000	—	8,000
520a-2	Trans.-Out of District	8,000	—	8,000
520a-4	Trans.-Field Trips	800	—	800
610a	Salaries-Janitors	5,000	—	5,000
720a	Upkeep of Grounds	5,000	2,000	3,000
730b	Equip. Repl.-Non-instr.	500	—	500
	Total-Current Expense	$79,400	$16,800	$62,000
1240b	Equip.-Admin.	$ 350	$ —	$ 350
1240c	Equip.-Instr.	1,500	—	1,500
1240d	Equip.-Health Services	430	—	430
1240f	Equip.-Operation of Plant	10,316	—	10,316
1240g	Equip.-Maintenance	2,000	2,000	—
	Total-Capital Outlay	$14,596	$ 2,000	$12,596

The Commissioner finds and determines that the reductions recommended by the Committee in certain items amounting to $18,800, will provide insufficicient funds for the maintenance of a thorough and efficient school system. The Commissioner directs, therefore, that the sum of $18,800 be added to the appropriations previously certified by the Committee for the school purposes of the district.

COMMISSIONER OF EDUCATION

August 26, 1968

JOHN MCKEOWN, PETER DANIELS, JAMES MARKGRAF, AND ROBERT BRUCE,
Petitioners,

v.

BOARD OF EDUCATION OF THE GATEWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,
Respondent.

For the Petitioners, Plone, Tomar, Parks & Seliger (Howard S. Simonoff, Esq., of Counsel)

For the Respondent, Hannold & Hannold (Harold W. Hannold, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

The four petitioners, two of whom, Robert Bruce and James Markgraf, have withdrawn from this appeal, were dismissed as janitors in respondent's school system. They allege that their dismissal was a direct result of certain union activities in which they participated. The Board denies that petitioners' union affiliation had anything to do with the termination of their employment and maintains that their dismissal was the result of unsatisfactory performance of their duties during the probationary period.

The issue is submitted on the pleadings, affidavits of petitioners, briefs of counsel, and oral argument before the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on July 10, 1968. Robert Bruce having withdrawn from the appeal and James Markgraf having failed to complete his pleadings or file his affiadvit, the issue is to be decided with respect only to petitioners McKeown and Daniels.

The first official action to employ petitioners occurred at a board meeting on December 6, 1967, when individual motions were adopted to hire McKeown and Daniels "as a Custodian for the 1967-68 school year." The motions went on to provide that the "salary will be $4,300.00 pro-rated from November 1, 1967 to June 30, 1968 with a ninety-day probationary period."

Respondent's pay records show, however, that both petitioners began to work in October 1967, and were paid for time prior to November 1, 1967. The complete pay record is as follows:

Pay Date	*Petitioner McKeown Gross Pay*	*Petitioner Daniels Gross Pay*
October 30, 1967	$ 188.00	$ 276.00
November 15	272.00	192.00
November 30	166.00	196.00
December 15	179.16	179.16
	15.45	15.45
December 22	179.16	179.16
	12.36	
January 11, 1968	40.17	15.45
January 15	179.16	179.16
January 30	179.16	179.16
	24.72	
February 15	107.52	107.52
	$1,542.86	$1,519.06

On February 7, 1968, the Board met and adopted the following motion:

> "* * * to notify Peter Daniels and John McKeown that they are not recommended for future employment as they did not successfully complete their 90-day probationary period."

Petitioners were notified on February 9, 1968, that their services were no longer required.

Petitioners maintain that they were not dismissed because of unsatisfactory performance but because of their efforts to organize and affilate with a labor union. They contend that they received no criticisms, "dirty detail" slips (written notices of improperly or unacceptably performed duties), or any indication of any kind at any time that their work was other than satisfactory. The opposite is shown, they contend, by the fact that they received two merit increases during their term of employment, one for six cents and another eighteen cents an hour. They concede that they did sign a union card early in January 1968, authorizing the Teamsters Local Union No. 676 to represent them in matters concerning their wages, hours and conditions of employment. Thereafter a letter dated January 29, 1968, was received by the Superintendent of Schools informing him that "Teamsters Local Union No. 676 has been selected by a majority of your maintenance and janitorial employees to represent them in collective bargaining." The letter, which was signed by the local union's President, went on to request a meeting.

Both petitioners filed affidavits in which they say that following receipt of the above cited letter from the union President, they were interrogated by the head custodian and the Secretary of the Board with respect to their having joined a union and were told that they would "never get a union in here." Subsequently, they assert, they were asked to sign an employment contract which they refused to do. Petitioner McKeown alleges further that approximately one week thereafter, on February 7, 1968, he was offered advancement

to the job of night foreman which he declined. Two days later both he and Petitioner Daniels received written notice of dismissal.

Petitioners contend that the only reason for their discharge was their attempt to organize respondent's janitorial employees and be represented by a union. All other causes advanced by respondent, they argue, are offered only to cover the real and unlawful reason of dismissal because of union activity. They cite the absence of any criticism or other indication that their work performance was less than satisfactory, the increases in pay, and the offer of promotion to refute respondent's statement of failure to perform.

They point out, although respondent denies that petitioners' union activities had anything to do with their discharge, it did not file counter affidavits of the head custodian and Board Secretary to refute the statements imputed to them. Such an omission, petitioners claim, warrants an inference that such affidavits would be unfavorable to respondent's cause herein. Petitioners assert that as public employees they have not only a constitutional right to organize, but they are further entitled to be protected in the exercise of that right. Therefore, they contend, if it is found that their dismissal resulted from the exercise of their right to join a union, they must be reinstated in their jobs and awarded back pay for the period of their illegal dismissal.

Respondent argues that petitioners were hired for several weeks on an emergency basis by the Superintendent prior to the time the Board took action to employ them; their continued employment was conditioned on successful completion of a 90-day probationary period; they failed to perform their duties in a satisfactory manner during such period; and accordingly, their services were terminated within 90 days of their hiring. Respondent claims further that petitioners' allegations of reprisal because of union activities is a sham. According to respondent, when petitioners realized that their work was unacceptable they sought out union protection in order to intimidate the Board.

The Commissioner finds no necessity in this case to reach the issue of alleged reprisals against petitioners because of their affiliation with a labor union, for the reason that the cancellation of their employment under the circumstances herein constitutes a clear breach of the terms under which they were hired. The action to employ petitioners was taken at a meeting of the Board on December 6, 1967, employing petitioners for the 1967-68 school year beginning November 1, 1967, and ending June 30, 1968, with a 90-day probationary period. Petitioners' trial period began on November 1, 1967, and expired before the end of January 1968. No notice of unsatisfactory performance was given during that time, nor was any action taken to terminate petitioners' services at the end of the trial period. The purported dismissal action was not taken until February 7, 1968. By that time petitioners had every right to believe that their period of probation had been successfully accomplished and that their status had become one of regular employment for the balance of the year as set forth in the initial employment action. Respondent took no action with respect to petitioners' services until after the 90-day probationary period had elapsed. Petitioners therefore acceded to regular employment status and as such could not be discharged without a statement of charges and a hearing thereon. *N. J. S.* 18A:17-3 No such charges have been filed and respondent's termination action must be deemed

to be a breach of its employment agreement entitling petitioners to reinstatement and salary lost during the period of illegal dismissal. *N. J. S.* 18A:6–30

The term for which petitioners were hired, November 1, 1967, to June 30, 1968, has expired and reinstatement in their jobs is now moot. Counsel for petitioners urges the Commissioner to order their reemployment by respondent. If petitioners are not continued in their employment, he argues, respondent will have accomplished by indirection its objectives of discouraging union affiliation by its employees.

The employment offered by respondent and accepted by petitioners was for a period from November 1, 1967, to June 30, 1968. After that time neither party has any obligation, absent a new agreement, to the other. Petitioners cannot be required to perform further services for respondent, nor can respondent be required to continue to employ them. The authority to employ and dismiss school personnel rests solely in the board of education. The Commissioner of Education knows of no authority whereby a board of education can be ordered to employ or to renew the employment of a person whose contractual rights have been satisfied.

The Commissioner finds and determines that petitioners' employment in respondent's school system was improperly terminated. Petitioners are entitled to make written application to respondent for compensation for the period during which they were illegally dismissed. *N. J. S.* 18A:6–30

COMMISSIONER OF EDUCATION

September 13, 1968

Affirmed by State Board of Education without written opinion, February 5, 1969.

GWEN SCHAFFER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,

Respondent.

For the Petitioner, Budd, Larner, Kent & Gross (Mark D. Larner, Esq., of Counsel)

For the Respondent, Maurice D. Emont, Esq.

COMMISSIONER OF EDUCATION

DECISION ON
MOTION TO DISMISS

Petitioner, a teacher employed under her third annual contract with respondent, was not offered a fourth contract of employment. She asked for and was denied a written statement of the charges against her and a hearing

on the charges. In a petition to the Commissioner she alleges that the denial by the respondent constitutes an unlawful and unconstitutional deprivation of her rights as a public employee and has caused her irreparable harm. Respondent answers that because petitioner has not acquired tenure in its district, as a matter of law she is not entitled to a written statement of charges against her or to a hearing. Respondent has moved to dismiss the petition on the grounds that said petition sets forth no cognizable cause of action.

Argument on respondent's motion was heard by the Assistant Commissioner in charge of Controversies and Disputes on June 19, 1968, at the State Department of Education, Trenton.

There is no dispute as to the essential facts in the case. Petitioner was first employed by respondent for the ten months of the 1965-66 academic year. She was reemployed for the 1966-67 academic year, and was again reemployed under a contract whose term ran from September 1, 1967, to June 30, 1968. On or about February 15, 1968, the principal of her school informed her that he would recommend to the Board that her contract not be renewed. This information was reiterated at a later conference with both the principal and the Superintendent. It is alleged by petitioner but denied by respondent that the principal and Superintendent both proposed that she submit her resignation, in which case they would give her a favorable recommendation for employment elsewhere. Petitioner did not resign, but through counsel demanded from the Board of Education a written statement of the charges against her and a hearing thereon. Respondent refused both elements of her demand, and replied through its counsel that her demand was not legally supportable. The petition herein followed.

Respondent grounds its motion on a series of decisions of the Commissioner which hold that until a teacher has achieved tenure in a school district, her employment rights are defined by and limited to those established by the terms of her contract, and unless otherwise specified therein, she has no right to renewal of her contract or a statement of the board of education's reasons of its refusal to renew the contract. *Taylor and Ozmon* v. *Paterson State College*, 1966 *S. L. D.* 33; *Ruch* v. *Board of Education of the Greater Egg Harbor Regional School District*, decided by the Commissioner January 29, 1968 See also *Amorosa* v. *Board of Education of Bayonne*, 1966 *S. L. D.* 213; *Zimmerman* v. *Board of Education of Newark*, 38 *N. J.* 65 (1962). It is, therefore, respondent's contention that the law is settled on the question and there is no cause of action cognizable by the Commissioner.

Petitioner argues that the decisions on this question cannot be so narrowly and rigidly construed. Petitioner points to a part of the Commissioner's decision in *Ruch, supra*, upon which respondent relies, as follows:

> "The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily prescribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists

> it should be brought to light and subjected to scrutiny. But such is not the case in the instant matter. While petitioner has charged respondent with arbitrary, frivolous and discriminatory conduct with respect to his further employment, such a bare allegation is insufficient to establish grounds for action. *U. S. Pipe and Foundry Company* v. *American Arbitration Association* 67 *N. J. Super.* 384 (*App. Div.* 1961) * * *"

While petitioner admits that she, too, makes no more than the "bare allegation" of arbitrary and capricious conduct, she contends that it should be the responsibility of respondent to come forward with evidence to rebut an allegation based on reasonable inferences that it acted arbitrarily or frivolously. To require her to carry such a burden, she says, is unreasonable.

Further, petitioner argues that a non-tenure teacher is entitled to a hearing as a matter of right. She says that there is support for this argument in the concurring opinion of Chief Justice Weintraub in *Zimmerman, supra*, and while no specific language is cited, the Commissioner notes, with his own emphasis added, the following language in this opinion, at page 80:

> "But if we may inquire into 'unreasonableness,' it would seem to follow that there must be a 'reason,' *i.e.*, 'cause' for refusal to continue the teacher into a tenure status. *That course has its difficulties.* It would not mean the court would not recognize a wide range of 'reasons' or would lightly disagree with the employer's finding that the 'reason' in fact existed. But it would follow that upon demand the teacher would be entitled to a statement of the grounds, with the right to a hearing and to a review as to whether the grounds are arbitrary in nature or devoid of factual support. But see *Vitarelli* v. *Seaton*, 359 *U. S.* 535, 539, 79 *S. Ct.* 968, 3 *L. Ed.* 2*d* 1012, 1016 (1959); *cf. Cafeteria and Restaurant Workers Union* v. *Mc Elroy*, 367 *U. S.* 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). *Such individual inquiries could involve some practical problems in the administration of a school system.*
>
> "*I think the question might well be left for another day*, since here the reason was given and I cannot say it is aribitrary in nature or unfounded in fact."

Petitioner reasons further that in removing the hearing of charges against a tenure teacher from the local board of education to the Commissioner under the Tenure Employees Hearing Act (*Chapter* 136, *Laws* of 1960), the Legislature did not deny to local boards of education the right to afford a hearing to a non-tenure teacher.

Finally, petitioner looks to the provision in the statutes (*N. J. S.* 18A:28–14) that the services of teachers not in possession of an appropriate certificate issued by the State Board of Examiners "may be terminated without charge or trial." She reasons from this that if the Legislature specifically granted the right of *summary* termination of non-certificated teachers, it may be reasonably inferred that an inherent right to charges and hearing exists, which the Legislature felt it necessary to deny *only* to non-certificated teachers.

Petitioner's case thus rests upon three inferences:

1. that in a concurring opinion in *Zimmerman*, *supra*, a statement of charges and a hearing thereon are dictated by the doctrine of reasonableness of a board's action where the renewal of a teacher's contract is at stake.
2. that since the teacher cannot know the basis of the board's action, the burden of showing reasonableness passes to the board.
3. that as a result of the Legislature's provision of a hearing at the State level on charges against a tenure teacher, and the elimination of any hearing to terminate the services of a non-certificated teacher, the Legislative intent is to insure right to a hearing at the local (school district) level for a certificated non-tenure teacher.

The Commissioner cannot accept any of these inferences as reasonable. (1) As to the concurring opinion in *Zimmerman*, petitioner concedes that this is not the majority opinion of the Court and does not establish the law in the case. The Commissioner's determination here, as in *Taylor and Ozmon* v. *Paterson State College, supra*; *Ruch* v. *Board of Education of the Greater Egg Harbor Regional School District, supra*; and *Amorosa* v. *Board of Education of Bayonne, supra*, is consonant with the majority opinion in *Zimmerman*, in which the Court said that the "historically prevalent view" had been expressed in *People* v. *Chicago*, 278 *Ill.* 318, 116 *N. E.* 158, 160 (1917), as follows:

> "'A new contract must be made each year with such teachers as (the board) desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant *for any reason whatever or for no reason at all.* * * *'" (*Emphasis supplied.*)

The Court went on to observe that certain statutory limitations, such as illegal discrimination and tenure, have been placed upon the employment powers of boards of education, but

> "Except as provided by the above limitations or contract the Board has the right to employ and discharge its employees as it sees fit." *Ibid.* at page 71

(2) As to respondent's burden of coming forward with evidence to show the reason for its action, there is not in this case any showing that there ever was any "action." Notwithstanding whatever may have been discussed in executive session of the Board, it is clear that the Board took no official action with respect to petitioner's contract. Respondent simply failed to renew the contract, and by its own terms, it expired on June 30, 1968. Where there is a complete absence of action of any kind as here, a charge of arbitrary or unreasonable behavior appears unsupportable. Moreover, a presumption of proper conduct lies with the Board and the burden of proving unlawful action must be carried by petitioner. (3) The clear intent of the Legislature to assign to local boards of education full power to employ teachers, to make and terminate contracts with them, and make rules and regulations governing the conduct and discharge of their employees is shown in the statutes. *N. J. S.* 18A:11–1; 18A:27–4, 5, 6; 18A:6–30, 30.1 Nowhere does the Legislature make provision for a hearing at any level for a teacher whose contract is

terminated in accordance with its own terms (*cf. Branin* v. *Board of Education of Middletown Township*, decided by the Commissioner January 25, 1967) or whose contract is not renewed (*cf. Ruch* v. *Board of Education of Greater Egg Harbor Regional School District, supra*). The Commissioner may not presume that the Legislature intended to confer upon boards of education a power or an obligation which it did not write into the law.

> "* * * no broader construction should be given to a statute than its language justifies." *Kappish* v. *Lotsey*, 76 *N. J. Super.* 215, 223 (*Warren Co. Ct.* 1962)
>
> "An administrative agency may not under the guise of interpretation * * * give the statute any greater effect than its language allows." *Kingsley* v. *Hawthorne Fabrics, Inc.*, 41 *N. J.* 521, 528 (1964)
>
> " 'We are enjoined to interpret and enforce the legislative will as written, and not according to some supposed unexpressed intention.' *Camden* v. *Local Government Board*, 127 *N. J. L.* 175, 178 (*Sup. Ct.* 1941); *Burnson* v. *Evans*, 137 *N. J. L.* 511, 514 (*Sup. Ct.* 1948)." *Hoffman* v. *Hock*, 8 *N. J.* 397, 409 (1952)
>
> "* * * the court is not at liberty to indulge in the presumption that the legislative intended something more than what it actually wrote in law." *State* v. *Tolbert*, 100 *N. J. Super.* 350, 356 (*Middlesex Co. Ct.* 1968)

The Commissioner reaffirms as applicable herein his determination in the case of *Ruch, supra*, including the cases cited therein. Absent anything but the bare allegation of arbitrary action of respondent Board, the Commissioner finds the petitioner has no right to a statement of reasons for respondent's nonrenewal of her contract, or to a hearing thereon. There being no genuine issue of material fact, the Commissioner therefore finds that petitioner has established no cause of action on which relief can be granted. Respondent's motion to dismiss is therefore granted.

COMMISSIONER OF EDUCATION

September 16, 1968

PAUL E. POLSKIN,

Petitioner,

v.

BOARD OF EDUCATION OF NORTH PLAINFIELD, SOMERSET COUNTY,

Respondent.

For the Petitioner, George G. Mutnick, Esq.

For the Respondent, Reid & Reid (Charles A. Reid, Esq., of Counsel)

COMMISSIONER OF EDUCATION

ORDER

This matter coming before the Commissioner of Education by reason of a petition of appeal filed on May 1, 1968, in which the father of a pupil in the

North Plainfield High School alleges that (1) his son was arbitrarily excluded by the coach from participation on the school tennis team; (2) the conditions imposed for his reinstatement in a competitive position were illegal; (3) the coach expressed bias toward his son and acted in a manner that was capricious, arbitrary and discriminatory; and (4) the Board of Education abdicated its responsibility in refusing to intervene; and requesting that the Commissioner hold a hearing to grant petitioner's son an equitable, competitive opportunity; and respondent, in an answer filed at the direction of the Commissioner on May 22, 1968, having denied all of said allegations; and it appearing that at the date of such filing of respondent's answer the 1967-68 high school tennis season was effectively complete; and it further appearing that the pupil in question completed his course of study and was graduated from respondent's high school at the close of the 1967-68 school year and is, therefore, no longer enrolled in respondent's school district or subject to its jurisdiction or control; and it appearing, therefore, that there is no affirmative relief which can be afforded and that the issue raised is now moot; and it being well established that the Commissioner of Education, consistent with the policy of the Courts, will not hear and decide controversies which are moot; now therefore, for good cause appearing,

IT IS ORDERED on this 17th day of September, 1968, that the petition herein be and the same is hereby dismissed.

COMMISSIONER OF EDUCATION

September 17, 1968

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LARUSSO AND JOSEPH CHAGNON,

Petitioners,

v.

FRANKLIN TITUS, SUPERINTENDENT OF THE NEWARK BOARD OF EDUCATION AND THE NEWARK BOARD OF EDUCATION ESSEX COUNTY,

Respondents.

For the Petitioner, Bracken and Walsh (Joseph F. Walsh, Esq., of Counsel)

For the Respondent, Victor A. DeFilippo, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioners are members of the teaching staff of the Newark public schools who allege that they have been unlawfully deprived of rights to promotion by recent actions of respondent aimed at abolishing established procedures for advancement to administrative and supervisory vacancies. They seek an order requiring respondent to rescind its action which purported to abolish promotional examinations, to reinstate eligibility lists derived therefrom and make appointments from such lists, and to extend the expiration date of such lists until this matter has been finally litigated.

Prior to filing the instant appeal to the Commissioner, petitioners instituted suit in Federal Court, raising certain constitutional issues in this matter. Such suit is being held in abeyance pending the administrative determination sought herein.

Petitioners also took an appeal to the State Board of Education within one week after the filing of this petition before the Commissioner on the grounds that the Commissioner's adjudication of the controversy would come too late to provide effective relief. The appeal to the State Board was subsequently withdrawn prior to a hearing conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Essex County Superintendent of Schools, East Orange, on September 13, 1968. At the conclusion of the hearing both counsel waived the filing of briefs or further arguments and submit the matter on the basis of testimony, documentary evidence and argument educed at that time.

The material facts are not disputed. For some years the Newark school system has utilized an examination system to screen candidates for promotion to supervisory and administrative positions and to produce an eligibility list for each category of position from which appointments were made to vacancies as they occurred. The system was included in respondent Board's rules and regulations. After meeting certain criteria of training and experience, candidates for promotion were admitted to a written examination. Successful achievement entitled the applicant to an oral examination before a specially constituted board of examiners. Those who achieved satisfactory ratings were then placed on an eligibility list for the appropriate category in the order of their score on the examinations. The list, once established, remained in existence for four years, after which it expired and a new list was established. All appointments to positions of principal, vice-principal, teacher to assist the principal, etc., were filled in the order of numerical rank from the appropriate list. See *Flagg et al.* v. *Newark Board of Education*, 1963 *S. L. D.* 65.

The current eligibility lists for the positions of principal and vice-principal were published in May 1964, to remain in force until October 1, 1968. Written examinations for the new list were held during the 1967-68 school year but no oral examinations were held. No eligibility list has been established, therefore, to succeed the current one which will expire October 1, 1968.

On May 28, 1968, respondent Board adopted a motion "that there be a suspension of appointments to the positions of principal and vice-principal in the Newark school system pending an evaluation by the Board of Education of the present procedure for making such appointments, effective after October 1, 1968." The first 15 persons on the principals' list and candidates 1 to 35 on the list for vice-principals had already attained promotion by May 28 (or had declined or left the system). Petitioner Shapiro was in line for the principalship opening, as candidate number 16; petitioner Porcelli is number 17; and petitioner Bigley number 19 on the list. Six of the other petitioners are on the vice-principals' list.

On August 22, 1968, the Board resolved "that the Board Rules in reference to promotional procedures be suspended." The Superintendent then recommended the following plan which was adopted by a 5–3 vote:

"The Superintendent recommends the approval of the plan listed below for appointment to promotional positions.

The objective of this plan is to have one standard of selection.

The existing procedure of written and oral examinations for promotional positions shall be abolished. A pool of candidates for promotional positions shall be established. The procedure for placement in the pool is described below. The Superintendent would make appointments to promotional positions from candidates in the pool.

Procedure for Establishing a Pool of Candidates for Promotional Positions

1. Candidates shall submit a formal application.

2. Candidates in order to be eligible for inclusion in the pool shall meet training, experience, and State certification requirements as established for each promotional position. These requirements must be met prior to interview by the screening committee.

   The following are minimum experience requirements:

   a. For Principals:

      Five years of successful contractual teaching experience in the Newark Public Schools, or ten years of successful contractual teaching experience in schools outside of Newark, three years of which shall have been on a recognized administrative level.

   b. For Vice Principals, Department Chairman, and Junior High School Supervisory Assistants:

      Three years of successful contractual teaching experience in the Newark Public Schools (with the attainment of tenure).

3. Candidates for the pool shall not be restricted to members of the Newark Public School staff.

4. Candidates shall be screened by a committee composed of:
   a. Assistant Superintendent in charge of personnel or a Director on his staff.
   b. Assistant Superintendent from the appropriate school level.
   c. A Newark school administrator from the appropriate level.
   d. An educator from outside the Newark school system.
   e. A Newark school teacher from the appropriate school area.
   No teacher shall serve on a screening committee who is a candidate for promotional position.

5. The screening committee shall recommend to the Superintendent those candidates judged to be worthy candidates for promotion. These suc-

cessful candidates shall constitute the pool from which promotions shall be made.

6. The criteria for use by the screening committee shall be co-operatively developed by representatives of the N.T.A. and the Superintendent's staff.

7. New candidates shall be selected for the pool once each year in March.

8. The pools shall be in existence for a period of five years from the date of their establishment. At that time this entire procedure will be subject to re-evaluation.

9. As a result of negotiations with the N.T.A., it is recommended that all individuals who were on unexpired promotional lists, upon their request, be automatically placed in the pool for the appropriate area without prejudice. It is further agreed that all such individuals will be sent notices to this effect by the Department of Personnel.

10. As a result of negotiations with the N.T.A., all individuals who applied and paid the required fees for participation in the examinations which have been suspended by the Board of Education shall automatically be considered as having applied for inclusion in the pool. It is further agreed that all such individuals will be sent notices to this effect by the Department of Personnel. It is also recommended that all such fees for the suspended promotional examinations be returned."

After the adoption of the new procedure, the Board approved 24 temporary promotional appointments and transfers to the positions of principal, vice-principal, and teacher to assist the principal in the secondary schools, and eleven such assignments in the elementary schools. Sixteen of the employees so promoted are white and 19 are Negro. Two of the petitioners, who were on the vice-principal list, were assigned to the position of teacher to assist the principal.

Petitioners contend that the primary purpose underlying respondent Board's action to abolish the examination procedure was to place non-white personnel in administrative and supervisory positions. Petitioners admit that there is a dearth of non-white persons in such positions in the Newark school system and that such a condition should be corrected. They maintain, however, that the Board has violated the law and its own rules by making race a basis for breaching its contractual obligations. Petitioners argue that the action of the Board serves to penalize them because they are white and is therefore a violation of their rights.

Respondent Board takes the position that all of its teachers are employed under its rules, as provided in *N. J. S.* 18A:27–4, and are therefore subject to all the rules and regulations of the Newark Board of Education. It cites its rule 103.28, which provides:

"Any rule of the Board may be suspended by a two-third vote of the entire Board * * *."

It maintains that this rule was invoked at its August 1968 meeting when the new rule of procedure for appointment to advance position, recited *supra*, was

adopted. Respondent contends that its actions were in full compliance with its powers and duties as set forth in *N. J. S.* 18A:11–1.

Petitioners pray for an order requiring respondent Board to (1) fill all existing vacancies by the immediate appointment of persons from the eligibility lists in existence on May 28, 1968; (2) extend the life of the lists until the issues herein have been fully litigated; (3) cease violating its own rules and regulations; (4) comply with the terms of its agreement with the N.T.A.; (5) make appointments without regard to race; and (6) continue the interrupted examinations.

The Superintendent of Schools testified that 70 per cent of the pupils in the Newark public schools are of the Negro race and 7 per cent are children whose primary language is Spanish; that proper administration of the Newark school system requires that such groups be represented at administrative and supervisory levels; that there has been increasing demand for such representation from both the general public and the school staff; that the promotional examination procedure has failed to produce the desired representation; that he entered into negotiations with a committee of the N.T.A. to develop a more effective system; and that these negotiations resulted in agreement to abandon the old procedure and adopt the new method of selecting administrative and supervisory personnel recited *supra*. The Superintendent testified further that temporary appointments in an acting capacity were made to various vacancies after the new procedure was agreed upon toward the end of August. The persons so appointed were selected and recommended to the Superintendent by various assistants. The Superintendent testified that he accepted the recommendations of his assistants and recommended approval by the Board. He conceded that race was a consideration in the selection of the staff members who were recommended and appointed to the administrative and supervisory positions on a temporary, acting basis. The Superintendent stated also that there is no guarantee that those so appointed will be continued and made permanent after the new promotional pool procedure has been perfected and implemented.

Germane to the problem herein is the fact that respondent's predecessor Board had entered into an agreement with the Newark Teachers Association, which represented a majority of the teaching staff members, for a period of three years from February 1, 1967, to February 1, 1970. (Exhibit P-2) This instrument spelled out policies affecting salaries, fringe benefits, working conditions and similar matters of mutual concern and provided a procedure for the negotiation of any changes which might appear necessary or desirable to either party during the life of the agreement. (Article II, Section B, Item 4) The promotion system based upon examinations and eligibility lists at issue herein formed a part of the agreement. (Article X)

The Superintendent testified that after the eligibility lists were suspended on May 28, he entered into negotiations with an appropriate committee of the N.T.A. and eventually reached agreement on substitution of the new promotional pool procedure adopted by respondent on August 22 for the examination and eligibility list system. Such agreement was subject to ratification by the N.T.A. and was accordingly referred to the "Senate" of that body. At the time of the hearing herein that group had failed to act upon the matter. Subsequent

to the hearing, counsel for petitioners notified the Commissioner by letter dated September 20, 1968, that the Senate had referred the question to the membership at large, who voted to disapprove the proposed change in the agreement. It appears, therefore, that the concurrence by the N.T.A. expected by respondent as a result of the Superintendent's negotiations during the summer and upon which it grounded its action of August 22, has not been realized.

The mainthrust of petitioners' appeal when this matter was heard was directed toward retention of the examination procedure and the promotion eligibility lists derived therefrom. They contended that the Board violated its rules and ignored their rights when it abandoned the procedure and substituted a new system. Respondents testified, however, that they changed the rules governing promotion only after negotiating such an alteration with the majority representative. Such a change, respondents argue, it not only within the statutory authority of the Board but conforms to the terms of its agreement with the N.T.A. which calls for negotiation of any modification. At the time of its action and as late as the time of the hearing, the Board apparently assumed that its negotiations had been successful and that the report of the majority representative's negotiations team would be accepted and approved by the organization's governing body. Petitioners had elected to press the racial issue in the Federal Court. Their primary issue presented to the Commissioner, therefore, was the right of petitioners to be continued on an eligibility list for promotion. Other issues were raised only inferentially and were not supported by evidence or argued.

But respondents' apparent assumption that the majority representative's governing body would ratify the negotiations proved false. The N.T.A. Senate failed to act on the report of the negotiations and referred the question to the membership at large who rejected it. This action did not occur until a week after the hearing in this matter was completed. Thus respondents had no knowledge at the time that this case was presented to the Commissioner what final action the majority representative would take.

As a result an issue, one not raised in the appeal or at the hearing, is now much more sharply in focus. Did the Board breach its agreement with the majority representative by reason of its unendorsed modification of that part of its terms which govern promotions? But that question poses several others with respect to the legal validity of the agreement itself which went unchallenged at the hearing. Did the 1967 Board have the power to enter into such a "contract" with an organization representing a majority of its teaching staff? If it had such authority, to what extent is it bound to such an agreement should changing circumstances, in the judgment of the Board, warrant its modification or cancellation? Is the incumbent Board bound by an agreement which was made by its predecessor and to which it was not a party? The Commissioner is aware, as no doubt are both parties herein and the N.T.A., that although such questions have existed below the surface and have been the subject of conjecture and informal debate since the first such "contract" they have never been raised or determined in any formal or legally effective way.

The Commissioner does not believe that these questions are yet ripe for adjudication. First, as has been said, they were not raised at the time of the hearing and consequently neither side had an opportunity to present evidence or to argue the merits of its position. Second, this appeal is brought by ten

teachers who claim certain promotion rights. It is clear, however, that the interests of the entire teaching staff are involved in the issues which have arisen since the matter was heard. While no necessity appeared to include other than the ten petitioners heretofore, in the light of the larger issues raised by later developments, it is now obvious that the N.T.A. is a proper party if this appeal is to be pressed. Finally, another occurrence, unforeseen at the time of hearing, may significantly affect this matter. That event was the enactment of *Chapter* 303, *Laws* of 1968 by the Legislature. This new statute, known as "the New Jersey Employer-Employee Relations Act," whose effective date is July 1, 1968, was not filed until September 16, 1968. While the application of this legislation to problems such as those herein is yet to be determined, the Commissioner has reached the conclusion that the parties should be afforded the opportunity to reconsider this matter also in the light of this recent development.

The Commissioner notes that petitioners do not ask that the persons appointed to various supervisory and administrative positions in a temporary, acting capacity be summarily removed. Petitioners' primary concern is the continuation of the eligibility lists and examination procedure for promotion. Counsel for both parties have stipulated in a companion action in the Federal District Court to continue the lists *pendente lite*.

For all of the above reasons the Commissioner concludes that this appeal comes before him prematurely in view of occurrences subsequent to its presentation. The Commissioner believes that the wisest and most equitable course calls for a remand of this matter to the parties for further consideration in the light of those developments. Reconsideration may result in the resolution of the questions raised above with the result that they may not need to be argued and determined. The Commissioner believes that the climate for successful reconsideration, which will take into account not only the aspirations of the employees but also the paramount needs and welfare of the children and the community to be served, presently exists in the Newark school system. In any case, the Commissioner will reserve decision at this posture and will remand this matter to the named parties and such others as may have a proper interest, for whatever procedures may be appropriate toward a harmonious settlement of this controversy. The eligibility lists which were to have expired on October 1, 1968, and the temporary appointments in an acting capacity made on August 22 will not be disturbed pending final resolution of this matter. Finally, these procedures before the Commissioner may be reinstituted if necessary by either party should reconsideration efforts herein directed be exhausted without agreement being reached.

COMMISSIONER OF EDUCATION

October 22, 1968

Remanded by State Board without written opinion, November 13, 1968.

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LARUSSO AND JOSEPH CHAGNON,

Petitioners,

v.

FRANKLIN TITUS, SUPERINTENDENT OF THE NEWARK BOARD OF EDUCATION AND THE NEWARK BOARD OF EDUCATION, ESSEX COUNTY,

Respondents.

For the Petitioners, Bracken and Walsh (Joseph F. Walsh, Esq., of Counsel)

For the Respondents, Victor A. DeFilippo, Esq.

COMMISSIONER OF EDUCATION

DECISION

In a decision dated October 22, 1968, the Commissioner remanded this matter for further consideration by both parties. In his decision the Commissioner pointed out that the ratification by the teachers' association of respondents' new promotion policy, which had been assured at the time of the hearing, had not in fact been realized and that as a result issues not raised or argued at the hearing of this matter emerged. The Commissioner took the position, therefore, that, in the light of this development, the parties should be afforded an opportunity to resolve the controversy or to be heard on the new issues raised before his final adjudication.

Apparently this course of action had no appeal to either side, both of whom preferred that the Commissioner decide the dispute without further attempts to work out a mutually agreeable solution. An appeal to the State Board of Education from the decision of the Commissioner to remand was filed on October 30, 1968. The State Board of Education, in a decision rendered November 13, 1968, remanded the matter to the Commissioner with a directive to render a decision within one month.

The factual situation underlying this controversy, the issues raised thereby, and the contentions of the parties have been set forth in detail in the Commissioner's interlocutory decision of October 22, 1968, and will not be repeated herein. Said decision is specifically incorporated herein and made an integral part of that which follows.

At a conference of counsel held November 20 at the Division of Controversies and Disputes, Trenton, agreements were reached that (1) this matter be submitted on the pleadings, argument and exhibits offered in connection with the original petition filed on August 19, 1968, supplemented by pertinent excerpts from minutes of the Board of its meetings on June 30, 1967, July 1, 1967, and July 11, 1968; (2) the decision herein be confined within the issues raised in the original pleadings and the further issues raised in the

Commissioner's decision of October 22, 1968; (3) the membership of the N.T.A. did not ratify the proposal of its negotiating team and that such rejection occurred subsequent to the hearing on September 13, 1968; and (4) the Federal Court action alluded to on page 1 of the Commissioner's decision to remand was instituted after rather than prior to the filing of the petition herein on August 19, 1968. It should be noted further that neither party felt any necessity for inclusion of the Newark Teachers' Association as a party nor has that organization at any time requested leave to intervene in these proceedings.

Included in the adopted rules and regulations of the Newark Board of Education are rules setting forth the procedures by which promotions are made to administrative and supervisory positions. Such promotion procedures are included in an "Agreement between the Newark Board of Education and the Newark Teachers' Association covering the period Feb. 1, 1967 to Feb. 1, 1970" (hereinafter "the agreement"). Petitioners contend that in changing the promotion practices, respondents violated their own rules and the agreement made with the staff.

There is no question of the right of the Board to make rules for the government of the school (*N. J. S. A.* 18A:11–1), but what of its power to enter into an agreement with its teachers covering matters of employment? The Commissioner is already on record that a board of education has an affirmative duty to meet with employee representatives and an obligation to take into account and give full consideration to their proposals with respect to salaries, working conditions and the general welfare of the employees. *Perth Amboy Teachers Association* v. *Perth Amboy Board of Education*, 1965 *S. L. D.* 159 Moreover, the State Board of Education by resolution dated March 2, 1966, has required each board of education to develop, in cooperation with its staff, a procedure for the disposition of grievances and to file and keep on record a written copy of such procedure. In the Commissioner's judgment, such action can extend by mutual consent to agreement on other matters involving employment, working conditions and similar mutual concerns. The Legislature has also recognized the existence of such agreements in its recent enactment of *Chapter* 303, *Laws* of 1968, the Employer-Employee Relations Act, wherein it provided:

> "Nothing in this act shall be construed to annul or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization * * *."

A further question to be answered is whether the incumbent Board, which came into being on July 1, 1968, is subject to an agreement which was made by a predecessor and to which it was not a party.

The excerpts from the minutes referred to in stipulation (1) above disclose that each Newark Board of Education since the formulation of the agreement with the N.T.A. has taken formal action to adopt its terms. The 1967-68 Board at its first meeting on July 1, 1967, adopted "the Rules, By-Laws and Regulations for the Government of the Public Schools as codified February 1, 1963, with amendments and deletions made through June 30, 1967." These rules and regulations included modifications based on the agreement, *supra*. The 1968-69 Board took similar action at its initial meeting on July 1, 1968. More-

over, at no point in their defense in this matter have respondents asserted in any way that they do not consider themselves a party to the agreement made by their predecessor, or that they have not continued to accept and enjoy the benefits of such agreement. On the contrary, all acts of the Board and its officers in dealing with the appropriate negotiating officers of the Association, and the negotiation of a revised promotion procedure itself, lend support to the clear acceptance by all parties of the viability of the agreement. It is therefore the conclusion of the Commissioner that for the purposes of the decision herein he will accept the subject agreement as a proper basis for the claims made by petitioners.

Respondent Board saw fit, however, to suspend its rules governing promotions and to formulate a new procedure aimed at producing certain results which it believed would effect desirable changes in the school system. It suspended the eligibility lists, appointed persons not on any list to vacancies in a temporary acting status, and adopted a new procedure creating a promotional pool. Petitioners, although placed in the new pool, lost the advantage they had acquired by being on an eligibility list, and as a result filed this action to preserve the rights they claim.

Respondents defend their action on the grounds of educational necessity and statutory right. They contend that a condition had developed which was thwarting the satisfactory operation and development of the public schools in the city and as such required appropriate corrective action. They point out that they attempted to effect such corrective measures within the framework of the agreement with the majority representative and had reason to believe at the time of the hearing herein that those efforts had been successful. But whether or not the N.T.A. ultimately approved the proposed alteration in the promotion policy, respondents contend that the change had to be made in the best interests of the school system and that they were within the scope of their statutory powers in taking such action outside the terms of the agreement. They cite the powers and duties to make rules ascribed to boards of education in *N. J. S. A.* 18A:11–1 and assert that the actions herein are in accord with that statute. Respondent Board argues further that all of its teachers are employed under its own rules, as provided in *N. J. S. A.* 18A:27–4 and are subject to all of the regulations of the Newark Board of Education. It cites its rule 103.28 which provides:

> "Any rule of the Board may be suspended by a two-third majority of the entire Board * * *."

It contends that the action to adopt the new promotion procedure at its August 1968 meeting was accomplished by the invoking of such rule.

Petitioners disagree and contend that the Board breached its contractual obligations, and in so doing violated both the law and its own rules. They maintain that respondents' action was grounded in a purpose to appoint nonwhite personnel to administrative and supervisory positions and although such a result might be held to be desirable, under the circumstances herein it constitutes an unlawful discrimination based upon race and violates the rights of the petitioners.

We come then to the basic issue in this appeal. What is the legal effect of the Board's rules and of the agreement between the Board and the N.T.A. upon the statutory powers delegated to the Board by the Legislature? Since it has been held that the Board may enter into an agreement governing matters of employment and working conditions with the majority representative of its professional staff, can the Board by such an action and instrument give away or abdicate the responsibilities and duties assigned to it by law?

With respect to the Board's suspension and modification of its rules governing promotion, it is well established that a Board is not bound by its rules and may alter them as it deems necessary or appropriate. *Greenway* v. *Board of Education of Camden*, 1939-49 *S. L. D.* 151, affirmed State Board of Education 155, affirmed 129 *N. J. L.* 46 (*Sup. Ct.* 1942), 129 *N. J. L.* 461 (*E. & A.* 1943); *Flagg* v. *Board of Education of Newark*, 1963 *S. L. D.* 65, 69 It is to be noted that petitioners had not acquired any vested rights by being on a promotion eligibility list. Placement on such a list did not guarantee promotion or remove the necessity for the Board to make appointments to particular positions by formal action. None of petitioners had been so appointed and therefore none had acquired rights which were subsequently rescinded by Board action. Placement on the eligibility list entitled them at best to be considered for future vacancies, and that consideration was preserved when their names were automatically placed in the new promotion pool.

The Legislature of New Jersey has a mandate under the state constitution to provide for a thorough and efficient system of free public schools. *New Jersey Constitution, Article* VIII, *Section* IV, *paragraph* 1 In carrying out this duty the Legislature has seen fit to delegate the operation of the public schools to local district boards of education. *N. J. S. A.* 18A:10–1 To accomplish its purpose the Legislature has further invested boards of education with broad discretionary powers with respect to the day-to-day functioning of the schools within their jurisdiction. That authority is clearly expressed in *N. J. S. A.* 18A:11–1:

"The board shall—

* * *

c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and the public school property of the district and for the employment, regulation of conduct and discharge of its employees * * *; and

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

The board's powers with respect to rules governing its professional staff are more expressly enunciated in *N. J. S. A.* 18A:27–4:

"Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, *promotion*, and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, *and may from time*

to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto." (Emphasis added.)

In the Commissioner's judgment these grants of authority do not preclude a board of education from consulting with representatives of its employees with respect to terms of employment, working conditions and like subjects, arriving at mutual understandings, and reducing such consensus to a written instrument of agreement. He does hold, however, that such an agreement, whatever it may be labeled, cannot constitute a surrender by the board of education of its responsibility to conduct the schools in its charge in the best interests of the children to be served. This overriding purpose of the public schools finds clear expression in *Bates* v. *Board of Education*, 72 *P.* 907 (*Calif. Sup. Ct.* 1903), quoted with approval in *McGrath* v. *Burkhart*, 280 *P. 2d* 864 (*Calif. App.* 1955) as follows:

" 'The public schools were not created, nor are they supported for the benefit of the teachers therein, * * * but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.' "

As noted above the Legislature in its wisdom has invested each board of education with certain powers, and those powers can be neither increased nor diminished except by the Legislature. *Burke* v. *Kenney*, 6 *N. J. Super.* 524 (*Law Div.* 1949) A board of education may reach and enter into certain agreements with its employees in the interest of mutual understanding, harmonious relationships or other desirable objectives, but it cannot abdicate or delegate the obligations and responsibilities imposed upon it by law or surrender the authority conferred upon it to enact or amend such rules and regulations as may be needed for the proper and effective operation of the schools. It follows, then, that while a board of education may enter into agreements with its staff and must in good faith hold to and work within that accord, it cannot be foreclosed thereby from exercising its discretionary authority to take appropriate and necessary unilateral action when the educational welfare of the pupils requires such action.

This enunciation of the law is not to be construed to imply that a board of education is not legally and morally bound to comply in good faith with the terms of any agreement consummated with its employees. Nor is a board permitted to enter into such an agreement with the implicit reservation that it can abrogate the terms thereof on any pretext. Such drastic, unilateral action can be sustained only in the fact of a real threat or obstacle to the proper operation of the school system, or in an emergency of equal importance.

In the subject instance, the Board deemed it essential to alter its method of selecting and appointing administrative and supervisory personnel for the reason that the educational needs and aspirations of its children and of the community were being thwarted by the dearth of representation by Negro staff members in its leadership councils. Respondents attempted to work out a new procedure to accomplish the desired result within the framework of the agreement with the staff. Apparently they had succeeded in doing so with a representative group, only to find that the membership at large found any change unacceptable. The Board was thus presented with a difficult

choice. It could abide by its agreement and make no deviation of any kind in its rules and ignore public demand for change, or it could respond to what it conceived to be the needs of the school system and the desires of the community by modifying a part of its agreement against the wishes of a majority of the teachers' association. Faced with such a Hobson's choice the Board made its decision in terms of its overriding obligation to serve the needs of the children and the community. Under such circumstances the Commissioner finds that the Board's *ex parte* adoption of new rules despite lack of approval by a majority of the N.T.A. was warranted and appropriate and will be sustained.

It is well established that the Commissioner will not substitute his judgment for that of the appointed representatives of the community who constitute the Board of Education, or intervene in matters which fall within the exercise of its discretion, absent a clear showing of improper conduct. There is no such showing herein. The Commissioner will therefore decline to intervene.

Petitioners also raise but do not press a charge of unlawful discrimination by respondents on the basis of race. On the basis of what was presented by petitioners on this question, it would not be possible for the Commissioner to find that racial discrimination of any unconstitutional dimension was practiced by respondents in this case. The most that was presented by the record before the Commissioner is a clear indication that race was a consideration in the selection of the temporary acting appointees. The Commissioner will make no finding with respect to this issue, therefore, and will restrict himself to the observation that the mere consideration of the factor of race is not *per se* in conflict with established constitutional principles. *Morean* v. *Board of Education of Montclair*, 42 *N. J.* 237 (1964); see also *Fuller, et al.* v. *Volk, et al.*, 230 *F. Supp.* 25 (*D. C. N. J.* 1964). Petitioners have elected to press this issue under the Federal Civil Rights Act in the Federal District Court, and therefore the Commissioner finds no necessity to deal more fully with this question.

For the reasons stated the Commissioner finds and determines that the action of the Newark Board of Education to suspend its promotion procedure and its eligibility lists and to institute a new system was a reasonable and lawful exercise of its discretionary authority and it is, therefore, sustained.

The petition is accordingly dismissed.

ACTING COMMISSIONER OF EDUCATION

December 13, 1968

Pending before State Board of Education.

NEPTUNE EDUCATION ASSOCIATION, A CORPORATION ORGANIZED NOT FOR PROFIT OF THE STATE OF NEW JERSEY, JAMES VACCHIANO, AMOS BASS, JOHN O'NEILL, MATTHEW O'BRIEN, LEO GALCHER AND EDITH HOLLAND,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondents.

For the Petitioners, Joseph N. Dempsey, Esq.

For the Respondents, Stout and O'Hagan (Sidney Hertz, Esq., of Counsel)

COMMISSIONER OF EDUCATION

ORDER OF DISMISSAL

Petitioners in this matter having sought certain relief by way of appeal to the Commissioner of Education from determinations made by respondents; and hearing having begun into the matter before a hearing examiner; and the parties herein through their counsel, having now by letters dated October 8, 1968, from petitioners and October 21, 1968, from respondents, represented to the Commissioner that determinations of respondent Board of Education since the filing of the petition of appeal herein have rendered moot the issues raised in said petition; and the parties, through their counsel, having further represented that they would yield to a decision by the Commissioner to such effect; now therefore, for good cause appearing.

It is Ordered, on this 29th day of October 1968, that the petition herein be and the same hereby is dismissed on the grounds that the issues therein are moot.

COMMISSIONER OF EDUCATION

October 29, 1968

WOODBRIDGE TOWNSHIP FEDERATION OF TEACHERS LOCAL 822, AFFILIATED WITH THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, ON BEHALF OF ITS MEMBERS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Ranzini & Canellis (George W. Canellis, Esq., of Counsel)

For the Respondent, Foley & Gazi (Francis C. Foley, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION
ON MOTIONS OF PETITIONER
AND RESPONDENT

Petitioner is a labor organization which has brought this action on behalf of nine of its members who claim that they were improperly denied salary for two days on which they were absent from their employment, in violation of respondent's bylaws and policies. Respondent denies the allegations with respect to the nine teachers, and asserts that in any event petitioner is not a proper party to bring this action. Respondent has moved that the petition herein be dismissed on the ground that petitioner is not the real party in interest, but that such dismissal be without prejudice to the rights of the nine teachers. Petitioner has moved that respondent's answer be stricken, and asks for judgment on the merits.

Argument on the motions was heard on August 20, 1968, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Respondent's motion for dismissal is grounded on its assertion that the named petitioner (the Union) has no standing in this action. The aggrieved parties, respondent says, are the nine teachers whose pay was reduced for two days' absence from duty, when they appeared before the Middlesex County Probation Department for a pre-sentence investigation, and when they appeared in Chancery Division for sentencing (*In re Block*, 50 *N. J.* 494 (1967)). Thus, respondent asserts, petitioner has no direct interest in the controversy, nor can it be said to represent a class, since each of the nine persons mentioned in the petition asserts a different claim to be supported by different proofs. In support of its contention that a cause of action must be pursued by the real party in interest, respondent cites *New Jersey Bankers Association* v. *Van Riper*, 1 *N. J.* 193, 196 (1948) in which the Court held that a voluntary unincorporated association was not authorized to invoke the jurisdiction of the

courts on behalf of its members. See also *N. J. State A.F.L.-C.I.O.* v. *State Federation of District Boards of Education*, 93 *N. J. Super.* 31 (*App. Div.* 1966); *Newark Twentieth Century Cab Association* v. *Lerner*, 11 *N. J. Super.* 363 (*Ch. Div.* 1951); and *Bergen County* v. *Port of New York Authority, et al.*, 32 *N. J.* 303 (1960).

Petitioner, on the other hand, argues that its right to represent its members is guaranteed by Paragraph 19, Article 1 of the New Jersey Constitution, which reads in relevant part as follows:

> "* * * Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

Petitioner argues further that the right of public employees to bring suit in the name of a union is clearly demonstrated in *N. J. Turnpike Authority* v. *Amer., etc., Employees*, 83 *N. J. Super.* 389 (*Ch. Div.* 1964).

The hearing examiner has considered the argument of counsel and has read the cases cited. It is to be noted that the provision of the New Jersey Constitution which guarantees public employees the right to organize and present their grievances and proposals through their own representatives has been affirmed by the Commissioner in *Perth Amboy Teachers Association et al.* v. *Board of Education of Perth Amboy*, 1965 *S. L. D.* 159, and in *Union Township Federation of Teachers Local 1455* v. *Union Township Board of Education*, decided by the Commissioner October 23, 1967, reversed by State Board of Education, October 9, 1968. In each of these cases, it should be noted, the question of the organization's capacity to function as an organization was at issue, and as a petitioner the orgnization was a "real party in interest." The same condition prevailed in the *New Jersey Turnpike Authority* case, *supra*, in which one of the issues was the right of the union to engage in collective bargaining. On the other hand, while the Commissioner has affirmed the constitutional guarantee as expressed in the *Perth Amboy* and *Union Township* cases, the application was to the right of the representatives of the employee organizations to present proposals and grievances to their employers. There has been no determination which extends this right to public employees to be represented, as in the instant matter, as the petitioner or plaintiff in litigation contrary to the principles enunciated in *New Jersey Bankers Association* v. *Van Riper*, *supra*. The hearing examiner concludes that petitioner is not the real party in interest in this matter. He further concludes that this action cannot be considered a class action brought by petitioner as a member of a class, since it is settled that "[s]uch a representative action can be maintained only by a plaintiff who is himself a member of the class sought to be represented." *Newark Twentieth Century Taxicab Association* v. *Lerner*, 11 *N. J. Super.* 363, 367 (*Ch. Div.* 1951) It is accordingly recommended that respondent's motion be granted and the petition dismissed, without prejudice to the rights of any or all of the nine individuals named therein.

Petitioner has filed a counter motion that respondent's answer be stricken on the grounds that it is frivolous and erroneous in point of fact.

Respondent's answer generally denies the factual allegations of the petition, except that it admits that the requests for payment made by the nine teachers named in the petition were rejected, first by the Superintendent of Schools, then by the Board of Education. While petitioner claims that such a denial is frivolous and erroneous in the light of all the actions of the Board with respect to petitioner and to the requests for payment, respondent takes the position that its denial is essential to its defenses, and that the Commissioner must determine whether the answer is erroneous in point of fact.

The answer raises four separate defenses, as follows:

1. "The petitioner is not a proper party to bring this action and respondent reserves its right to dismiss the petition."
2. "The Commissioner lacks jurisdiction of the alleged dispute."
3. "There is no obligation of the respondent to pay to the petitioner or any other persons for the absences claimed by petitioner."
4. "The Petition fails to state a cause of action upon which relief can be based."

As to its first defense, respondent has moved for dismissal on this ground, and the argument and conclusions have been presented in this report.

Respondent abandons the second defense.

As to the third defense, respondent contends that the essential issue to be decided rests upon the facts to be determined by the Commissioner, and that this defense goes to that issue.

As to the fourth defense, petitioner claims that a cause of action arises under the statute authorizing boards of education to make rules "governing the employment, terms and tenure of employment * * * and salaries and time and mode of payment thereof of teaching staff members" (*N. J. S.* 18A:27–4), and the authority of the Commissioner "to make rules governing the prosecution and hearing of controversies and disputes" (*N. J. S.* 18A:6–26). Respondent, on the other hand, contends that petitioner has made no allegation that any law exists permitting payment for work not performed, save for the sick leave statutes.

The hearing examiner concludes that respondent's answer is responsive to the issues raised in the petition, and that there exist questions of fact and law which if presented in a proper petition would constitute a controversy for the Commissioner's determination. *N. J. S.* 18A:6–9 It is therefore recommended that petitioner's counter motion be denied.

* * * * * * *

The Commissioner has considered the report, conclusions and recommendations of the hearing examiner as set forth above.

With respect to respondent's motion to dismiss, the Commissioner recognizes that the motion raises a procedural question which avoids the central issue in this controversy. *Cf.* the dissenting opinion of Justice Jacobs in *Bergen County* v. *Port of New York Authority, et al., supra*, at page 316. However, the Commissioner recognizes a necessity to restrict his function pursuant to *N. J. S.* 18A:6–9 to deciding

"'* * * only concrete contested issues conclusively affecting adversary parties in interest.' *Borchard, Declaratory Judgments* (2*d ed.* 1941), *pp.* 34–35; *New Jersey Turnpike Authority* v. *Parsons, supra.*" *Moss Estate, Inc.* v. *Metal and Thermit Corporation*, 73 *N. J. Super.* 56, 67 (*Ch. Div.* 1962), cited by the Commissioner in *McPhee* v. *Board of Education of Emerson*, 1966 *S. L. D.* 213, 214

It is therefore the determination of the Commissioner that Woodbridge Township Federation of Teachers Local 822, having no substantial interest in the outcome of the litigation herein is not a "real party in interest" and has no standing to bring this action. The Commissioner therefore grants respondent's motion and dismisses the petition without prejudice to any rights which the nine teachers named therein may have.

Having so decided, the Commissioner finds it unnecessary to consider petitioner's counter motion.

COMMISSIONER OF EDUCATION

November 6, 1968

BOARD OF EDUCATION OF THE BOROUGH OF DUMONT,
Petitioner,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF DUMONT, BERGEN COUNTY,
Respondent.

For the Petitioner, Cummis, Kent & Radin (Clive S. Cummis, Esq., of Counsel)

For the Respondent, Gross and Gross (James D. Demetrakis, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Dumont, hereinafter "Council," certifying to the County Board of Taxation a lesser amount of appropriations for the current expense and capital outlay purposes of the school district for the 1968-69 school year than the amount proposed by the Board in its budget which was twice defeated by the voters. The facts of the matter were educed at a hearing conducted on July 19, August 1, and October 3, 1968, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election held on February 13, 1968, the Board submitted to the electorate proposals to raise by local taxation $2,609,832 for

current expenses and $55,150 for capital outlay. Both proposals were defeated. At a special election held on February 27, 1968, pursuant to *N. J. S.* 18A:22–36, proposals in the amounts of $2,594,832 for current expenses and $55,150 for capital outlay were submitted to the voters and the proposals were again defeated. It is stipulated that the Board had directed that the original current expense amount be resubmitted, but that the printing of a figure $15,000 lower occurred as a result of clerical inadvertence in the Board Secretary's office. At any rate, the budget figures of $2,609,832 for current expense and $55,150 for capital outlay were thereafter submitted to the Council pursuant to *N. J. S.* 18A:22–37. Council consulted with the Board and at a meeting on March 3 arrived at minimum and maximum reductions which it believed could be made in certain budget items. Council then asked the Board for additional information concerning class sizes, pupil achievement test results, proposed textbook purchases and replacements, and a listing of equipment to be purchased from the capital outlay account. (R-2) The request was denied. (R-2) Thereafter the Council met again on or about March 6 and certified to the County Board of Taxation the amount of $2,538,262 to be raised for current expenses and $46,350 for capital outlay. These amounts constitute reductions of $71,570 and $8,800 in the two items respectively. The Board appeals from these reductions, contending that they were fixed in an arbitrary and capricious manner, and that amounts certified are insufficient to meet minimum educational standards and provide for a thorough and efficient school system in Dumont.

The hearing examiner does not find in the evidence sufficient support to sustain petitioner's allegation of arbitrary and capricious action by Council. While it is true that Council regarded the double defeat of the Board's referendum proposals as a demonstration that the voters sought greater economy in the operation of the schools, and acted to effect economies where it seemed possible to do so, the evidence demonstrates, and the hearing examiner so finds, that in the limited time and with the information available the Council endeavored to act judiciously.

As a part of its answer to the petition herein, respondent has specified the line items of the budget in which it believes reductions should be made. The data provided, supplemented by facts educed at the hearing, are presented in the following table:

Acct. No.	*Item*	*Board's Proposal*	*Council's Proposal*	*Amount of Reduction*
	Current Expense:			
J110d	Salaries-Elections	$ 810	$ 540	$ 270
J110f	Salaries-Supt.'s Office	4,600	1,000	3,600
J120b	Legal Fees	2,500	1,000	1,500
J120c	Architect's Fees-Prelim.	12,200	5,000	7,200
J130d	Elections-Other Exp.	1,885	1,285	600
J130f	Supt.'s Office-Other Exp.	4,000	3,050	950
J130n	Misc. Exp.-Admin.	5,000	1,500	3,500
	Salaries:			
J213	Instruction	1,925,380	1,906,585	18,795
J214b	Guidance Pers.	56,900	55,700	1,200

Acct. No.	*Item*	*Board's Proposal*	*Council's Proposal*	*Amount of Reduction*
J214c	Psych. Pers.	5,300	0	5,300
J215a	Prin.'s Office	68,420	64,820	3,600
J230a,b,c,e	Library and A-V Materials	30,000	27,000	3,000
J250b	Travel Exp.-Instr.	3,450	2,640	810
J250c	Misc. Exp.-Instr.	4,080	1,580	2,500
J410a-5	Salaries-Health Services	7,760	5,760	2,000
J610a	Salaries-Custodial (overtime)	6,000	4,500	1,500
J720b	Repair of Bldgs.-Contractual	11,385	6,235	5,150
J720c	Repair of Equip.-Contractual	8,440	6,940	1,500
J730a	Replacement of Equip. Instr.	13,765	9,865	3,900
J730b	Replacement of Equip. Non-instr.	875	0	875
J930	Deficit-food services	5,000	3,700	1,300
J1020	Student Activ.-Other Exp.	14,090	11,570	2,520
	Total Current Expense Reductions			$71,570
	Capital Outlay:			
L1240b	Equip.-Admin.	$ 1,800	$ 300	$1,500
L1240c	Equip.-Instr.	26,550	19,900	6,650
L1240f	Equip.-Plant Oper.	1,320	670	650
	Total Capital Outlay Reductions			$8,800

The hearing examiner makes the following findings and recommendations with respect to each of the items:

J110d—Salaries—School Elections; J120b—Legal Fees; J120c—Architect's Fees—Preliminary; J130d—School Elections—Other Expense; J130n—Miscellaneous Expense—Administration. These items are grouped because the reductions proposed by Council, amounting in total to $13,070 are related in such a manner that the findings and arguments for and against these items are mutually interrelated. The projected expenditures arise from the fact that the Dumont school system is faced with an existing and increasing classroom shortage. The Board employed a school consultant firm to study its building needs and recommend a program. The Superintendent testified that the rated capacity of the present buildings totals 3,400 pupils, with an enrollment of 4,206 anticipated for the 1968-69 school year. There are presently six "portable" classrooms in use, as well as eight substandard classrooms used in 1967-68 and two more to be added in 1968-69. The high school and one middle school operate on a nine-periods-per-day schedule. Additionally there are no suitable elementary school libraries, and development of science, reading, and learning resource laboratories is prohibited by lack of space. Faced with this need,

which was not effectively disputed, the Board proposed to proceed in 1968-69 with preliminary architectural drawings, presentation of a bond issue proposal, and a bond issue referendum. The Council contends that the proposed building program can be deferred until a later year, thereby eliminating special election expenses. It argues that legal fees associated with the bond issue proposal should be paid from bond issue proceeds, and that the proposed architectural fees for preliminary drawings are too high. With respect to the legal fees, the hearing examiner finds that fees incurred prior to the bond issue referendum are chargeable to current expenses. In the light of the Board's projection of a building program costing between 3 and 4.6 million dollars, the hearing examiner further finds that the $12,200 figure proposed for architect's fees, including additional fees for planning a required fire detection system in existing schools, is not excessive. In summary, the hearing examiner finds that the Board's proposals to proceed as planned during the 1968-69 school year on a comprehensive building program are essential for a thorough and efficient school system in Dumont. It is therefore recommended that the total of $13,070 cut from Items 110d, 120b, 120c, 130d, and 130n be restored.

J110f—Salaries—Superintendent's Office. At present the Superintendent has one full-time and one part-time secretary in his office. He testified that the increased work load in the office requires that the part-time secretary be employed on a full-time basis, in order that the Superintendent be relieved of clerical duties. Council believes that such additional help can be deferred, at least until a building program is undertaken. Apart from the question of the building program, the hearing examiner finds that the need for the proposed secretarial help in the Superintendent's office is sufficiently established to warrant a recommendation that the $3,600 cut from this item be restored.

J130f—Superintendent's Office—Other Expenses. An amount of $4,000 was budgeted by the Board for this item, to provide for teacher recruitment, the Superintendent's attendance at workshops, and a petty cash fund for postage. Council based its cut of $950 from this item on past expenditures in this account. However, the Superintendent testified that in 1967-68 this account was overspent by more than $2,000, partly as a result of higher postage rates and the increased difficulty in recruiting a sufficient number of qualified applicants for teaching positions. The efficient operation of the Superintendent's office is essential to an efficient school system. The hearing examiner recommends that the $950 reduced from this item be restored.

J213—Salaries—Instruction. The Board's budget provided for the addition of five teachers to the staff, two at the elementary level and three at the secondary, at an average of $7,000 each. In addition, two retiring teachers were to be replaced, and if such replacements were employed at an average of $7,000 each, a saving of $5,200 would be realized. The need for the additional teachers in all cases was defended as a move to reduce class sizes. Council reduced the number of additional teachers to four, and cut $18,795 from the budget for this item. The remaining funds would provide approximately $21,405, which would allow an average hiring salary of less than $5,300 per teacher. The Dumont salary guide provides for a $6,200 beginning salary. It is clear to the hearing examiner that the Council either misunderstood the salary guide, or believes that teachers at the two- and three-year preparation level are still readily available. The hearing examiner also finds that the evidence sustains

the Board's need for five additional teachers in order to maintain suitable class sizes. He therefore recommends that $13,595 of the $18,795 cut from this item be restored.

J214b—Salaries—Guidance. The Board had provided $1,200 to provide additional guidance service during the 1968 summer vacation period. Council eliminated this expenditure altogether. It is stipulated that the passage of time has rendered moot the question of restoring this item. Council's reduction will therefore be undisturbed.

J214c—Salaries—Psychological Personnel. The Board provided $5,300 in its budget to provide for a full-time psychologist instead of a three-fifths time position provided in the 1967-68 budget. It was testified that the position has in fact been made full-time, and the budgeted funds were allocated to cover the increased expense. It was testified that the increased services were not only to provide for testing and evaluation of an increase in referred cases, but also to make it possible to give special attention to 30 identified maladjusted pupils. The Superintendent testified further that existing services have been essentially for elementary school pupils, and that the needs of high school pupils have scarcely been touched. Council's reduction of the entire $5,300 was grounded on its belief that the Board had not substantiated the need for additional service, and that in any event existing County services could be employed, although such services were not fully described. In any event, petitioner answers, County services would not suffice to meet the in-school needs for psychological services. It was estimated that five per cent of the Dumont pupil population can be classified as handicapped within the meaning of the statutes for the education of the physically and mentally handicapped. The hearing examiner finds that the full-time position of psychologist in the Dumont school system is necessary for complying with the requirements of such statutes, and recommends that the $5,300 reduction by Council be restored.

J215a—Salaries—Principal's Office. The Board's budget provided $3,600 to add a clerk in the principal's office in Selzer School, one of two middle schools. It was testified that this school now enrolls 893 pupils, with 43 teachers. The present one clerk is unable to perform all the duties in a timely manner, including the maintaining of central attendance registers, correspondence, and filing, and it has been necessary for the principal to devote some of his time to these clerical tasks. Council's reduction would eliminate this position on the ground that its omission would not adversely affect the functioning of the school. The hearing examiner finds that the clerical duties at Selzer School cannot be satisfactorily performed by the one clerk presently employed, and recommends the restoration of the $3,600 originally budgeted for the second position.

J230a, b, c, e—Library and Audio-Visual Materials. The Board's budget for this item was $30,000, in comparison with a budget of $25,155 for 1967-68. Council suggested a budget of $27,000, which it said would permit the Board to operate on the same level as last year. The Superintendent testified that its present level of expenditures does not meet American Library Association standards for per pupil expenditure, and that Council's proposed reduction of $3,000 would leave an inadequate amount. The hearing examiner observes that the $27,000 figure proposed by Council would provide over six dollars

per pupil, which, while not as much as might be desired to bring the system's libraries up to suggested standards, will not produce such disastrous effects as the Superintendent foresees. It is recommended that the $3,000 reduction in this item be undisturbed.

J250b—Travel Expense—Instruction. The Board's budget provided $3,450 to enable teachers to attend conferences and workshops for the improvement of instruction. Council proposed reducing this amount by $810, to the level budgeted for 1967-68. While the hearing examiner raises no question as to the testimony that the instructional program is improved by attendance at professional meetings, he cannot find that the proposed reduction will so seriously handicap the operation of a thorough and efficient school system as to require that he recommend the restoration of Council's reduction.

J250c—Miscellaneous Expenses—Instruction. Two items in this account were reduced by Council. Of $4,080 budgeted by the Board, it was planned to spend $1,500 for in-service programs. Last year $1,400 was spent for consultants and speakers. Council's elimination of this item was based on the fact that in the two prior school years no moneys had been committed for this purpose. The hearing examiner finds that $1,500 is a reasonable expenditure for this means of improving the instructional program, and recommends its restoration. The other challenged reduction was the elimination of $1,000 budgeted by the Board to provide a connection to a computer terminal in New York City to furnish computerized information for mathematics and science classes. The statements furnished by Council in the supplement to its answer, and the testimony offered by Council's witness, demonstrate that the Board's proposal was not clearly explained to Council, which envisioned the need for purchase of computer equipment and the use of computer data processing for school administrative purposes. Notwithstanding this misunderstanding, and not questioning the desirability of the proposed computer connection, the hearing examiner does not find in the testimony sufficient warrant to conclude that such a program is essential to a thorough and efficient school system. It is recommended that the reduction of $1,000 for this item be undisturbed.

J410a—Salaries—Social Worker. The Board's budget provided funds to employ a social worker four days per week instead of three, as heretofore. It was testified that the social worker's case load in 1967-68 was 60 children, and will increase in 1968-69 to 100. Council recommended that the increased expenditure of $2,000 be eliminated on the ground (as in J214c, *supra*) that the need had not been substantiated and that existing municipal and County services were available for use. The hearing examiner finds that the data on handicapped children supplied in connection with this item and J214c amply demonstrate the need for an additional day's service from the social worker. He therefore recommends the restoration of $2,000 cut from this account.

J610a—Salaries—Custodial. An item of $6,000 for overtime pay for custodial workers was included in the Board's budget. Council proposed reducing this item to $4,500, the budget figure for 1967-68, recommending rescheduling custodians' working hours to eliminate the need for overtime except in the case of recognized emergencies. It was testified that overtime pay is needed for such purposes as snow removal, the adult education program, and the evening activities program, and that Council's reduction would curtail the

activities program. The data on previous years' expenditures for this purpose were inadequate to demonstrate the need for the increase proposed by the Board. It is therefore recommended that Council's reduction be undisturbed.

J720b—Repair of Buildings—Contractual. Three items cut by Council from this account are challenged. The first is an item of $1,900 for the repair of stage curtains in two schools. While it was testified that this repair is long overdue and that the present curtains are in poor condition, the hearing examiner does not find this expenditure necessary for the operation of a thorough and efficient school system. The other two items, in the amounts of $1,750 and $1,500, would provide storage cabinets in one of the elementary schools and science storage in the high school. The testimony with respect to these items demonstrates that insufficiency of storage space for valuable equipment results in damage and loss, and inhibits the use of long-term science projects requiring safe storage. Council's reasoning that the Board's appropriations in this account increased by 55 per cent over the previous year does not have validity in this context. Where repairs are needed to protect property and enhance the instructional program, it may be uneconomical to delay them. The hearing examiner therefore recommends the restoration of a total of $3,250 to this account.

J720c—Repair of Equipment—Contractual. It was testified that the Board appropriated $8,440 for repair of equipment. Council reduced this figure by $1,500, without specifying particular repairs which should be eliminated or reduced, but stating that the increase in appropriation over the $5,510 budgeted for 1967-68 should be kept at a lower level (28 per cent). The high school principal testified that the repair of many items of instructional equipment (Kiln, audio-visual equipment, business machines, musical instruments, etc.) would be needed in order to carry on the program of instruction in the school. Council's reduction was based upon its belief that the increase in the budget was too high, rather than upon a consideration of the needs for repair, and it asserts that the 28 per cent increase allowed over the 1967-68 budgeted amount is adequate. The hearing examiner finds that the anticipated repairs are necessary for the maintenance of a thorough and efficient program of education, and recommends the restoration of the $1,500 reduction in this appropriation.

J730a—Replacement of Equipment—Instructional. From a Board budget of $13,765 for this item, Council proposes a reduction of $3,900, again basing its determination on the size of the increase made by the Board over its 1967-68 budget (62 per cent). Specifically it recommended that $3,000 be cut from the appropriation for the high school, which the Board's budget had increased from $5,750 in 1967-68 to $11,000 for 1968-69, and $900 from the allocation for Selzer School, which had no allocation for 1967-68. The high school principal testified as to several items of equipment used in art, industrial arts, business education, and science classes, in addition to audio-visual equipment, file cabinets, teachers' desks, and athletics classes which are either broken or not operating efficiently, and should be replaced. The principal further testified that replacement is planned on a rotating basis. If this be so, explanation of a nearly doubled budget over last year's figure was not given. The cut proposed by Council will leave $8,000 for high school purposes, an increase of more than $2,000 over the 1967-68 appropriation. In the light of petitioner's failure to establish that its policy of replacement on a rotating basis cannot be

suitably effectuated in 1968-69, the hearing examiner recommends that the proposed $3,000 reduction in this item for high school purposes be undisturbed. As to Council's elimination of the entire $900 allocated to Selzer School, the testimony shows that the replacement of several items of audio-visual equipment will be more economical than continued attempts at repair, the cost of which last year was one-third the cost of replacement. The hearing examiner finds that the need for the proposed equipment to carry on the instructional program is established, and recommends restoration of the $900 reduced by Council for this item.

J730b—Replacement of Equipment—Non-instructional. The Board's budget allocated $875 for the replacement of air conditioners used in administrative offices which function during the summer months. It was testified that at least one such air conditioner currently in use is 15 to 20 years old. Council eliminated this item as non-educational, stating that the "proposed building program should embrace these quasi-luxury items." The hearing examiner finds that the testimony supports the need for this expenditure as an element of efficient operation of the school system's administrative function, and recommends the restoration of the $875 reduction.

J930—Deficit—Food Services. The Board increased the allowance to offset an anticipated deficit in its food service operations from $3,700 budgeted in 1967-68 to $5,000 for 1968-69. Council eliminated the $1,300 increase, suggesting that the deficit could be held down by instituting more efficient business practices, increasing certain prices, and controlling certain expenses such as meals for cafeteria help. Petitioner testified that the actual deficit for 1966-67 had been $4,300 and the deficit for 1967-68 before final audit was $5,000, the result of higher labor and materials costs and decreases in Federal support of the school lunch program. There was no testimony establishing inefficient business practices. The hearing examiner finds that actual deficits for the past two school years warrant the allocation of $5,000 to this account for 1968-69. Restoration of the $1,300 cut by Council is therefore recommended.

J1020—Student Activities—Other Expense. From an allocation of $14,090 to this account in the Board's budget, Council proposes a cut of $2,520. This amount represents transportation expenses to transport athletic teams and the high school marching band to athletic events, a cost which in 1967-68 and prior years was paid by a direct subsidy to current expense funds from the Student Organization of the high school. The Student Organization, it was testified, does not derive support from tax funds, but had maintained a sufficient balance from other sources to support such transportation costs. However, the Student Organization's funds are now so far depleted that it cannot continue to subsidize the activities program in the prior fashion, and the Board's budget was planned to carry these transportation costs at taxpayers' expense. Whether Council was aware of the circumstances was not shown in the testimony; its supplement to the answer filed herein stated that the previous years' arrangements should be continued. The hearing examiner finds that notwithstanding any other consideration, such a continuation is not possible for 1968-69. Since the Commissioner is not asked to consider the question of financing other aspects of the total activities program, it must follow that transportation to away-from-home events is essential to the effectiveness of the program. It is therefore recommended that the $2,520 deleted from this account be restored.

L1240b—Equipment—Administration. From a budget allocation by the Board of $1,800, Council proposes eliminating $1,500 of the appropriation for purchasing equipment for the school administrative offices. Although Council's action centers on the relative advantages of purchase or rental of a photocopier, the Board Secretary testified that additionally it was proposed to purchase an adding machine, a "ditto" machine, and a replacement typewriter. The testimony also shows that there is a photocopier and two duplicating machines in the high school offices, a short distance away from the system's administrative offices. While the hearing examiner recognizes the added convenience that would result from having this equipment closer at hand, the testimony does not support a finding that it is essential for efficient operation of the school system. It is therefore recommended that Council's reduction be undisturbed.

L1240—Equipment—Instruction. Council proposes a reduction of $6,650 from a total of $26,550 budgeted by the Board for the purchase of instructional equipment. Of this reduction, $2,300 was cut from a planned expenditure of $5,700 at Honiss School, one of two middle schools in the district. The Superintendent testified that laboratory equipment was necessary to make this school's science program comparable to that at the other middle school. Additional equipment needed to provide storage and filing space, it was testified, cannot be sacrificed to provide funds for the science equipment. At Lincoln School, a budgeted $800 was reduced $350 by Council. The Superintendent testified that this school houses pupils with hearing difficulties, and the planned expenditures were for various items of audio-visual equipment to facilitate greater individualization of instruction. The remaining $4,000 of Council's reduction applies to planned expenditures of $13,000 at the high school, covering the whole range of the instructional program. Cross-examination of the principal disclosed that nearly $3,000 of the budgeted $13,000 was uncommitted, to be reserved for "emergency" purchases. Council did not direct its suggested reduction at particular items of proposed purchases in this account, but recommended rather that purchase of capital equipment be spread over a period of years, in order to keep expenditures at the approximate level of the two previous school years. While it is not possible for the hearing examiner to make precise findings with respect to the essentiality of each item proposed to be purchased by the Board, and in no wise reflecting adversely on the desirability of adequate, up-to-date equipment in the instructional program, he cannot find that the need for capital purchases representing an increase of approximately 50 per cent over the average of the past two years has been established. He therefore recommends that Council's proposed reduction of $6,650 in this account be undisturbed.

L1240f—Equipment—Plant Operation. The Board's budget provided $1,320 for this account from which Council cut $650, again to keep capital expenditures at previous levels. It was testified that the Board planned to buy a second tractor for use in grass mowing and snow plowing. It was further testified that presently the Borough administration assists the school district in snow removal; no testimony was offered to show that this assistance would not be continued. The hearing examiner finds that this purchase is not essential at this time to the operation of the school plant, and recommends that Council's reduction in this item be sustained.

In summation, for the reasons stated, the hearing examiner finds that the amounts proposed by the Board in the following accounts are necessary in

whole or in part for the maintenance and operation of a thorough and efficient school system in Dumont, and recommends restoration of part or all of Council's reductions, as shown in the following table:

Account No.	*Council's Reduction*	*Recommended Restoration*
Current Expense:		
J110d	$ 270	$ 270
J110f	3,600	3,600
J120b	1,500	1,500
J120c	7,200	7,200
J130d	600	600
J130f	950	950
J130n	3,500	3,500
J213	18,795	13,595
J214c	5,300	5,300
J215a	3,600	3,600
J250c	2,500	1,500
J410a-5	2,000	2,000
J720b	5,150	3,250
J720c	1,500	1,500
J730a	3,900	900
J730b	875	875
J930	1,300	1,300
J1020	2,520	2,520

Total Recommended Restoration to Current Expense $53,960

* * * * * * *

The Commissioner has reviewed the findings and recommendations as set forth above, and concurs therein. He therefore directs the Mayor and Council to certify to the Bergen County Board of Taxation, in addition to the amounts previously certified for the 1968-69 school year, the amount of $53,960 to be raised by taxation for the current expenses of the Dumont school district in the 1968-69 school year.

COMMISSIONER OF EDUCATION

November 14, 1968

IRVING THIELLE, JOHN MCKINNEY, AND EVELYN HOCHMAN, INDIVIDUALLY AND AS PRESIDENT, FIRST VICE PRESIDENT AND SECOND VICE PRESIDENT RESPECTIVELY OF THE FAIR LAWN COMMITTEE FOR PEACE IN VIET NAM; AND THE FAIR LAWN COMMITTEE FOR PEACE IN VIET NAM,

Petitioners,

v.

BOARD OF EDUCATION, BOROUGH OF FAIR LAWN: BENJAMIN HALPERIN, PRESIDENT, BOARD OF EDUCATION, BOROUGH OF FAIR LAWN, AND DONALD A. FUSCO, SECRETARY, BOARD OF EDUCATION, BOROUGH OF FAIR LAWN, BERGEN COUNTY,

Respondents.

For the Petitioners, Hoffman & Humphreys (Howard H. Kestin, Esq., of Counsel)

For the Respondents, Maurice D. Emont, Esq.

COMMISSIONER OF EDUCATION

DECISION ON
MOTION TO DISMISS

Petitioners, who are officers and members of the Fair Lawn Committee for Peace in Viet Nam, appeal from rules of respondent which required them to furnish property damage and public liability insurance as a condition of their use of public school facilities. They demand judgment in the amount they have already paid for such insurance, plus interest. Respondents reply that petitioners' complaint is *res adjudicata* and moot and that petitioners' demand for judgment does not constitute a cause of action cognizable by the Commissioner.

There is no disagreement as to the material facts. Petitioners applied for and were granted use of respondents' school facilities for three public meetings scheduled for January 22, 1968, April 1, 1968, and June 3, 1968. The public meeting scheduled for January 22 was held without incident. Subsequently, respondent Board alleges high feeling developed among the citizenry, and there were threats of bombing of its property and violent harm to its personnel, if the speaker scheduled for April 1, 1968, Dr. Benjamin Spock, were permitted to appear. Respondents therefore notified petitioners, in accordance with long practice, but not on the basis of any rule, that they would be required to furnish insurance coverage in the amount of $500,000 for property damage and $500,000/$1,000,000 for public liability before the April 1 meeting could be held. Petitioners complied by purchasing the required insurance from an insurance carrier at a cost of $550. The facts indicate that the meeting of April 1 was held in respondents' Thomas Jefferson Junior High School without any apparent incidents, despite the fact that approximately 2,500 persons milled around the school and police officers and special police were stationed throughout the area during the meeting. On

May 6, 1968, respondent Board incorporated the insurance requirement in "Temporary Amendments" to its policy on use of its school buildings and grounds as follows:

> "The Secretary of the Board shall, upon examination of the application for school use, determine whether in his opinion the program may cause damage or injury to property or people. In order to minimize the school insurance rates by keeping the experience factor at a minimum, the Secretary, with the approval of the Board, may require applicants to obtain their own insurance in amounts necessary to protect the property and third parties. If, after granting approval, he determines the program may be one in which a risk is involved, he shall notify the applicant in writing. Unless the coverage is obtained within 5 days of the program, the school use shall be denied."

On June 17, 1968, however, subsequent to a judgment rendered by Honorable Morris Pashman of the Superior Court of New Jersey, dated June 3, 1968, which restrained the enforcement of the temporary amendments, *supra*, respondents rescinded said amendments. By reason of respondents' rescinding action, therefore, counsel for petitioners and respondents, by a Stipulation dated July 24, 1968, agreed on the dismissal of the First Count of the petition in which the validity of the rule set forth in the temporary amendments was raised. Counsel further agreed that the sole remaining matter to be adjudicated by the Commissioner in the dispute herein is whether petitioners are entitled to a judgment of $550, plus interest, for the amount expended for the insurance required for the April 1 meeting.

Respondent moves to dismiss this issue, which constitutes the Second Count of the petition, on the grounds that the demand for judgment against respondents in the amount of $550, plus interest, does not constitute a cause of action cognizable by the Commissioner of Education. Council agreed on argument of the motion in briefs.

Respondents contend that petitioners' payment for the insurance was voluntary and was not made to the Board of Education. The Board contends further that it is not therefore liable to petitioners for the $550 expended for the insurance. Respondents rely on the decision of the New Jersey State Board of Education in the case of *Padukow* v. *Board of Education of Jackson Township*, decided by the Commissioner of Education August 25, 1967, affirmed by the State Board of Education, April 3, 1968, which held in part:

> "* * * The only question is whether or not he [Padukow] has a claim for money against the Board of Education of Jackson.
>
> "* * * the exercise of the Commissioner's expertise should be limited to matters directly bearing upon education and withheld in purely commercial matters."

Petitioners argue that procurement of the insurance was not a voluntary act but was unlawfully required by respondents as a mandatory condition for the use of the school facilities. Petitioners argue further that the purchase of the insurance was required by respondent Board in order to prevent its own insurance rates from increasing in the event of any claims made against

its insurance company as a result of said use. Respondents, petitioners assert, are adequately insured for all damage and injury which may occur on public school property in the district. It is petitioners' further contention that since the judgment of the Superior Court, *supra*, held it unlawful, as a prior restraint upon freedom of expression, for a local board of education to require the purchase of additional insurance as a condition precedent to the use of public school facilities by the public, the sole surviving issue herein is within the Commissioner's authority to "hear and determine * * * all controversies and disputes arising under the school laws * * *" (*N. J. S. A.* 18A:6–9) and is therefore a proper matter to be decided by the Commissioner. Petitioners argue that, unlike *Padukow, supra*, the instant case clearly arises from the school laws and is related to educational policy and the day-to-day functioning of local boards of education with respect to the granting of use of its school facilities by the public. *N. J. S. A.* 18:20–34

The Commissioner of Education cannot agree that the issue herein is a proper matter to be decided by him. The Commissioner holds that the fact that this case involves *N. J. S. A.* 18A:20–34, *supra*, is "not sufficient to impose jurisdiction upon the Commissioner." (See *Rainier's Dairies* v. *Boards of Education of the Borough of Collingswood and the Township of Cinnaminson*, decided by the Commissioner of Education August 12, 1965, reversed by the State Board of Education September 6, 1967.) In the Commissioner's judgment there is in the instant case no controversy arising under the school laws since the only question is whether or not petitioners have a claim for money against respondent Board of Education. The Commissioner further holds that the exercise of his expertise is limited to matters directly bearing upon education and must be withheld in purely commercial matters. (*Cf. Padukow, supra.*)

The Commissioner finds and determines therefore that the issue herein does not properly lie within his jurisdiction. Accordingly, for the reasons stated the petition must be dismissed.

COMMISSIONER OF EDUCATION

November 14, 1968

THOMAS CAMBRIA AND MARILYN CAMBRIA,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY, AND GERARD WALLACE,

Respondents.

For the Petitioners, Robert D. Gruen, Esq. (Morton R. Covitz, Esq., of Counsel)

For the Respondent Board, Bauer, Bogosian & Whyte (Eznick Bogosian, Esq., of Counsel)

For the Respondent Wallace, Saul R. Alexander, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioners are the parents of a pupil in respondent Board's schools. Respondent Wallace is a teacher in the public schools, and during the 1967-68 school year, was the teacher of a class in which petitioners' son was enrolled. The petition of appeal alleges that the respondent Board, in violation of its responsibility under the Tenure Employees Hearing Act, refused to certify to the Commissioner of Education charges which they had filed against the teacher in accordance with that Act. They assert that the Board has demonstrated bias and is therefore without power to consider the charges against the teacher, and they ask that the Commissioner assume full jurisdiction over the charges and all proceedings in connection therewith. Respondent Board denies petitioners' allegations, and opposes petitioners' request that the Commissioner assume such jurisdiction.

A hearing in this matter was conducted on August 21, 1968, at the office of the Bergen County Superintendent of Schools, Wood-Ridge, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

It was stipulated by the parties hereto that the petitioners, parents of Guy Cambria, a seventh grade pupil, forwarded to the respondent Board, on or about March 27, 1968, a statement of charges against the teacher, a respondent herein. In the letter accompanying the charges, petitioners requested that they be informed as to the date and time when the Board would consider these charges. Neither the petitioners nor their attorney was so notified, but on or about April 11, 1968, the Board adopted the following resolution:

> "RESOLVED, That the Board of Education, after having reviewed the charges made in the statement by the attorney of the parents of Guy Cambria, determines that such charges, and the evidence in support of such charges, would not be sufficient, if true in fact, to warrant dismissal, or reduction in salary, of Mr. Gerard Wallace."

It is also stipulated that the Board and the teacher are co-defendants in a civil action arising out of the incident which forms the basis of the charges filed against the teacher.

It is further stipulated that the action taken by the Board with respect to the charges filed by petitioner were not in accordance with the Tenure Employees Hearing Act (*N. J. S. A.* 18A:6–10 *et seq.*) insofar as procedural requirements are concerned.

Thus the determination to be made by the Commissioner in this petition is what further action, if any, is required to be taken, and by whom, with respect to the charges filed by petitioners against the teacher.

It is petitioners' contention that the Board does not have the legal ability to consider the charges against the teacher, by virtue of its previous determination and because of its interest as a co-defendant with the teacher in a civil action brought against it by petitioners. Counsel likens the Board's position to a trusteeship. *Cf. Driscoll* v. *Burlington-Bristol Bridge, Co.*, 8 *N. J.* 433, 474 (1952); *Rankin* v. *Board of Education*, 135 *N. J. L.* 299 (*E. & A.* 1947). If the Board of Education is a public trust and its members the trustees, it is argued, then such trustees are subject to the scrutiny of a higher body. Thus, petitioners contend that the Commissioner, like the courts, may remove a trustee in a case of potential, as well as actual, conflict of interest. *In re Kolbeck*, 27 *N. J. Super.* 135 (*App. Div.* 1953); *In re Koretzky*, 8 *N. J.* 506 (1951); *Dufford* v. *Nowakowski*, 125 *N. J. Eq.* 262 (*E. & A.* 1938) Petitioners contend that a potential conflict of interest exists here, and that the Commissioner has adequate power to assume the direct and full jurisdiction which they request.

Respondents deny that the Commissioner has power to take over a function delegated by law to a local board of education—that of determining whether charges filed against a tenure teacher and the evidence in support thereof would be sufficient, if true in fact, to warrant dismissal or reduction in salary. The statutes, they say, clearly define the respective procedural steps to be taken in a tenure hearing matter, and the respective powers and duties of the local board of education and the Commissioner. Respondent Board acknowledges a procedural defect, but asserts that such an error, if it be one, is without bias or prejudice. The civil action against the Board, respondents assert, cannot be construed to establish a condition in which the Board cannot act in proper performance of its duty, since under the statutes board members are indemnified for the costs of their defense. *N. J. S. A.* 18A:12–20 As to petitioners' argument that the situation here is analogous to that under consideration by the Courts in cases cited by petitioners, respondents say that the fiduciary relationship of the Board members as trustees is of a different nature in the instant matter, and the analogy thus falls. No evidence exists of such abuse of discretion as would warrant the Commissioner's assumption of duties assigned by statute only to the Board of Education, respondents assert. Thus, it is argued, in the light of the procedural fault which is freely acknowledged, the matter should be remanded to the Board for action consistent with the statutes.

The hearing examiner finds that respondent Board of Education has failed to provide petitioners a proper opportunity to present evidence in support of

their charges against respondent Wallace in such a form and to such extent as would enable the Board to determine whether the charges and the evidence in support thereof would be sufficient, if true in fact, to warrant the dismissal or reduction in salary of the teacher. *N. J. S. A.* 18A:6–11 *Cf. Sheffmaker* v. *Board of Education of Runnemede*, 1963 *S. L. D.* 116. The hearing examiner further concludes that no legal impediment exists to prevent the Board from making such a determination, and recommends that this matter be remanded to respondent Board for a determination consistent with the statutes, and in accordance with the principles enunciated in *Sheffmaker, supra*, such action and determination to be concluded within 45 days of the Commissioner's decision in this case.

* * * * * * *

The Commissioner has reviewed and considered the report, findings, conclusion, and recommendations of the hearing examiner as set forth above. The Commissioner concurs in the findings, and holds that in the circumstances of this case the statutes give the Commissioner no authority to assume the jurisdiction over petitioners' charges which they seek. He further holds that absent clear showing of bias, prejudice, or abuse of discretion on the part of the Board, no reason exists to warrant his intervention in the exercise of the Board's duties in accordance with the Tenure Employees Hearing Act. Appropriate remedies are available to petitioners should such bias, prejudice, or abuse of discretion in fact appear. The Commissioner therefore remands this matter to respondent Board of Education, directing it to consider the charges filed by petitioners against respondent Wallace in accordance with *N. J. S. A.* 18A:6–11, within 45 days from this date.

COMMISSIONER OF EDUCATION

December 2, 1968

Pending before State Board of Education.

ANGELO DE MARCO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,

Respondent.

For the Petitioner, Vincent P. Rigolosi, Esq.

For the Respondent, William Boyle, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a janitor under tenure in respondent's schools, complains that his services were unlawfully terminated. Respondent denies petitioner's allegation, and answers that petitioner voluntarily terminated himself in order to

apply for retirement for disability, which application was subsequently denied by the Teachers' Pension and Annuity Fund.

A hearing on the petition was conducted at the office of the Bergen County Superintendent of Schools, Wood-Ridge, on October 15, 1968, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

It is stipulated that petitioner was a janitor under tenure of employment as of June 30, 1967, and that since that date he has enjoyed no emoluments of employment by respondent; that his annual salary for the school year 1966-67 was $5,650; that he received from the supervisor of custodians on March 22, 1967, a statement setting forth his incapacity to do the work expected of him; and that on May 8, 1967, he conferred with the Board of Education.

On May 11, 1967, the Secretary of the Board addressed the following letter to petitioner (P-1):

"The Board of Education after its conference with you on Monday, May 8, 1967 has decided to apply for a disability retirement for you. Its decision is based upon your inability to perform the major duties necessary for a janitor.

"We are writing to the Teachers' Pension and Annuity Fund for a disability form and will notify you when we receive same.

"I believe the date of separation for disability will be June 30, 1967."

On May 23 the Board adopted the following resolution (P-R-1):

"BE IT RESOLVED by the Garfield Board of Education that the Teachers' Pension and Annuity Fund be notified that ANGELO DE MARCO is to be retired as of June 30, 1967 under a disability retirement, and

"BE IT FURTHER RESOLVED that the Secretary be authorized to forward copies of this resolution to all agencies involved with a copy of the doctors report, and also a performance report on Mr. De Marco submitted by his superiors."

Thereafter the appropriate forms for application for disability retirement were completed by the Secretary of the Board and petitioner and submitted to the Teachers' Pension and Annuity Fund. Petitioner did not work after May 11, 1967, but was paid through June 30, 1967. It is stipulated that on December 19, 1967, the Secretary of the Pension Fund notified petitioner by letter, with a copy to the Board, that the Trustees of the Fund had denied the application, stating, in part:

"The medical testimony obtained in connection with your application failed to give any evidence that you are totally and permanently incapacitated for regular janitorial duties.

"The statutes provide for the granting of accidental disability retirement only upon the determination that the applicant is totally and permanently incapacitated for further duties."

Background testimony as to the history of petitioner's employment record was given by the Secretary of the Board. In 1964, while on Board business, petitioner was involved in an automobile accident, suffering injuries for which he received Workmen's Compensation payments. Prior to the accident he had performed all the duties of a janitor; thereafter he performed the duties "up to a certain point." (Tr. 17) In 1966 he complained of a problem with his back, and in May of that year he had an operation, causing him to be absent from work until October. He was absent from work again from the end of November 1966 until March 1, 1967. Shortly thereafter the supervisor of janitors reported to the Secretary that he had received a complaint that petitioner was not performing all of his duties. The supervisor was instructed to file a report, and on March 22, 1967, a report was submitted indicating many jobs of janitorial duties, each followed by the word "Yes" or "No" to indicate that petitioner did or did not perform the particular task. (R-1) The supervisor testified that petitioner personally told him that he could not do certain kinds of work. Thereafter the Secretary arranged for petitioner to be examined by a physician, whose report (R-2) states in part:

> "Although the patient claims limitations on his job, he is able to bend anteriorly, posteriorly, and laterally without much difficulty. * * *"

The conference with the Board on May 8, 1967, followed. At that conference petitioner confirmed that he was unable to perform the tasks indicated by "No" on R-1. The Secretary testified that the Board decided that petitioner should seek disability retirement and that the Board would file such an application, to which petitioner agreed.

It is stipulated that there was no consideration that petitioner was malingering. The testimony further shows that no written charges against petitioner were ever served upon him, nor was there any hearing or any formal determination by the Board on an allegation of incapacity.

The Secretary testified further that to his knowledge petitioner has never executed any waiver or relinquishment of his tenure rights.

The hearing examiner finds that while petitioner concurred in and participated in an application for disability retirement, the purported termination of his services on June 30, 1967, was in anticipation of favorable action on the application by the Pension Fund. There was no resignation by petitioner from his duties, and there have been no procedures leading to petitioner's dismissal in accordance with the Tenure Employees Hearing Act. On the other hand, there is nothing in the evidence to show that petitioner offered himself ready to work after June 30, 1967, until the application for retirement was denied by the Pension Fund. Thereafter, through counsel, he sought reinstatement, that effort culminating in the petition herein. The hearing examiner therefore recommends that petitioner be reinstated in his employment, but that any claim for compensation be limited to compensation due since December 14, 1967, the date on which the Trustees of the Teachers' Pension and Annuity Fund denied the application for disability retirement. (See letter of the Secretary of the Fund attached to the petition of appeal.)

* * * * * * *

The Commissioner has carefully reviewed and considered the findings and recommendation of the hearing examiner reported herein. The Commissioner

finds in the report the evidence of a mutual effort by both of the parties initially to find a solution to a difficult personnel problem. That the proposed solution was ineffective cannot be assessed against either party. However, in addition to concurring in the findings of the hearing examiner, the Commissioner agrees that petitioner should not be entitled to compensation for the period of non-performance of duties from June 30, 1967, through the entire period of the pendency of the application for disability retirement until it was denied on December 14, 1967. Thereafter petitioner was entitled to reinstatement, subject to such remedies as might be available to respondent in accordance with the statutes. Failure to reinstate petitioner at that time constitutes an unlawful dismissal by respondent. The Commissioner therefore directs that petitioner be reinstated in his position as janitor, with the right to file a claim for such compensation as may be due him from and after December 14, 1967.

COMMISSIONER OF EDUCATION

December 2, 1968

IN THE MATTER OF THE TENURE HEARING OF MERT P. HYLAND, SCHOOL DISTRICT OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY

For the Complainant, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Charges of inefficiency made by the Superintendent of Schools of complainant school district against Mert P. Hyland, a teacher under tenure in that district, were certified to the Commissioner of Education by complainant Board of Education of the Township of Millburn. The charges, with the certifying resolution of the Board, were filed before the Commissioner on July 17, 1968, with proof of service of a copy of the charges and resolution upon the teacher. Upon receipt of the charges, the Commissioner, in accordance with *N. J. S. A.* 18A:6–15, on July 22 caused a copy of the charges to be served upon the teacher. At the same time, the Assistant Commissioner in charge of Controversies and Disputes directed the teacher to file his answer to the charges within ten days of receipt of notice. No answer was filed, and on August 20, 1968, telephone contact was made with the teacher, who said he would attend promptly to the filing of his answer. Again no further response was received, and on October 4, 1968, the Commissioner entered an order directing that unless the teacher submitted an answer to the charges by October 18, 1968, the Commissioner would proceed to decide the matter on the basis of the record before him. No answer has been filed.

The charges made by the Superintendent set forth that on March 25, 1968, in consequence of a letter directed to the Board by him, the teacher was charged with inefficiency, and a letter setting forth the nature of the alleged infficiencies was delivered to the teacher by the principal of the school in which he was employed. *N. J. S. A.* 18A:6–12 During the 90-day period which followed to the end of the school year, the teacher's classroom work

was observed three times by the principal, three times by the vice-principal, and twice by the Superintendent. Five conferences based on these observations were conducted with the teacher by either the principal or vice-principal. Additionally, during the 90-day period, the teacher administered corporal punishment upon a boy in his class, and the Superintendent admonished the teacher by letter not to use such form of punishment again, and advised him that this incident would be used to support the charge of inefficiency.

At the conclusion of the 90-day period, the Superintendent, principal, and vice-principal met to discuss their observations, and came to the conclusion that the inefficiencies had not been corrected. Thereafter the Superintendent specifically charged that:

"Mr. Hyland has not complied with the directions given to him this year (1967-68):

"1. Lesson plans are not submitted each week.

"2. Lessons are not developed clearly, keeping to the subject.

"3. Classroom control is unacceptable."

Upon certification of the charges, the Board suspended the teacher without pay, pending determination by the Commissioner. *N. J. S. A.* 18A:6–14

Under the circumstances of this case, the Commissioner makes the following findings and conclusions:

1. The procedures followed by complainant Board with respect to serving notice of inefficiency, determination of failure to correct the inefficiency within 90 days thereafter, and the certification and service of the charges are all in accordance with the statutes.

2. The nature of the inefficiency charged against the teacher in this case is such as to support a determination that the charges are sufficient to warrant dismissal or reduction in salary. *Cf. In the Matter of the Tenure Hearing of Leo S. Haspel*, 1964 *S. L. D.* 17, affirmed State Board of Education 31, affirmed Superior Court, Appellate Division, June 10, 1965, cert. denied New Jersey Supreme Court, May 12, 1965, cert. denied U. S. Supreme Court, May 16, 1968; *In the Matter of the Tenure Hearing of Francis M. Starego*, 1967 *S. L. D.* 271.

3. The teacher has been afforded full opportunity to answer the charges and to offer his defense thereto, and he has failed to do so.

4. The written statement of the charges, together with the statement of the circumstances leading to the Board's 90-day notice of inefficiency, in the absence of any controverting evidence, supports a finding that the teacher has been inefficient in the performance of his teaching duties in the school district of Millburn, and the Commissioner so finds.

Therefore, upon a finding of inefficiency, the Commissioner determines that such inefficiency is sufficient to warrant the dismissal of Mert P. Hyland from his employment in the school district of Millburn. Accordingly, he directs the Board of Education to dismiss said teacher effective as of the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

December 10, 1968

GLADYS M. CANFIELD,
Petitioner-Respondent,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL,
Respondent-Appellant.

Decided by the Commissioner of Education, August 22, 1966.

Affirmed by the State Board of Education, April 5, 1967.

Decided by Superior Court, Appellate Division, November 10, 1967.

DECISION OF THE SUPREME COURT

Argued March 5, 1968. Decided April 1, 1968.

On appeal from a judgment of the Superior Court, Appellate Division, whose opinions are reported at 97 *N. J. Super.* 483.

Mr. Frank E. Vittori argued the cause for the appellant (*Messrs. Piarulli and Vittori*, attorneys).

Mr. Cassel R. Ruhlman, Jr., argued the cause for the respondent.

PER CURIAM.

The judgment is reversed for the reasons expressed in the dissenting opinion of Judge Gaulkin in the Appellate Division.

JACOBS, J., disssenting:

The plaintiff Gladys M. Canfield is a duly certified teacher who was originally employed as such by the Pine Hill Board of Education on November 19, 1962. So far as the record before us indicates, she performed her assigned duties to the Board's satisfaction and her contract was renewed annually for the three ensuing school years 1963-64, 1964-65 and 1965-66. Each of the contracts contained a notice of termination clause in the form prepared and distributed by the State Commissioner of Education pursuant to *R. S.* 18:13–7. Thus the 1965-66 contract provided that it could be terminated by either party upon giving "60 days' notice in writing of intention to terminate."

When the 1965-66 school year began, the plaintiff knew that by November 19, 1965 she would have actually served three full academic years. And when September 20, 1965 had passed, she also knew that her employment could not be terminated by the Board until a later date which would unmis-

takable satisfy the literal terms of the legislative mandate that a teacher shall have tenure "after employment, within a period of any 4 consecutive cademic years, for the equivalent of more than 3 academic years." *R. S.* 18:13–16. The recent revision of the Education Law carries forth the same thought by providing for tenure "after employment in such district or by such board for . . . . (c) the equivalent of more than three academic years within a period of any four consecutive academic years." *R. S.* 18A:28–5. On November 15, 1965 the Board, without any forewarning, as its counsel advised at oral argument, notified the plaintiff that it was terminating her teaching contract "to take effect immediately," giving her two month's pay.

The Board's abrupt conduct violated not only the elemental decencies of the relationship but the very terms of its contractual undertakings. It had expressly agreed in each of the four contracts that it would give the designated number of days' notice before it would terminate. This agreement was a customary and reasonable one which had the full approval of the State Commissioner. It was designed to further wholesome policies of the school laws and, while assuring fair notice to the Board and continuance of the employment for the designated period when the teacher sought to terminate, it equally assured to the teacher such notice and continuance of the employment when the Board sought to terminate. *See* 6 *Corbin, Contracts* § 1266, *p.* 66 (1962). Although *R. S.* 18:13–11.1, which provides that between the notice and the termination the Board shall have the option as to whether the teacher shall continue to teach, applies broadly to nontenure instances, it is not part of and has no relation to the tenure provisions of the school laws (*R. S.* 18:13–16; *R. S.* 18A:28–5) and has no significant bearing here. *See Canfield* v. *Bd. Edu. of Pine Hill*, 97 *N. J. Super.* 483, 488 (*App. Div.* 1967).

Tenure is designed to aid in the establishment of a competent and efficient school system by affording to teachers a reasonable measure of security after a reasonably fixed probationary period. With this goal in mind, the provisions of the Tenure Act should be construed and administered fairly and sensibly rather than harshly. *See Bd. of Ed. of Manchester Tp.* v. *Raubinger*, 78 *N. J. Super.* 90 (*App. Div.* 1963). Here the Board had extensive and timely opportunity to determine the teacher's qualifications and performance. It gave her four separate contracts in consecutive school years, apparently all without any adverse intimations. When it ultimately decided to terminate her employment, it attempted to do so in a manner which was clearly impermissible under the contractual terms and at a belated time when, according to the administrative interpretations of the State Commissioner and the State Board of Education, it could no longer preclude her tenure. *Cf. Mateer* v. *Board of Education of Fair Lawn* 1950-51 *S. L. D.* 63, 65, *aff'd*, 1951-52 *S. L. D.* 62. Those interpretations should be given weight (*State* v. *LeVien*, 44 *N. J.* 323, 330 (1965)) and any ambiguity which might be said to inhere in the tenure provisions should be resolved in favor of the clear administrative understandings and the strong equities of the situation. I agree essentially with the majority opinion in the Appellate Division (*Canfield* v. *Bd. of Edu. of Pine Hill, supra*, 97 *N. J. Super.* 483) and therefore vote to affirm.

51 *N. J.* 400 (1968), 241 A. 2*d* 233.

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK
IN THE COUNTY OF BERGEN,

Petitioner-Respondent,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF CLIFFSIDE PARK
IN THE COUNTY OF BERGEN,

Respondent-Appellant.

Decided by the Commissioner of Education, May 2, 1967.

Affirmed by the State Board of Education, January 3, 1968.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued April 22, 1968—Decided May 3, 1968.

Before Judges Goldmann, Kilkenny and Carton.

On appeal from State Board of Education.

Mr. Paul L. Basile argued the cause for appellant.

Mr. Eznick Bogosian argued the cause for respondent (*Messrs. Bauer, Bogosian & Whyte*, attorneys).

Mr. Cassel R. Ruhlman, Jr. argued the cause for New Jersey Education Association, *Amicus Curiae.*

The opinion of the court was delivered by

CARTON, J. A. D.

The Borough of Cliffside Park appeals that part of the determination of the State Board of Education which restores to the local board of education school budget an item of $17,000 for premiums on Blue Cross-Blue Shield and Major Medical insurance covering all employees of the local board.

The facts are not in dispute. The voters rejected the local board's proposed 1967-68 budget at the annual election held on February 14, 1967. They also rejected the board's second budget proposal at the election held on February 28. It then became the duty of the governing body of the appellant municipality to fix the amount required for school purposes (*N. J. S.* 18A:22–37, formerly *N. J. S. A.* 18:7–82). Pursuant to that statute, on March 11, 1967, appellant certified to the county board of taxation a school appropriation of $1,270,908, $110,000 lower than the board's second budget proposal. The local board appealed to the Commissioner of Education requesting, among other things, reinstatement of the $17,000 item. The Commissioner sustained the board's contention as to this item. The State Board affirmed the Commissioner's decision. This *R. R.* 4:88–8 appeal followed.

The single issue presented is whether the Commissioner erred in restoring the $17,000 item to the local school budget.

N. J. S. A. 18:5–50.7a expressly authorized a local board of education to enter into an agreement with its employees to provide them with hospitalization insurance coverage:

> "[T]he board of education * * * may pay as additional compensation to the individual members of the group or groups [of employees desiring to participate in a group hospitalization insurance plan], a part or all of the premiums on the group policy or policies * * *."

This provision was substantially re-enacted as *N. J. S.* 18A:16–10. Consequently, it is clear that the local board was permitted to include in its budget proposal the amount necessary to carry out the agreement it had made.

It is equally clear that once the board entered into the agreement, it was bound by its terms for two years as to all of the members of its full-time teaching staff. *N. J. S.* 18A:29–4.1 (formerly *N. J. S. A.* 18:13–5.1 and 5.2) provides, in pertinent part:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members * * *. *Such policy and schedules shall be binding upon the adopting board* and upon all future boards in the same district *for a period of two years* * * *. *Every school budget* adopted, certified or approved by the board, the voters of the district, * * * the governing body * * * or the commissioner, as the case may be, *shall contain such amounts as may be necessary to fully implement such policy and schedules* for that budget year." (Emphasis added)

Thus, the local board is bound as to such employees for a two-year period by its "salary policy" and must provide funds "to fully implement such policy."

Ignoring the broader, more inclusive phrase "salary policy," appellant urges that "salary schedule" does not contemplate payment of hospitalization insurance premiums. While this fact may be conceded, and indeed appears obvious from the statutory definition of "salary schedules" (*N. J. S.* 18A:29–6, formerly *N. J. S. A.* 18:13–13.1), it is difficult to see how appellant's position is advanced.

The term "salary schedules" clearly refers to only one facet of "a salary policy" and the plain meaning of the latter phrase would seem to include what are commonly called "fringe benefits" of employment. Any other construction of the scope of *N. J. S.* 18A:29–4.1 would render the reference to "salary policy" mere surplusage.

We hold that "salary policy" includes, in addition to "salary schedules," such "fringe benefits" of employment as payment of hospitalization insurance premiums. The board having undertaken to pay such premiums, *N. J. S.* 18A:29–4.1 requires that funds be provided therefor and appellant was without authority to remove that item from the budget.

Appellant argues, however, that even if *N. J. S.* 18A:29–4.1 binds the local board to its salary policy for two years, it does so only with respect to "full-time teaching staff members" and has no effect upon policies made applicable to other board employees. While this argument may have some merit, we find no valid basis for making such a distinction between the teaching and non-teaching personnel in this case.

We note that when appellant resolved to eliminate the $17,000 from the local school budget, it did so without the slightest explanation or itemization of any categories of employees which would warrant making a distinction between them. This failure to do so would, in our estimation, justify a determination by the Commissioner that elimination of the entire item was arbitrary and therefore improper. See *Board of Education of East Brunswick* v. *East Brunswick*, 48 *N. J.* 94, 105-106 (1966), where Justice Jacobs said:

> "The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. * * * Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. This is particularly important since, on the board of education's appeal under *R. S.* 18:3–14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found.
>
> * * *"

The record before us does not show what part of the $17,000 item is attributable to the non-teaching personnel, or any specific factual basis supporting appellant's claim that this portion should be eliminated. We shall not, therefore, exercise our original jurisdiction in this case to make independent findings. Nor do we believe the public interest requires or will be served by a remand to the Commissioner for the purpose of affording appellant an additional opportunity to bolster its claim for the elimination of a sum which, in terms of the total budget, is extremely small. The budget in question is the operating budget for the current year and should not be disturbed at this late hour to resolve a dispute of such limited effect.

Affirmed.

100 *N. J. Super.* 490 (*App. Div.* 1968), 242 *A. 2d* 649.

DOROTHY L. ELOWITCH,

Petitioner-Appellant,

v.

BAYONNE BOARD OF EDUCATION, HUDSON COUNTY,

Respondent-Respondent.

Decided by the Commissioner of Education, April 18, 1967.

Affirmed by the State Board of Education, December 6, 1967.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued October 8, 1968—Decided October 14, 1968.

Before Judges Goldmann, Kolovsky and Carton.

On appeal from the State Board of Education.

Mr. Geoffrey Gaulkin argued the cause for appellant (*Messrs. Frohling & Gaulkin*, attorneys).

Mr. John J. Pagano argued the cause for respondent.

Mr. Arthur J. Sills, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education (*Mr. Stephen G. Weiss*, Deputy Attorney General, of counsel).

PER CURIAM

The record adequately supports the determination of the State Board of Education that petitioner's asserted claim for relief is, in the particular circumstances of this case, barred by laches. We therefore find it unnecessary to decide whether she had, in fact, acquired tenure as school psychologist—a matter passed on by the Commissioner of Education but not by the State Board on appeal from his ruling.

Affirmed.

IN THE MATTER OF THE APPLICATION OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY, TO TERMINATE THE SENDING-RECEIVING CONTRACT WITH THE BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY.

Decided by the Commissioner, December 21, 1967.

STATE BOARD OF EDUCATION

DECISION

Decision of the Commissioner of Education affirmed without written opinion.

March 6, 1968.

MARIE S. HOWARD AND HELEN B. HOCKENJOS,
Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,
Respondent.

AND

MARIE S. HOWARD,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,
Respondent.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 29, 1967.

For the Petitioners, *Pro Se*

For the Respondent, Egan, O'Donnell, Hanley & Clifford (Robert P. Hanley, Esq., of Counsel)

At the argument before the Law Committee of the State Board of Education, petitioners abandoned their objections to the retention of legal counsel by respondent Board of Education for purposes of the hearing before the Commissioner and this appeal. Their other contention addressed to the payment of legal fees by the Board in behalf of members of the Board who were

and are Defendents in a libel action was held by the Commissioner to have been ". . . within the proper and lawful scope of Board actions," based upon his finding that the actions which engendered the libel suit ". . . were undeniably acts arising out of and in the course of the performance of their duties as Board members." This finding is amply supported in the record and the decision of the Commissioner is hereby affirmed.

October 9, 1968.

GEORGIA L. JOHNSON,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST WINDSOR, MERCER COUNTY,

Respondent-Respondent.

Decided by the Commissioner of Education, December 13, 1967.

STATE BOARD OF EDUCATION

DECISION

Decision of the Commissioner of Education affirmed without written opinion.

October 9, 1968.

JEROME B. KING,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent-Respondent.

Decided by the Commissioner, June 21, 1967.

STATE BOARD OF EDUCATION

DECISION

Decision of the Commissioner of Education affirmed without written opinion.

April 3, 1968.

ETHEL MASSEY,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER, MONMOUTH COUNTY,

Respondent-Respondent.

Decided by the Commissioner of Education, August 19, 1966.

STATE BOARD OF EDUCATION

DECISION

Dismissed by the State Board of Education.

March 6, 1968.

SERGEY PADUKOW,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

Respondent-Appellee.

Decided by the Commissioner of Education, August 25, 1967.

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellant, Harry Green-Robert F. Novins, Esq. (Robert F. Novins, Esq., of Counsel)

For the Respondent-Appellee, Harold Kaplan, Esq.

The decision of August 25, 1967, of the Commissioner of Education is affirmed for the reasons set forth therein.

We note that neither party has raised the question of whether this is a proper matter to be decided by the Commissioner and the State Board of Education. We question whether it is proper for the Commissioner to invoke his jurisdiction when the only issue to be resolved is a claim for money by one party against the other. We are cognizant of the recent decision of the Appellate Division in *Fisher* v. *Board of Education, Union Township*, 99 *N. J. Super.* 18 (*App. Div.* 1968) in which the Court suggested that a case involving the interpretation of the separate bids section of the School Law would have been better brought before the Commissioner. However, in the case before us, the

school as to which architectural services were to be supplied is already nearing completion. Mr. Padukow can no longer be the architect on this job. The only question is whether or not he has a claim for money against the Board of Education of Jackson.

We suggest that the exercise of the Commissioner's expertise should be limited to matters directly bearing upon education and withheld in purely commercial matters.

April 3, 1968.

CLIFFORD L. RALL,

Appellee-Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Appellant-Respondent.

Decided by the Commissioner of Education, November 22, 1967.

STATE BOARD OF EDUCATION

DECISION

For the Appellant, John J. Pagano, Esq.

For the Appellee, Joseph N. Dempsey, Esq.

The issue in this appeal is the validity of certain actions taken by the Appellant Board of Education on January 14, 1965, at a regular meeting held shortly before the organization of its successor board on the following February 1. An excerpt from the minutes of that meeting is reproduced below. If these actions were valid and lawful, as the Commissioner held in resolving the matter on cross motions for summary judgment, then it would follow that Dr. Rall had achieved tenure on that occasion, and the subsequent action of the Appellant Board in discharging him on May 31, 1967, was invalid and ineffectual. We disagree and reverse the Commissioner.

Excerpt from the minutes of the Board of Education of the City of Bayonne, held January 14, 1965:

"14. BY THE COMMITTEE OF THE WHOLE:

WHEREAS, on June 25, 1964, by resolution duly adopted by this Board, Dr. Clifford L. Rall was appointed Superintendent of the Public Schools which are under the control of this Board of Education in and for the District of Bayonne, Hudson County, New Jersey, for a term commencing July 1, 1964 and terminating on May 31, 1967, and his salary was fixed at $22,000 per annum, payable in twelve (12) equal monthly installments; and

WHEREAS, the said Dr. Clifford L. Rall accepted the aforesaid appointment; and

WHEREAS, the said Dr. Clifford L. Rall from July 1, 1964 to date has efficiently performed the duties of his office as Superintendent of Schools; and

WHEREAS, it is the considered opinion of this Board that he be granted tenure;

Now, Therefore, Be It Resolved, that the remainder of the term fixed aforesaid, after January 14, 1965, be rescinded; and

Be It Further Resolved, that pursuant to N. J. S. A. 18:13–16, (a) page 237, 1964 Cumulative Supplement, Dr. Clifford L. Rall, Superintendent of the Public Schools of the City of Bayonne, be and he is hereby granted tenure after January 14, 1965, in his position as Superintendent of the Public Schools which are under the control of this Board of Education in and for the District of Bayonne, Hudson County, New Jersey, at the salary of $22,000 per annum, the same salary he is now receiving, and payable in the same manner."

N. J. S. A. 18:13–16 (Now N. J. S. A. 18A:28–5) provides in pertinent part:

"The services of all . . . superintendents . . . shall be during good behavior and efficiency, (a) after the expiration of a period of employment of 3 consecutive calendar years in that district unless a shorter period is fixed by the employing board . . ."

The Commissioner disposed of the contention that the purported grant of tenure in this case amounted to ". . . a personal benefit not available to others in his employment category." *Cf. Spadoro* v. *Board of Education of Jersey City*, 1965 *S. L. D.* 134 at 138, and distinguished this situation from Spadoro with the statement: "In the instant matter, of course, the petitioner as Superintendent of Schools, was in an exclusive category." Certainly each district may have but one superintendent at one time, but inevitably from time to time a new superintendent must be retained. Does the next superintendent in Bayonne achieve tenure after six months and three weeks? The resolutions and the introductory language quoted above seem very clearly to be intended not for the exclusive category found by the Commissioner, but for one individual alone. The basis for the resolution as expressed in the third Whereas and the discussion was the personal performance of the individual rather than a policy determination that the tenure period for the job category be shortened. Furthermore, the resolutions do not establish a period after which tenure shall vest in the position of Superintendent. In fact, no reduction of the period for achieving tenure is defined.

There is another troublesome aspect of the Commissioner's interpretation of the statute. Take assistant superintendents for example, usually a very small category, two or three, perhaps five in very large districts. Assume such a vacancy where all the other incumbent assistant superintendents have achieved tenure. May a Board hire one new such person and confer tenure in a few months, timed so that it takes place before a new Board takes office? Presumably there would be little challenge from the others in the same small category on the stated assumption that they had all previously achieved tenure. May the rules be changed to suit each person? We think not.

We hold that the actions of the Appellant Board on January 14, 1965, were invalid, and contrary to public policy. We find that the Board was not fixing a shorter period for the vesting of tenure in superintendents in the district, with the intention that this would apply to all future members of the "exclusive" category, but rather that they were arbitrarily granting a benefit to one individual without any thought or intention about the category as such. We hold that the purported rescission of the employment contract running from July 1, 1964, to May 31, 1967, was mutually agreed upon but mistakenly conditioned upon the purported grant of tenure, and therefore the recission was also of no effect, and Dr. Rall is entitled to be paid the contractual salary through May 31, 1967.

Mr. Martin S. Fox dissented in this matter.

May 1, 1968.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

CLIFFORD L. RALL,

Petitioner-Appellant,

v.

THE BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, NEW JERSEY, AND STATE BOARD OF EDUCATION, STATE OF NEW JERSEY,

Respondents-Respondents.

Argued December 9, 1968—Decided January 24, 1969.

Before Judges Conford, Kilkenny and Leonard.

On appeal from State Board of Education, State of New Jersey.

Mr. Joseph N. Dempsey argued the cause for appellant.

Mr. John J. Pagano argued the cause for respondent, Board of Education of the City of Bayonne.

Mr. Arthur J. Sills, Attorney General, filed a brief, specially, at the request of the court (*Mr. Stephen G. Weiss*, Deputy Attorney General, of counsel).

The opinion of the court was delivered by

CONFORD, S. J. A. D.

The principal question here presented is whether the Board of Education of Bayonne effectively conferred tenure in office on petitioner, as superintendent of schools of that municipal school district, by a resolution of January 14, 1965 purporting to accomplish that object. The State Commissioner of Education has ruled in the affirmative; the State Board of Education, on appeal, in the negative. Petitioner appeals.

The statute requiring construction for determination of this appeal, *N. J. S.* 18A:28–5 (being *N. J. S. A.* 18:13–16 prior to the revision of the State Education Law, effective January 11, 1968) reads, in material part, as follows:

> "The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, * * * 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; * * *." (Emphasis added.)

The particularly critical language is that italicized above in subparagraph (a).

There were cross motions for summary judgment before the State Commissioner. The following facts emerge from the proofs then adduced.

On June 25, 1964, the City Board appointed petitioner Superintendent of the Bayonne Public Schools. His contract commenced on July 1, 1964, and was to terminate on May 31, 1967, making a term of two years and 11 months, one month short of the three-year term for the acquisition of tenure under subparagraph (a) of the statute. See *Board of Education of Manchester Tp.* v. *Raubinger*, 78 *N. J. Super.* 90, 97 (*App. Div.* 1963). On January 14, 1965, the same City Board that executed his contract rescinded it, and, reciting that petitioner had efficiently performed his duties since appointment, granted him tenure by a unanimous vote. This grant was declared to be pursuant to *N. J. S. A.* 18:13–16(a) [*N. J. S.* 18A:28–5]. The resolution did not purport to shorten the period of service requisite generally for attainment of tenure by superintendents of schools or any other category of school employee. Nor did it even declare that the period of service by petitioner was one of sufficient length to justify positing tenure thereon.

Some two years and four months later petitioner apparently was investigating the possibilities of employment elsewhere. Although it appeared that the City Board then in office and petitioner had resolved the problem at a conference on May 13, 1967, the City Board on May 29, 1967, held a special meeting at which a resolution was adopted, by a vote of six to three, rescinding the former City Board's January 1965 resolution; declaring the original employment contract adopted on June 25, 1964, to be the only valid and subsisting contract between the parties; and, as the term of that original contract was to expire within two days, declaring the office of Superintendent of Schools

vacant as of June 1, 1967. The resolution of the Board undertook to justify this action by stating that one board cannot bind subsequent boards "in matters beyond the term of" the first board, nor hamper or deprive a subsequent board of its right to exercise discretion over the question of tenure. Thus, so it was resolved, the prior board's action was void because it deprived the present board of such discretion, because it attempted to usurp the present board's legal duty and obligation, and because it violated the public policy of the State by denying the citizens of Bayonne the benefits of the probationary period required by statute to precede the acquisition of tenure by a school superintendent.

Petitioner contended on appeal before the State Commissioner that the January 1965 resolution validly granted him tenure because the pertinent statute provided that the City Board could fix a term shorter than the three-year statutory period for the acquisition of tenure. The Commissioner agreed, ruling that he acquired tenure as of January 1965, and that therefore he could be removed only for cause following a hearing and determination pursuant to the Tenure Employees Hearing Act. He ordered petitioner reinstated with full compensation rights.

The Commissioner held that the City Board had properly exercised statutory authority in granting petitioner tenure in January 1965 since this was merely a shortening of the three-year tenure period in petitioner's case, as deemed to be allowed by statute. The action was held free from criticism as conferring a personal benefit upon petitioner, as against others in his employment category, prohibited by such school decisions as *Spadoro* v. *Board of Education of Jersey City*, 1965 *S. L. D.* 134, and *Rinaldi* v. *Board of Education of North Bergen*, 1959-1960 *S. L. D.* 109, since petitioner was the only occupant of his employment category in the school system.

The State Board, in reversing (with one dissent), held, in effect, that the statutory authorization for shortening the tenure period was not followed here by the City Board in January 1965, since it did not adopt a resolution shortening the general statutory tenure period for any category of school staff, but conferred a benefit upon "one individual alone." It pointed out that the fact that there could be only one superintendent of schools at a time was irrelevant, since a proper resolution reducing the tenure period for the position of superintendent of schools would apply to all successive holders of that position. We find ourselves in basic agreement with this rationale of the State Board, and, consequently, with its determination that the January 1965 resolution did not legally confer tenure on petitioner.

Although prior to 1952 superintendents of schools did not appear in the tenure statute, the incorporation of that category of school staff therein by *L.* 1952, *c.* 236, § 12, made the category subject to the full sweep of the statute and to ordinary rules of statutory construction thereof in relation to the category, as though included in the statute from the beginning. Subparagraph (a) of the pertinent stautory section fixes a general period of three calendar years for attainment of tenure by the members of any of the staff categories designated in the section; but that provision is qualified to the extent that any local board of education is permitted, by express delegated authority, to promulgate for its own jurisdiction general legislation in place of the three-year rule and thereby ordain a specific, shorter period than three years wherein

the members of any category designated by the board in such legislation may achieve tenure. Decisions of the Commissioner of Education prior to the instant case contain reasoning clearly in accord with this concept of the statutory design. See the *Spadoro* and *Rinaldi* cases, cited above.

We regard the foregoing construction of the statute as so obvious from its language and apparent purpose as to defy the contention that it authorizes a local board to simply select an individual member of an employment category who has served less than three years and confer tenure upon him alone, by name, *ad hoc*, without in any way undertaking to fix a specific, generally applicable, shorter-than-three-years term of service for achievement of tenure by members of that individual's staff category or of any category inclusive of his.

This is not a matter of elevating form over substance. Far from it. The statute, as we see it, contemplates that before acting under the authority of subparagraph (a) to fix a tenure period shorter than three years the board will give consideration to whether such shorter period is suitable for *general application* to all present and future members of the category coming into the system until such time, in the indefinite future, as that or a later board amends or repeals the provision by a similarly general legislative resolution. The intent was plainly not to authorize *exemptions* from the three-year probationary term on an *ad hoc* basis in individual cases, as was so obviously done in the present instance. Were petitioner to have died or resigned a month or two after the January 1965 resolution no successor would have been in a position to claim tenure after 6½ months service on the mere basis of that resolution. It did not purport to have general prospective legislative effect, but rather to have exhausted its effect in its operation on the status of petitioner alone.

Petitioner challenges the foregoing reasoning on the ground, among others, that the City Board could not legally have adopted a resolution for shortening tenure of superintendents which would automatically survive in legal effect the life of the adopting board, *i.e.*, beyond the next annual reorganization meeting of the board the following February. It is true, broadly speaking, that rules and regulations adopted by a local board of education, being a non-continuous body, die with the annual reorganization meeting of the board unless expressly or impliedly adopted anew by the next board. *Skladzien* v. *Board of Education of Bayonne*, 12 *N. J. Misc.* 602 (*Sup. Ct.* 1934), *aff'd.*, 115 *N. J. L.* 203 (*E. & A.* 1935); *Offhouse* v. *State Board of Education*, 131 *N. J. L.* 391 (*Sup. Ct.* 1944); *cf. Talty* v. *Board of Education, Hoboken*, 10 *N. J.* 69, 71-2 (1952). However, the Legislature obviously has the right to empower a local board to act, in regard to particular subject matter, in a manner effective for a period of time beyond the life of the acting board, and there are many obvious examples of such legislation. *E.g.*, *N. J. S.* 18A:29–4.1 (a salary schedule binds the adopting and future boards for 2 years from date of adoption); *N. J. S.* 18A:39–2 (contracting for school transportation for four years); *N. J. S.* 18A:27–3 (teacher employment contracts binding until June 30). There are many others. In all such instances the Legislature regards it as politic that the local board be enabled, *pro hac vice*, to act in the manner of a continuous body.

It is perfectly clear to us that by delegating to local boards the function of fixing, at option, a shorter term than 3 years for vesting tenure in employees, the Legislature in *N. J. S.* 18A:28–5(a) intended to confer upon such a local

board the power to enact such a regulation which would continue in effect indefinitely thereafter, just as does the three-year rule of the statute, until such time as that or a later board expressly abrogated or amended it. The argument of petitioner to the contrary, supported by the brief of the Attorney General, seems to us to involve consequences strongly militating against the construction advanced—that is, that a "shortening" resolution must automatically die with the incumbency of the succeeding annual board. For example, should a board decide to reduce the statutory tenure period, say as to principals, to two years, no principal engaged by that board thereafter could enjoy the assurance that he would achieve tenure after two years of satisfactory service since he would be under the constant peril that either of the two successive annual boards might fail specifically to readopt the rule. Many comparable situations could be envisaged. It is thus obvious that considerations of school-employee morale strongly bespeak the construction of the statute which its natural reading evokes. Just as new-employee morale is promoted, under the three-year provision of the statute (where shorter periods have not been adopted), by the knowledge of such employees that the statutory provision does not require annual reenactment for continued subsistence and effectiveness, so would the same result follow from giving continuous prospective effect to a resolution shortening the tenure period for any category of employee.

In appraising the legislative intent we cannot properly distinguish the case of superintendents from that of other classes of school employees on the basis, contended for by petitioner, that there is only one superintendent in a school district at a time. The statute requires uniform construction as to all categories of staff within its coverage since its provisions are, in terms, uniformly applicable to all. Moreover, as indicated above, we are in accord with the reasoning of the State Board that *successive* holders of the position would fall within the category of superintendents, and that all of them would have to be treated uniformly by a local board undertaking to shorten the period of tenure for the category pursuant to the statutory authorization (subject of course to any later general amendment of the resolution).

To the extent, therefore, that the determination of the State Board reversed the Commissioner's summary adjudication that petitioner enjoyed tenure under the January 1965 resolution, we affirm it, concluding that the resolution failed of that effect as a matter of law.

Petitioner argues, in the alternative, that the purported tenure accorded him in 1965 must be left undisturbed because the corrective action of the later Board was not taken "promptly." He cites the reference in the opinion in *Thomas* v. *Bd. of Ed. of Morris Tp.*, 89 *N. J. Super.* 327, 335 (*App. Div.* 1965), *aff'd.* 46 *N. J.* 581 (1966), to the fact that the second action of the Board there, invalidating the first action granting tenure, was taken "promptly and expediently" and that no "legal prejudice" resulted to the petitioner.

We observe that the issue now raised by petitioner was not a subject of contention by him before either lower administrative tribunal. It comes too late. Nor do we discern any such prejudice to petitioner which could support anything like an estoppel (an argument not even advanced). The resolution of January 1965 was not a mere irregularity, but a totally unauthorized act, and void legal effect. *Cf. Thornton* v. *Village of Ridgewood*, 17 *N. J.* 499, 510

(1955); *V. F. Zahodiakin &c. Corp.* v. *Bd. of Adjustment, Summit*, 8 *N. J.* 386, 395 (1952). We could not lightly impose upon the public of Bayonne a tenured superintendent whose status as such was lacking in any official action having a statutory foundation, for no better reason than the date of official repudiation of the illegal action, when that repudiation took place before tenure would otherwise have legally vested in petitioner under the applicable statute.

Petitioner also complains of the decision of the State Board that the purported recission of the employment contract running from July 1, 1964 to May 31, 1967 was "mistakenly conditioned upon the purported grant of tenure" and that therefore the rescission is of no effect and petitioner is entitled to be paid his contractual salary through May 31, 1967. He argues that these are findings of fact and law never submitted as issues before the lower tribunals and that he ought not to be bound thereby in any future litigation over the amount of compensation he may be entitled to. We agree. These findings will be set aside.

We limit our determination solely to affirmance of the decision of the State Board that petitioner does not have and never has had legal tenure rights as Superintendent of Schools of Bayonne.

Modified in accordance with the foregoing; affirmed as modified.

KILKENNY, J. A. D., dissenting.

I would reverse the decision of the State Board of Education. I agree with the determination of the State Commissioner of Education, and for the reasons expressed in his opinion, that petitioner was granted tenure by reason of the resolution of the Bayonne Board of Education, unanimously adopted on January 14, 1965. The discharge of petitioner as of May 31, 1967 by the board's resolution of May 29, 1967, without charge or a hearing was violative of petitioner's tenure rights.

Petitioner was originally appointed superintendent of schools of Bayonne by resolution of June 25, 1964 for a term of two years and 11 months—July 1, 1964 to May 31, 1967. Petitioner admittedly demonstrated his competency so completely that 6½ months of acknowledged excellent performance induced the board to insure his future services as its superintendent of schools by the unanimous adoption of a resolution on January 14, 1965. Thereby, the board rescinded the original contract of employment and conferred tenure upon its superintendent.

The school superintendent's continued satisfactory performance is manifested by the concurrence of succeeding boards of education in the action in 1965. There was a recognition of petitioner's tenure status. For more than two years and four months no board or board member challenged the validity of the January 1965 resolution, which conferred tenure. Petitioner, too, relied on the fact of tenure conferred in 1965. Without that assurance, he might have pursued other courses.

The board of education concedes that the 1965 resolution conferring tenure was adopted in good faith. The attorney for the board admitted at oral argu-

ment that he drew the resolution to carry out the board's intention to confer tenure. This was no "lame duck" appointment. It did not contain the objectionable feature, observed in some other cases, of granting tenure immediately upon appointment, without an allowance for a probationary period.

What prompted the board to take away in May 1967 a tenure which it had voluntarily and unanimously bestowed in January 1965? It had received information that petitioner was considering severing his relationship with the Bayonne schools and seeking, perhaps, a better job elsewhere. He was called into conference, the result of which was his issuance of a public statement disclaiming his intention of leaving Bayonne. The president of the board issued a confirmatory public statement.

Yet, a few days later, without warning or any notice of its intention to petitioner, the board at a special meeting adopted by a six-to-three vote its May 29, 1967 resolution terminating petitioner's employment as of May 31, 1967—a bare two days later, and about a month before the close of the school term. It purported to rescind its January 14, 1965 tenure resolution and to restore unilaterally the 1964 employment contract which the January 1965 resolution had cancelled.

I cannot in conscience subscribe to this conduct by the board and lend by my silent adherence to the majority opinion concurrence in the board's treatment of the educational leader of its school system.

I appreciate the technical legal rationale of the majority. I need not repeat, what I believe to be, the sound legal answers thereto, as expressed in the opinion of the State Commissioner of Education. It is conceded that tenure may be granted by a local board of education in less than three years, if done in good faith and following a reasonable probationary period. *N. J. S. A.* 18:13–16(a), now *N. J. S.* 18*A*:28–5. This was done here, and intentionally so. There was a long-standing acceptance of that action and agreement of successive boards therewith.

That the tenure conferred was limited to a single person was necessitated by the fact that he was the only person in the particular category. To destroy that tenure because the proper *form* of resolution was not adopted would be nothing more or less than exalting form over substance. The board's attorney admitted at oral argument that he used that form only because he was unaware of a different form to be employed to effectuate the board's purpose. The conjectural effect of the lessening of the time for tenure in the case of the appointment of some new superintendent in the future is immaterial. In such an event, the then-existing board can fix the terms of the contract and adopt its own rule.

I would reverse the decision of the State Board of Education and reinstate the determination of the State Commissioner of Education.

104 *N. J. Super.* 236, 249 *A.* 2*d* 616.

Appeal pending before Supreme Court.

GEORGE W. SCHULTZ, PUBLISHER, THE WANAQUE BULLETIN AND CONTINUING WANAQUE BOROUGH NEWS,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,

Respondent.

Decided by the Commissioner of Education, October 4, 1967.

STATE BOARD OF EDUCATION

DECISION

Decision of the Commissioner of Education affirmed without written opinion.

May 1, 1968.

Appeal pending before Superior Court, Appellate Division.

IN THE MATTER OF THE TENURE HEARING OF FRANCIS M. STAREGO, BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY

Decided by the Commissioner of Education, September 21, 1967.

STATE BOARD OF EDUCATION

DECISION

Affirmed by the State Board of Education without written opinion, February 5, 1969.

Pending before Superior Court, Appellate Division.

UNION TOWNSHIP FEDERATION OF TEACHERS LOCAL 1455, AFFILIATED WITH AMERICAN FEDERATION OF TEACHERS, AFL-CIO, ON BEHALF OF ITS MEMBERS,
Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

Decided by the Commissioner of Education, October 23, 1967.

STATE BOARD OF EDUCATION

DECISION

For the Appellant, Rothbard, Harris & Oxfeld (Samuel L. Rothbard, Esq., of Counsel)

For the Respondent, Francis J. Simone, Esq.

Appellant is a labor organization comprised of teachers and other professional staff members employed by respondent. On October 12, 1964 (Ex. P-2), appellant sent the following letter to the Superintendent of Schools:

> "The Union Township Federation of Teachers would appreciate your arranging a meeting between the Board of Education and the representatives of the Federation for the purpose of presenting our program."

The Superintendent replied by letter dated October 20, 1964, as follows (Ex. P-3):

> "At the October 19, 1964, executive meeting of the Board of Education I presented your request to meet with the Board of Education for the purpose of discussing your organization's program. The Board of Education has instructed me to reply to this request as follows:
>
> "The Board does not feel that a meeting is in order and recommends that you submit your program to the Union Township Teachers' Association for presentation. However, if this does not meet with your approval you may present your program at any public meeting of the Board of Education which is the third Tuesday of each month."

At the hearing before the Legal Committee, counsel for the respondent stipulated that he knew the appellant union existed and that he knew that it had at least two members. He stated that the only reason the Board would not talk privately with representatives of the union was that the union refused to disclose its full membership list.

By decision dated October 23, 1967, the Commissioner determined that respondent's requirement that it be specifically informed with respect to the employees which appellant purports to represent is a reasonable conditional precedent to its recognition of appellant as an organization authorized to

present grievances and proposals to the Board of Education on behalf of the group of employees. We disagree.

Article I, Paragraph 19, of the New Jersey Constitution reads as follows:

"Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

In the case of *New Jersey Turnpike Authority* v. *American etc., Employees*, 83 *N. J. Super.* 389 (*Ch. Div.* 1964), the Court clearly stated that it was the obligation of a public employer to recognize representatives of any segment of its employees.

The decision of the Commissioner in this matter was based on his comments in the case of *Perth Amboy Teachers' Association* v. *Perth Amboy Board of Education*, 1965 *S. L. D.* 159. In that case, the Commissioner stated as follows:

"Effective and proper representation should be accomplished by presenting the Board with a membership list or some other designation sufficient to inform the Board as to the identity of the persons whose grievances it must consider * * *."

This may be a valid requirement in the case of a grievance for one employee or, perhaps, for a small group of employees. It would be difficult to discuss a grievance involving a special set of facts if the employees involved were not named.

However, the constitution gives the employees' representatives the right to present grievances and proposals. The letter sent by the appellant did not mention grievances. It merely requested an opportunity to meet "for the purpose of presenting our program." Appellant takes the position that it prefers not to present its membership list because of the fear of reprisals against members of what may be a minority group among the respondent's employees. Although this fear may be unfounded, we see no reason why the union would be obliged to name all of its members as a prerequisite to exercising its constitutional rights. It is entirely possible that the union membership might be very small and that recruitment of additional members would be inhibited were it obliged to set forth its membership strength on a public record.

We note that the letter to the Superintendent of Schools should properly have been addressed to the Board of Education rather than to the Superintendent of Schools. However, the Superintendent properly brought the matter before the Board which then refused to meet with appellant's representatives.

In the light of the stipulation that the Board knew of the existence of the appellant and the stipulation that the appellant had at least two members, we believe that the Board should grant appellant the right to present and make known its grievances and proposals through its representatives. If the right to meet privately with the Board is granted to other employee's representatives, the same right should be granted to appellant.

The decision of the Commissioner is reversed.

October 9, 1968.

MELVIN C. WILLETT,

Petitioner-Appellee,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF COLTS NECK, MONMOUTH COUNTY,

Respondent-Appellant.

Decided by the Commissioner of Education, December 2, 1966.

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellee, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Saling, Boglioli & Moor (Henry J. Saling, Esq., of Counsel)

On December 13, 1965, the respondent, Board of Education of the Township of Colts Neck, formally adopted the following policy regulation:

> "The Board of Education will permit a limited number of field trips. Approval of all trips must be secured by the administration from the board of education.
>
> "Transportation costs and admission charges will be borne by the parents of the children, except in the case of the Beadleston class, where the education of the children is dependent upon outside experience to a greater degree than that of the other children.
>
> "It will be the responsibility of the teacher and the administration to make certain that no child is deprived of a trip due to financial hardship. In such cases, expenses will be borne from petty cash funds.
>
> "The cost of transportation for students participating in (team) activities, such as sports events, music, and science programs, will be borne by the board of education."[1]

Thereafter, petitioner, Melvin C. Willett, a member of that local board, appealed to the Commissioner of Education of the State of New Jersey, who, on December 2, 1966, determined that so much of the regulation was improper as required parents of participating students to bear part of the cost of such field trips. Respondent brings the matter before the State Board of Education,

[1] The field trips planned include visits to a turkey farm, a firehouse, and a food store. We assume, and the local board's action suggests, that the field trips have substantial relevance to the school curricula. Neither party disputes this.

contending (1) that there is no legislative or other authority permitting a local school district to appropriate monies for field trips, and therefore (2) it could, in its discretion, require that part of the cost-burden be borne by the parents of participating children. We deal with only the first contention.

Specifically, respondent's position is that neither Article VIII, Sec. 4, par. 1 of the *New Jersey Constitution of 1947* (requiring the Legislature to provide "free public schools for the instruction of all children") nor any statutes, including *N. J. S.* 18A:33–1 and 2 (requiring school districts to provide suitable school facilities, accommodations and courses of study), *N. J. S.* 18A:38–1, 2, 3, 4, and 7 (providing for free public schools), and *N. J. S.* 18A:34–1 (providing for free textbooks and school supplies), are broad enough to include field trips. Consequently, it continues, the cost-burden expressed in the policy regulation violates no applicable code and therefore, absent an abuse of discretion, the Commissioner has no jurisdiction to act. At oral argument before the Legal Committee of the State Board, the parties agreed that under the policy regulation, field trips would be mandatory.

The concept of the field trip has not escaped legislative attention.

N. J. S. 18A:53–1 and 2 authorize local boards to contract and appropriate funds for museum facilities and services for the educational and recreational use and benefit of pupils in the public schools, and that such facilities and services may include, among other things, "conduct of *field trips* and other projects of an educational or recreational nature and provision for the personal services required in connection with any of the foregoing." Such a statement does not signal an intent that other types of field trips are to be excluded. For example, *N. J. S.* 18A:36–10 and 11 require the observance of John Barry Day by assembling pupils on that day "in the school building, *or elsewhere*, as they may deem proper" for the conduct of pertinent exercieses and instructions.

N. J. S. 18A:36–7, 8, and 9, designating Arbor Day for "the purpose of encouraging the planting of shade and forest trees" and requiring "programs of exercises" with respect thereto, would clearly seem to comtemplate a field trip to an appropriate location for that purpose, as would *N. J. S.* 18A:35–1 and 2 requiring instruction in the "history of the origin and growth of the social, economic and cultural development of the United States, of American family life and of the high standard of living and other privileges enjoyed * * *." And *N. J. S.* 18A:35–4.1 authorizes instruction in the principles of humanity as the same apply to kindness and avoidance of cruelty to animals and birds, both wild and domesticated" * * * "in a manner adapted to the ages and capabilities of the pupils in the several grades and departments." This expression can hardly be held to exclude a direct, out-of-school visual and aural experience.

In holding that field trips are part of the program of instruction, the Commissioner stated:

> "The term 'field trip' as used in this case is understood and is limited to mean a journey by a group of pupils away from the school premises under the supervision of a teacher for the purpose of affording a first-hand educational experience as an integral part of an approved course of study. * * *

> Teaching is more effective and learning is enhanced when it is not confined to activities within the classroom and the school building but moves out into the child's environment and employs actual observation and experience to supplement and enrich classroom procedures. * * * A field trip is, or should be, a valuable learning experience, planned, carried out, and followed up as an integral part of the course of study with clearly understood objectives in terms of learning. * * * It is the classroom made mobile." 1966 *S. L. D.* 202, 205

With the spirit of this statement we agree, although the meaning of the term, as we see it, may have wider reach. It is unnecessary to spell out, in this decision, the precise activities which may be embraced in the term "field trip," but the Commissioner of Education may wish to consider the promulgation of suggested guidelines.

For the reasons stated, the decision of the Commissioner is affirmed.
April 3, 1968.